DOING BUSINESS IN EUROPE
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INTRODUCTION

Welcome to our guide for doing business in Europe. We trust you will find the guide useful and we will be happy to answer additional enquiries that you may have.

Each contributing law firm is an independent leading law firm in its own jurisdiction and users of the guide should feel free to contact any of them as they wish.

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DOING BUSINESS IN AUSTRIA
Introduction and legal system

Legal system

The Austrian legal system is influenced by Roman law and German law. As it is a civil law legal system, legislation is the source of law, while the courts are, in principle, unbound by precedent and have authority only to interpret the law. For civil law purposes, the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch) applies.

Although there is principally no binding case law in Austria, the judgements / decisions of the supreme courts are important for interpreting the law. These courts are the Supreme Court (Oberster Gerichtshof) for civil and penal law cases, the Administrative Court (Verwaltungsgerichtshof) for administrative and tax law cases, and the Constitutional Court (Verfassungsgerichtshof) for certain issues under constitutional law (including constitutional issues, such as violations of constitutional and human rights).

Government and policy

The democratic republic of Austria is established as a federal state with nine provinces. The federation and the nine provinces hold the legislative and executive power in a complex system of distribution of competences. The most important authorities, including police and courts, rest with the federal government; the provinces bear responsibility for, among others, welfare matters, nature conservation, public construction law and local administration.

The legislation at federal level is carried out by the national chamber of parliament (Nationalrat) together with the federal council (Bundesrat) which represents the single provinces. At the level of the provinces, the regional parliaments (Landtage) are the legislative institutions. The function of the Austrian President (Bundespräsident) is limited to representation purposes, while the Austrian Chancellor (Bundeskanzler) holds – as the chairman of the Federal Government (Bundesregierung) – a more influential position.

Based on Austria’s geographic position and size, Austrian governments have tried in recent years to attract foreign investors by creating an investment-friendly climate. For example, in the year 2005, Austria’s corporate tax rate was decreased from 34% to 25% and a modern group taxation system was implemented. Such measures were also necessary to keep Austria competitive with the new EU member states from CEE and other low-tax and investor-friendly countries. It is also a part of Austria’s policy approach to maintain the high standard of living in Austria, in particular the excellent public school and university system as well as the highly developed public social and health care system.

After the financial crisis in 2008, Austria’s economy recovered swiftly and the economy is still growing, albeit at a slower rate. However, owing to social and political measures the unemployment rate has not risen as sharply as elsewhere in Europe and is one of the lowest in Europe. Like most European countries, the government is currently aiming to reduce the public sector debt. In particular, structural reforms are necessary in areas such as sustainability of pensions, efficiency of the social and welfare system, public sector salaries and streamlining.

Impact of government on the legal system

Draft bills are prepared in most cases by the government or the individual ministries, so the positions and policy taken by a respective government have great influence on the laws actually passed and on the legal system. However, certain legal areas are more subject to changes than others, for instance, whereas civil law, corporate law and tax law are frequently amended, constitutional law and certain fields of administrative law quite often remain unchanged for years. As Austria is a member state of the European Union, Austrian legislation is also highly influenced by European community law.

Why is it an attractive market?

Austria has a well-developed market economy and is closely linked to the economies of the other EU-member states, especially Germany’s. Over the years, Austria’s economy structure has changed and now features a huge service sector, a solid industrial sector, and a small but rather highly developed agricultural sector. Due to its geographic position, historic ties and strong economic connections, Austria is an attractive place for a regional headquarters if doing business in Central and Eastern Europe.
Austria is also an attractive market from a tax perspective. It is an interesting jurisdiction for holding companies and headquarters, for reasons including:

► the Austrian national participation exemption, which provides for an exemption for dividends from Austrian subsidiaries

► the Austrian international participation exemption, which provides under certain circumstances for an exemption for dividends and capital gains from foreign subsidiaries

► the Austrian group tax regime, which allows under certain circumstances a pooling of profits and losses within a corporate group and

► Austria's dense network of double taxation treaties

What type of investment is welcomed?

The Austrian government is especially keen on attracting investors in high-tech and high-potential industries such as telecommunications, non-agricultural biotechnology, medical and pharmaceutical research, transportation and electronics. Investments in “Green Technologies” (e.g. renewable energy sources) are also welcomed in Austria.

Foreign investment policy

In Austria, both greenfield operations and the acquisition of shares in Austrian companies by foreign investors is welcomed by companies and the government.

In relation to greenfield operations, the Austrian Chamber of Commerce set up the Austrian Business Agency to support any investor from abroad in the first evaluation of investment opportunities and determining whether any investment incentives would be applicable, such as preferred loans, subsidies for the acquisition of land and / or other local, national or international (EU-level) incentives. The acquisition of land by a non-EU entity or citizen requires the approval of the competent authority (for details see below).

The acquisition of shares in undertakings in Austria is generally not limited to EU entities or citizens and is, therefore, possible for any and all investors, as long as they are in compliance with the general rules for the capital market (as far as public listed companies are concerned) and the formal requirements for the transfer of shares in Austrian companies. In certain provinces, the transfer of shares in entities that, for example, own land, is subject to approval by the respective authorities (for details see below). The acquisition of shares may furthermore be subject to approval by Austrian or European Merger Control Authorities.

There are no corporate law restrictions preventing foreign managers from becoming managing directors in Austrian undertakings. Non-EU residents will have to apply for a residence and working permit if it is intended they are to be employed by the respective entity and will move to Austria.

Furthermore, the Austrian government supports foreign investments by favourable taxation systems (for details see below).

Foreign investments in Austria have played a major role in Austria since its accession to the European Union in 1998 and since becoming the gateway for international investors to CEE.

Types of business vehicles

Generally, Austrian law recognises commercial partnerships (Personengesellschaften) and capital companies (Kapitalgesellschaften). Commercial partnerships may be subdivided into general partnerships (Offene Gesellschaften, OG) and limited partnerships (Kommanditgesellschaften, KG). Capital companies may be subdivided into limited liability companies (Gesellschaften mit beschränkter Haftung, GmbH), stock corporations (Aktiengesellschaften, AG) and the Societas Europea (European Company, SE).

The most common business vehicle used to conduct business in Austria is the GmbH.
It is also possible to conduct business in Austria as a single entrepreneur.

**Offene Gesellschaft (OG – General Partnership)**

Although the OG is not a legal entity, it comes close to it – it may hold rights and incur liabilities, sue and be sued, and it may be registered in the commercial, land, trademark, and patent register. Although the OG is distinct from the parties that comprise it (i.e. its partners), all partners are fully liable and may not limit their liability regarding the OG’s debts.

It is advantageous to conduct a business in the form of an OG, since the set-up costs are low, and there are no requirements regarding minimum capital. Some other points regarding OGs are:

**Registration formalities**

Registration with the companies register is required (1-2 weeks). The articles of association may be, but need not, be submitted.

**Share capital**

There are no regulations regarding minimum or maximum share capital.

**Share issue for non-cash consideration**

Nature and amount of consideration (if any) need to be specified in the articles of association. Agreement on non-cash considerations is permitted, provided that such non-cash considerations may be evaluated in terms of money.

**Rights that can attach to shares**

There are no specific restrictions on the rights that can attach to shares. The internal legal relationship among the partners depends primarily on the articles of association, else the Austrian Commercial Code (Unternehmensgesetzbuch, UGB) provides for (mainly) non-mandatory regulations based on the principles of duty of loyalty and equal treatment of the partners.

**Restrictions on foreign shareholders**

There are no restrictions on foreign shareholders. Every natural and legal person with legal capacity may become a partner of an OG, unless otherwise provided in the articles of association.

**Management structure and restrictions on foreign managers**

The principle of self-management and self-representation (Selbstorganschaft) applies, and management is handled by one or all partners, unless otherwise provided in the articles of association. The power to represent the OG cannot be limited with effect towards third parties; only in the case of collusion (i.e. a partner and a third person cooperating in order to harm the partnership on purpose) those limitations become effective towards third parties.

If the OG carries out business activities pursuant to the Austrian Trade Act (Gewerbeordnung), it is necessary to obtain a “trade licence” and to register a “trade director” who meets the proficiency requirements for the type of business to be carried out. This “trade director” is responsible for the correct conduct of the business in compliance with applicable trade law, and – generally speaking – needs to be resident in Austria or the EEA.

**Director and parent company liability**

Directors and partners are identical, and partners are personally, unlimitedly, unrestrictedly, jointly and directly liable for the company’s debts and obligations in addition to the company itself.

**Reporting requirements and cost of compliance**

OGs are only obliged to draw up annual financial statements when meeting certain minimum size criteria (annual revenues of over EUR 700,000; see Sec 189 Para 1 No 2 UGB). Under Austrian tax law, there are special provisions for members of certain freelancers (civil engineers, attorneys, doctors, etc.), farmers, foresters and certain other entrepreneurs. Cost of compliance is rather low.
Opening a local branch office

The Austrian Commercial Code defines branch offices as sub-units of a company, without their own legal personality, that are: locally separated from the principal office; established on a long-term basis; internally subject to the instructions given by the principal office, despite an autonomous management and representation; engaged in material transactions of the principal office; and largely independent with regard to organisational matters. Only branches meeting these criteria are considered branch offices. All activities of a branch office will be attributed to the principal office as if the principal office itself had acted.

Branch offices are registered with the companies register and operate under their own business name. Foreign companies having their seat outside of Austria may establish a branch office in Austria.

OGs may not have or register branch offices.

Listing on local stock exchange

The shares of an OG may not be listed on a stock exchange in Austria.

Within corporate groups, do any issues exist in relation to the giving of upstream guarantees?

Under certain conditions, upstream guarantees may be subject to appeal in case of insolvency of the OG.

Laws relating to the charging of assets

Pledging of shares in the OG

Generally, claims resulting from the partnership or claims against the partnership itself may not be pledged (hence, shares in an OG itself may not be pledged). Exceptions to this are certain claims arising from management and profit distribution rights.

Pledging of the OG’s assets

The OG’s assets may be pledged in accordance with the respective property laws and their respective requirements.

Kommanditgesellschaft (KG – limited partnerships)

A KG is very similar to an OG, with the major difference that at least one general partner (Komplementär) has to be fully liable for the obligations of the partnership, whereas the other partner(s) (Kommanditist) only have limited liability to the amount of their capital contribution.

Therefore, unless expressively stated otherwise, the rules outlined for the OG above apply.

A very common form of a KG is the so-called GmbH & Co KG, in which case the general partner is a GmbH (limited liability company), and which are partly (e.g. accounting, capital maintenance) treated as de facto capital companies. The main reason for setting up such GmbH & Co KGS is the limitation of liability: The GmbH itself is liable with all of its assets, but the shareholders of the GmbH are only liable to a limited extent. This results in a commercial partnership with limited liability. Some other features are:

Restrictions on the rights that can attach to shares

Unless stipulated otherwise in the articles of association, profits are distributed to the general partner first.

Management structure and restrictions on foreign managers

Generally speaking, the limited partners may not take part in the management of the business and have no signing power. They may, however, be appointed as proxies of the KG or act under a commercial power of attorney (Handlungsvollmacht).

Parent company liability

Limited partners may only be liable in the amount of their capital contribution, general partners are liable without limitation.
Reporting requirements and cost of compliance
See above under the OG.

In case none of the general partners is an individual (i.e. a GmbH & Co KG), the KG is obliged to submit annual accounts to the companies register. Cost of compliance is overall low for a KG, slightly higher for a GmbH & Co KG.

Gesellschaft mit beschränkter Haftung (GmbH – limited liability company)
A GmbH is a separate legal person and entity. Apart from the obligation to pay in a share contribution, no other financial obligations apply to the shareholders; they can, generally speaking, not be held liable for the GmbH’s obligations. The shareholders are important to the managing directors, as they may give formal instructions (Weisung) to be complied with by the managing directors.

Amongst capital companies, GmbHs are the most common business type used in Austria. Some features are:

Registration formalities
The articles of association need to be drawn up in the form of a notarial deed, and need to be registered with the companies register (timing: 2-3 weeks).

Minimum and maximum share capital
The minimum share capital is EUR 35,000. At least half of it (i.e. EUR 17,500) has to be paid up in cash by the shareholder/s. The minimum initial contribution of each shareholder is EUR 70 (no maximum applies). At the option of the founder, the minimum share capital of GmbH may only amount to EUR 10,000 at the time of foundation, whereby the share capital subsequently needs to be increased to EUR 35,000 at the latest 10 years after foundation. In such case, the company’s firm name needs to include a reference to being a so called foundation-privileged GmbH (gründungsprivilegiert).

Share issue for non-cash consideration
Issuance of shares for non-cash consideration is generally permitted, provided that the minimum capitalisation is met and the contributed assets are duly evaluated.

Restrictions on the rights that can attach to shares
Shareholders are excluded from voting in the general shareholders meeting in case of conflict of interests (e.g. an allocation of advantages or relief from a liability, or transactions between the company and the shareholder).

Any restrictions on foreign shareholders
Shareholders merely have to have legal capacity (natural or legal persons), unless otherwise provided in the articles of association.

Management structure and restrictions on foreign managers
A GmbH is represented by one or more managing directors, who are appointed and removed by the shareholders at any time without cause. Only individuals, not legal entities, are eligible for this function. The set-up of a supervisory board is – except under certain circumstances – voluntary.

As to the “trade director”, please see above under the OG.

Director liability
Managing directors may be held personally liable if they negligently or wilfully cause damage to the GmbH. While carrying out their professional activities, managing directors are generally subject to the business judgment rule.

Generally, only the GmbH itself, represented by the (remaining) managing directors, the shareholders or the insolvency trustee, are entitled to claim such damages. Direct claims may be brought by third parties only in specific cases where the
managing director has violated a law protecting the interest of the creditors, intentionally infringed public policy or committed a criminal offense.

Parent company liability
Shareholders are generally not liable for the company’s obligations. There are exceptions, for example, in cases of qualified undercapitalisation, incomplete separation between the assets of the GmbH and of the shareholder, and economically destructive actions.

Reporting requirements and cost of compliance
GmbHs are subject to the accounting and reporting requirements of the Austrian Commercial Code (UGB). However, the law provides for special (simplified) size-related regulations. Financial statements must be filed with the companies register within nine months from the balance sheet date.

Opening a local branch office
See above under OG.

A GmbH may have and register national and foreign (subject to local laws) branch or representative offices. Under Austrian law, generally a foreign limited liability company (e.g. English Limited) may also have a registered Austrian branch or representative office.

Listing on local stock exchange
The shares are not incorporated as negotiable instruments; shares may not be listed on the stock exchange.

Within corporate groups, do any issues exist in relation to the giving of upstream guarantees?
Under certain conditions, upstream guarantees may be subject to appeal in case of insolvency.

Further, such guarantees have to be given on an arm’s length basis in order to comply with capital maintenance rules. Any payment directly or indirectly violating this principle shall be void and may be reclaimed by the GmbH.

Laws relating to the charging of assets
Pledging of shares in a GmbH
According to Austrian law, pledging requires a pledge agreement (Pfandbestellungsvertrag) and a respective transfer agreement (Pfandvertrag). Pledge agreements may be concluded without observing any specific formal requirements. Transfer agreements require a symbolic handover as an act of publicity (notification to the GmbH itself is sufficient). A notarial deed is not required; usually only the signing authority under the agreement/s is notarised.

Laws relating to this are in the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch), and Act on Limited Liabilities Companies.

Pledging of the GmbH’s assets
The GmbH’s assets may be pledged in accordance with the respective laws of property (e.g. physical handover with regard to movables, incorporation with regard to immovable objects, etc.). Also, the Austrian capital maintenance rules need to be obeyed.

Aktiengesellschaft (AG – stock corporation)
Shareholders of an Austrian Stock Corporation (Aktiengesellschaft, AG) have a share in the AG’s capital stock, which is divided into shares. They are not personally liable for the AG’s obligations. The shares may be transferred easily and generally without specific formalities. The management is independent and not subject to shareholder instruction.
Registration formalities
The articles of association need to be drawn up in the form of a notarial deed and subsequently registered with the companies register. A supervisory board needs to be set up as well. The set-up and registration process takes up to 3-4 weeks.

Share capital
Generally speaking, the minimum share capital amounts to EUR 70,000. At least a quarter of it (i.e. EUR 17,500) has to be paid up in cash. There are certain minimum capital requirements for AGs engaged in special kinds of business. For example, special minimum capital requirements apply to banks, investment services companies, or investment funds.

Shares may be issued as par value shares (Nennwertaktien) or no-par value shares (Stückaktien). Par value shares have to amount to at least one (1) Euro. Further, non-stock listed AGs may generally only issue registered shares (Namensaktien), whereas listed AGs may issue either registered or bearer shares (Inhaberaktien).

Share issue for non-cash consideration
Shares may be issued for non-cash consideration. Details regarding the non-cash considerations have to be laid down in the articles of association. Services do not qualify for such non-cash consideration. Non-cash considerations also require a so-called set-up audit by a certified auditing firm. Restrictions on the rights that can attach to shares.

Austrian stock corporation law provides for different classes of shares. Whether such preferred shares exist or not is determined in the articles of association.

The most common forms of preferred shares are non-voting preferred shares (shareholders are not entitled to vote but are privileged in the distribution of profits) and shares with restricted transferability (transfer of these shares is subject to the prior approval of the company).

Restrictions on foreign shareholders
Foreign persons or entities may become shareholders, as long as they have legal capacity under local laws, regardless of their nationality.

Management structure and restrictions on foreign managers
There are four obligatory bodies of an AG: the shareholders’ meeting, the supervisory board, the management board, and the auditors.

The management board runs the day-to-day business and represents the AG; the supervisory board supervises the management and appoints and recalls its members. The managing directors of an AG are not bound by instructions by the supervisory board and – generally speaking – the shareholders’ meeting. The shareholders’ meeting elects and removes the members of the supervisory board as well as the auditors.

A managing director may only be removed during his term of appointment due to material reasons (such as violation of duties, inability to perform his duties, or a vote of no-confidence by the shareholders’ meeting).

Director and parent company liability
Generally, see above under GmbH.

Reporting requirements and cost of compliance
AGs are subject to the accounting and reporting requirements of the Austrian Commercial Code (UGB). The financial statements must be filed with the companies register within nine months of the balance sheet date. In addition, large AGs within the meaning of the Austrian Commercial Code have to publish the annual financial statements in Wiener Zeitung (official Austrian publishing gazette). Special accounting rules apply to banks and insurances.
Details for opening a branch office or representative office

See above under GmbH.

Information for listing on local stock exchange

The Austrian Stock Exchange Act provides for the rules regarding the admission of shares to the listing on the Official Market (Amtlicher Handel) or on the OTC (over the counter) Market (geregelter Freiverkehr). Official Market and OTC Market differ primarily with respect to the quality of the admission criteria. Securities not admitted to the Official Market or the Second Regulated Market are included in trading in the Third Market (Dritter Markt), which is an unregulated market run by the exchange operating company Wiener Börse AG as a multilateral trading system.

<table>
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<th>REGULATED MARKETS</th>
<th>Official Market Sec 66a Stock Exchange Act</th>
<th>OTC Market Sec 68 Stock Exchange Act</th>
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<tr>
<td>TOTAL NOMINAL AMOUNT</td>
<td>At least EUR 2.9 million</td>
<td>At least EUR 725k</td>
</tr>
<tr>
<td>MINIMUM PUBLIC FREE FLOAT</td>
<td>Nominal value EUR 725k (par value shares)</td>
<td>Nominal value EUR 181,250 (part value shares)</td>
</tr>
<tr>
<td>PERIOD OF EXISTENCE</td>
<td>10,000 shares (non-par value shares)</td>
<td>2,500 shares (non-par value shares)</td>
</tr>
<tr>
<td>FROM THE PREVIOUS FULL FINANCIAL YEARS</td>
<td>At least 3 years</td>
<td>At least 1 year</td>
</tr>
<tr>
<td>ANNUAL FINANCIAL STATEMENTS</td>
<td>From three previous full financial years</td>
<td>From the previous full financial year</td>
</tr>
<tr>
<td>PROSPECTUS</td>
<td>Subject to Sec 74 Stock Exchange Act</td>
<td>Subject to Sec 74 Stock Exchange Act</td>
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The Vienna Stock Exchange rules upon applications for admission. Applications have to be submitted in written form and signed by an exchange member. The application has to be accompanied by, among other things: a recent excerpt from the companies register, the current articles of association, a copy of the compliance guidelines and, importantly, a prospectus approved under the Stock Exchange Act.

Issues in relation to the giving of upstream guarantees

See above under GmbH.

Laws relating to the charging of assets

Pledging of shares in an AG

Certificated registered shares are pledged by way of agreement and handover resp. transfer substitute and endorsement. Non-certificated shares may be pledged like other receivables, in accordance with general civil law.

Bearer shares that are held in custody on securities accounts and certificated in a global certificate may be pledged by way of agreement and transfer by way of an instruction to hold the shares on behalf of the pledgee. Bearer shares individually certificated may be pledged by way of agreement and handover of the certificate.
Laws relating to this: Austrian Civil Code, Stock Corporation Act.

Pledging of the AG’s assets

See above under GmbH.

Societas Europea (SE)

SEs are supranational companies with legal personality. Their capital stock is divided into shares. SEs may be formed by way of merger of two (or more) AGs from different EU member states, by a merger of AGs and GmbHs from different EU member states (Holding-SEs), by establishment of a subsidiary-SE by certain companies from different EC member states or by conversion of a national AG into an SE.

SEs are subject to the regulations of the SE-Regulation and the Austrian SE Act, complemented by the articles of association. Furthermore, the Austrian Stock Corporation Act also applies.

Therefore, unless stated otherwise, the principles outlined above for the AG apply to SEs as well.

Share capital

The minimum capital is EUR 120,000. At least a quarter of it (i.e. EUR 30,000) has to be paid up in cash. Special minimum capital requirements for Austrian AGs performing special kinds of business also apply to SEs performing the special kinds of business outlined above under AG.

Management structure and restrictions on foreign managers

The SE can be shaped in the form of a two- or one-tier system:

► Two-tier system:

In the two-tier system, the SE has a supervisory board as well as a managing board like the AG. The number of members of the supervisory board is determined by the Stock Corporations Act.

► One-tier system:

In this case, the managing board and supervisory board are “merged” into a Board of Directors, similar to the English board model. It consists of executive and non-executive directors, whereby the majority of the Board must be comprised of non-executive directors.

Employment

Employee relations

Austria’s employee relations climate is characterised by a historically founded and well-established partnership between the representative bodies of employers and employees – the so-called “Sozialpartnerschaft”. Within each industry sector, the trade unions negotiate with the employers’ associations (Fachverbände), collective bargaining agreements (Kollektivverträge) that provide mandatory minimum salaries (and annual increases thereof) and other material issues. On company level, if there are more than five permanent employees, they may chose to be represented by elected works councils (Betriebsräte). These are not only entitled to be informed by the management of the company on a regular basis about all issues that allude to the social, economic, cultural and sanitary interests of the employees, but may also conclude Shop Agreements (Betriebsvereinbarungen) about certain legally specified issues that are binding for the workforce. The employee representation is therefore generally well established via trade unions and works councils. Owing to such a high degree of cooperation between employers’ associations and management, this leads to a very stable and predictable business climate in Austria. Industrial actions are rare if not inexistent. Discussions about pay raises or other controversial issues are regularly resolved within the above described system of the Sozialpartnerschaft.
Main laws and regulations

The main acts governing employment in Austria are: the Austrian Act on White Collar Workers (Angestelltengesetz), Business Act (Gewerbeordnung), Austrian Labour Constitution Act (Arbeitsverfassungsgesetz), Equal Treatment Act (Gleichbehandlungsgesetz), Employment Law Harmonisations Act (Arbeitsvertragsrecht-Anpassungsgesetz), Working Time Act (Arbeitszeitgesetz), Maternity Protection Act, Paternity Leave Act (Mutterschutzgesetz, Väter-Karenz Gesetz) Paid Leave Act (Urlaubsgesetz), and the Act on Employment of Handicapped Persons (Behinderteneinstellungsgesetz).

Establishment of employment

Although generally it is not mandatory under Austrian Employment law to conclude a written employment contract, it is strongly advised to conclude both contract and amendments or side letters in writing to establish proof of employment. In addition to the employment contract, collective bargaining agreements (Kollektivverträge) and shop agreements (Betriebsvereinbarungen) may also govern the employment relationship. Collective bargaining agreements that are concluded between a trade union and employers’ associations usually provide a statutory minimum salary as well as other provisions (e.g. amendments to termination notice periods, overtime work or annual salary increases). Shop agreements are concluded between a works council and employer and may determine, for example, working time regulations or the implementation of a disciplinary code.

As a basic principle, the employment contract cannot regulate issues deviating from the applicable collective bargaining agreement or shop agreements to the detriment of the employee.

Employee representation and negotiation

The works council is entitled to delegate one member to the (non-executive) supervisory board of a public company for every two shareholder delegates.

If, owing to the form of the company, there is no representation in the supervisory board, the works council is then entitled to consultation by the management with regard to any material changes of the existing business unit (Betrieb). Such change could entail, for instance, the reduction or close-down of the business or parts of it, the transfer (relocation) of the business or changes in the method of manufacturing. The employer is obligated to inform the works council accordingly and in a timely manner in order to enable it to evaluate the impacts of the planned modification and comment on it. Upon request of the works council, the employer then has to consult with the works council to discuss potential modifications. The works council is, however, not entitled to request any amendments or to stop planned modifications.

Termination of employment

An employment relationship may either be terminated by mutual agreement, proper notice of termination, or (if appropriate) by summary dismissal. Fixed-term employment contracts may end without the necessity for a notice of termination.

The proper notice of termination (ordentliche Kündigung) of an employment relationship neither requires any reason nor the consent of any authority. Only the legal and contractual notice periods respectively have to be respected. However, if a works council is established, it is mandatory to notify it prior to actually giving notice. The works council may then issue an opinion within one week; an earlier termination will be null and void, unless the works council has already given its opinion. The works council can object to the termination, approve it or abstain from giving an opinion. However, the works council’s stance only influences the contestability of the dismissal as well as the scope of assessment by the court, but not the employer’s right to terminate the employment relationship as such.

With respect to white-collar workers, the following mandatory notice periods to be respected by the employer are specified in the Austrian Act on White Collar Workers (Angestelltengesetz):

<table>
<thead>
<tr>
<th>PERIOD OF SERVICE</th>
<th>NOTICE PERIOD REQUIRED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 2 years</td>
<td>6 weeks</td>
</tr>
<tr>
<td>PERIOD OF SERVICE</td>
<td>NOTICE PERIOD REQUIRED</td>
</tr>
<tr>
<td>-------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>More than 2 years</td>
<td>2 months</td>
</tr>
<tr>
<td>More than 5 years</td>
<td>3 months</td>
</tr>
<tr>
<td>More than 15 years</td>
<td>4 months</td>
</tr>
<tr>
<td>More than 25 years</td>
<td>5 months</td>
</tr>
</tbody>
</table>

Furthermore, a termination of white-collar workers can only take effect at the end of each calendar quarter. However, contractual agreements that allow termination to be effective on the 15th or last day of a calendar month are possible and also frequently used.

Notice periods for blue-collar workers are regularly included in the applicable collective bargaining agreement and are normally shorter than notice periods applying to white-collar workers. In the absence of such collective bargaining agreement, the notice period is 2 weeks.

A summary dismissal (Entlassung) is possible only for important reasons that make it unacceptable for an employer to continue an employment relationship – even during the notice period.

Certain groups of employees are specially protected against ordinary or immediate termination in that even their ordinary termination requires good cause. The labour court or an administrative agency must usually approve these terminations in advance. This approval has to be given only if the employer proves that the reason for the immediate termination is severe enough to make the continuation of the employment relationship unacceptable.

The protected groups are as follows:

► members of, and candidates for, a works council

► pregnant employees, until four months after giving birth. If the mother (or under certain circumstances, the father) opts for an unpaid maternity leave, protection is extended until the end of the leave plus four weeks

► employees rendering mandatory military services

► disabled employees and

► apprentices

In the event of an ordinary termination, “good cause” includes reasons similar to those that justify the immediate termination of employees who do not have special protection (e.g. disloyalty of the employee, offence of the employee against good morals). Proving the existence of good cause in order to obtain the court’s consent for termination of a specially protected employee is rather difficult. If the court’s consent is not obtained, then the termination is void, and the employer must pay the employee the full salary that he or she would have earned absent the employer’s action.

Redundancies and mass lay-offs

Any employer with more than twenty employees who intends to terminate at least five employees within thirty days must notify the local labour market agency (AMS) prior to giving notice. Redundancies and layoffs for other reasons may also require notification. A five percent threshold applies for undertakings with more than hundred employees. The same notification requirement is given if at least five employees of the age of fifty are to be terminated within thirty days.
The notification must indicate how many employment relationships are to be terminated, as well as the planned date of termination. The AMS may initiate consultations regarding the redundancies, but is not entitled to object to or prevent the planned redundancies. This procedure therefore only delays the termination process or requires at least a strategic timing for planned redundancies so that the above cited thresholds are not crossed within any given thirty day period.

Terminations before expiry of the thirty day period after notification of the AMS are null and void.

In addition, the employer is obligated to inform the works council of the details regarding the closing of or the reduction of a business, its relocation, or other business-related changes to the operation.

In the event that redundancies or other rationalisation measures have material negative effects on a considerable number of employees of a business unit with at least 20 employees, an agreement (Social Plan) can be entered into between the employer and the works council. This social plan is intended to mitigate the negative effects of the rationalisation measures. If the employer and the works council do not reach an agreement, either party may address a conciliation commission established at the Labour Court to issue a binding social plan.

**Employment of foreigners**

Except for EU, EEA and Swiss citizens, all foreigners need a work permit in order to be employed (or to be self-employed) in Austria. As of 1 July 2011, a new flexible system of work permits is in force, the so-called “Rot-Weiß-Rot Karte” - RWR. There are two different kinds of work permits: the RWR-card and the RWR-plus card. The main assessment criteria for obtaining a RWR-card are professional qualification, intended duration of work, language skills and an adequate job offer at not less than minimum wage level. The RWR-card authorises residence and employment by one specific employer only. The RWR-plus card authorises residence as well as unlimited employment possibilities. The following people can apply: highly trained employees, experts in occupational areas in shortage, and other key employees or university graduates. The requirements and arrangements differ between the groups of applicants. RWR-cards are granted for up to 12 months only, though they may be potentially converted to a RWR-plus card after this time.

Employment contracts with foreigners who do not possess an RWR-card are void. The employer must nevertheless pay the (minimum) salary, social insurance contributions and withholding taxes levied on salaries. Furthermore employers may be fined for violations up to EUR 50,000. Further consequences may result from violations of tax laws or social insurance law.

The application for an RWR-card should be submitted at least 8 weeks prior to the beginning of the (planned) employment. The administrative fees may be up to EUR 120.00.

**Economy and government**

Austria's economy continued to grow in 2011. According to calculations by the Institute of Economic Research, the Austrian economy faced a real growth of +3.1%, which is the highest real growth of the GDP since 2007 and above the average of the Eurozone (+1.4%) and the European Union (+1.5%).

For 2012, the Austrian national bank expects a growth rate of 0.7% and for 2013 of 1.6%.

Currently, Austria is governed (as for the majority of the years since 1945) by a coalition of the Social Democrats and the Conservative People's Party. The next general election is to be held in 2013.

**Restrictions / regulations**

Traditionally there have not been any rules and regulations in place limiting or controlling foreign investments in Austria. Recently (on 15 November 2011), however, an amendment of the Austrian Foreign Trade Act (Außenwirtschaftsgesetz; AußenwirtschaftsG) was adopted, which introduced certain restrictions on foreign investment in very specific circumstances. Sec 25a of this Act now entitles the Federal Minister for Economy, Family and Youth (Bundesminister für Wirtschaft, Familie und Jugend) to examine transactions in which the buyer has its seat outside of the European Union and the transaction involves a company which is active in an area of national security or national interest, as defined in Art 52 and Art 65 para 1 of the Treaty on the Functioning of the European Union (TFEU). The sectors of energy supply, telecommunications and defence, amongst others, fall within the scope of this provision.
The Minister of Economy may under certain circumstances deny an approval for a transaction, if the transaction would endanger the national security or national interest of Austria as defined in Art 52 and 65 Para 1 TFEU. However, this possibility to deny approval only applies in cases in which the buyer exceeds a voting right of 25% of the share capital of the company in question (in cases of joint course of action of shareholders, their respective voting rights will be added). Sec 25a para 11 also contains a “look-through” in case the buyer is an entity domiciled in the European Union which is controlled by non-EU-companies, and there are reasons to believe that the transaction structure has been chosen in order to circumvent the approval procedure.

The application for approval has to be filed in advance, i.e. before entering into a contract concerning the acquisition of the company or the share capital of the company in question.

The application has to include the name, address, telephone number and email address of the buyer as well as of the target, a description of the business operations of the company and a description of the envisaged transaction.

The Minister of Economy may then within two months approve the transaction or deny it in case the transaction would endanger the national security or national interest as defined above. The Minister may also approve the transaction but specify further conditions.

Currency regulations

According to the Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community, travellers entering or leaving the borders of the European Union and carrying cash exceeding the sum of €10,000 have to register this value at the customs authority.

Grants and incentives

Austria offers foreign investors a broad spectrum of investment incentives, grants and subsidies, for example, to assist small and medium-sized enterprises, support research and development or the launching of company start-ups, or to provide investment or technological promotion. Subsidies may be applied for and are granted at federal, provincial (Länder) or municipal level.

The type of funding ranges from cash grants and interest subsidies to loan guarantees. This extraordinarily extensive portfolio of incentives enables companies to take advantage of incentive programs tailored to their individual requirements.

The investment promotion policies pursued by the EU have defined maximum permissible limits on incentives for specific projects, which depend on the size of the applicant company, the particular location of the investment and the type of investment project. The scope of subsidies and assistance encompasses national subsidies, co-financing schemes as well as EU subsidies, including SME and regional grants.

Details for subsidies granted at federal level can be found at www.investinaustria.at.

Taxation

As a basic principle, taxation of income in Austria depends on the legal form under which income is generated and whether the person receiving the income is tax resident in Austria or not.

Legal form

Individuals are subject to income tax at progressive rates of up to 50%. The Austrian Income Tax Act sets forth seven categories of income, being income (including capital gain) from: (i) agriculture and forestry; (ii) independent personal services; (iii) commercial activities; (iv) employment; (v) capital investments; (vi) rent; and (vii) other specific income. Income which does not belong to any of these categories is not subject to income tax. Taxable income is the total amount of income from all categories after setting off of losses arising from these categories and deducting special allowances and extraordinary expenses.
Companies qualify as separate legal entities and are subject to corporate income tax at a rate of 25%. In principle, a company may derive income from all seven categories. However, the entire income of legal entities whose financial accounting has to be based on double entry bookkeeping under commercial law is deemed to be income from commercial activities.

Partnerships are treated as transparent for tax purposes and are not taxable themselves. Instead, the individual partners are subject to income tax with their share of the partnership income.

**Tax residence**

If a (legal or natural) person is tax-resident in Austria, he is subject to tax with his worldwide income (unlimited tax liability) unless otherwise provided for by a tax treaty or unilateral relief measures. Persons which are not tax-resident in Austria are subject to tax with their income from Austrian sources (limited tax liability).

**Other taxes**

Besides income taxes, the most important Austrian taxes which may arise are value-added tax, and Real estate transfer tax.

**Employee tax residency**

Under domestic Austrian tax law, a person becomes a resident of Austria if they have a domicile or habitual abode in Austria. A domicile is considered as being where a person has a home which is possessed under circumstances indicating that it will be maintained and used. The habitual abode is situated at the place where a person is present under circumstances indicating that his / her stay is not only of a temporary nature. However, in any case a physical presence in Austria exceeding six months results in unlimited tax liability under domestic tax law.

**Tax and social security contributions**

**Tax-resident employees**

Tax resident employees are subject to income tax at progressive rates of up to 50%. The tax on employment income is levied as wage tax (payroll tax) which has to be withheld and remitted by the employer. Employees have to pay social security contributions, currently amounting to 18.07% capped at EUR 4,530 gross salary per month.

**Non-tax-resident employees**

Non-tax resident employees are subject to income tax with their (employment) income from work carried out in Austria (an applicable double-tax treaty may limit Austria's taxation right with respect to such employment income). Generally, the same rates for income tax and social security contributions apply as for tax-resident employees described above. However, in most cases no social security contributions are payable in Austria, if the non-resident employee is included in a foreign system of social security.

**Employers in relation to their employees**

Employers have to pay social security contributions amounting to 21.83% of the gross salary of each employee, capped at EUR 4,530 gross salary per month (plus 1.53% of the gross salary as contribution to the severance payment insurance fund). Furthermore, (i) a municipal tax of 3%; (ii) an employer’s contribution to the family fund of 4.5%; and (iii) an additional fee to the employer’s contribution to the family fund of up to 0.44%, in all cases based on all salaries paid per month, is levied.

**Corporate tax residency**

A company has a tax residency in Austria if it has either its seat or place of management in Austria.

**Taxes on resident business vehicles**

**Corporate income tax**

Companies are subject to corporate income tax at a rate of 25% (dividends received from an Austrian company are exempt under the Austrian national participation exemption; for the taxation of dividends from foreign companies please see below).
The Austrian tax law provides for an attractive group tax regime; it allows for a tax group consisting of financially linked companies to be formed. If a resident company (or the Austrian branch of a comparable EU or EEA company) and its subsidiary form a tax group, profits / losses at the level of the holding company will be pooled. In case of comprehensive cross-border mutual assistance in tax administration, foreign first-tier subsidiaries could be integrated into an Austrian tax group as well. As a consequence, losses of such foreign group members (to the amount corresponding to the participation), can be offset against up to 75% of that tax period's profits of the Austrian group companies, whereas exceeding foreign losses can be carried forward at the top group company's level. The use of the foreign subsidiary's losses will be recaptured, however, if and as soon as such losses can be offset against profits in a foreign jurisdiction (no double dipping, only deferral) and upon disposal and certain other events.

### Value-Added Tax

The main taxable events under the Austrian VAT Act are the delivery of goods and the supply of services for consideration by taxable persons within Austria, the import of goods from non-EU member states, and intra-community acquisitions. Basically, VAT applies to all goods and services considered to be supplied in Austria by a taxable person in the course of its business. Specific rules apply regarding the supply of services. In certain cases the VAT liability is shifted from the supplier to the recipient (reverse charge system).

### Capital duty

There is a 1% capital duty on equity contributions to an Austrian company. It is triggered in particular in the course of the establishment of an Austrian company as well as any other equity contributions by the shareholders to an Austrian company. However, certain transactions are exempt from capital duty (certain indirect shareholders' contributions, certain transactions covered by the Reorganisation Tax Act, or transfer of the business or all its assets and liabilities to an Austrian company in exchange for shares), making it possible to mitigate this duty under certain circumstances. However, such capital duty will be abolished after 1 January 2016.

### Stamp Duty

Certain transactions may be subject to Austrian stamp duty amounting to up to 2%. Transactions that are potentially subject to Austrian stamp duty include, inter alia, lease agreements, assignments of debt claims or other rights, and sureties and obligations as a joint obligor. Stamp duty is triggered if a document or substitute documentation within the definition of the Stamp Duty Act evidencing the transaction is executed. There are certain structures where no stamp duty is triggered; however, any such structure needs careful planning.

### Taxes on non-tax-resident vehicles

Like the tax-treatment of non-tax resident individuals, the taxation of income of non-tax resident business vehicles is limited to the income from Austrian sources, such as an Austrian permanent establishment.

### Transfer tax

Transfer of Austrian-located Real estate is subject to up to 3.5% Real estate transfer tax pursuant to the Austrian Real estate Transfer Tax Act. In case domestic Real estate is owned by a company, the tax is also triggered where there is a transfer or acquisition of all of the shares in the company owning that Real estate.

As the Inheritance and Gift Tax Act was abolished in 2008, there are (currently) no taxes on gifts or inheritances. However, there is a statutory notification requirement for gifts exceeding certain amounts.

### Dividends paid to foreign corporate shareholders

In principle, dividends distributed by an Austrian company to its foreign shareholders are subject to 25% Austrian withholding tax. This withholding tax has to be deducted by the Austrian company when paying out the dividends. This withholding tax may be reduced under an applicable tax treaty (most treaties provide for a reduction to 15% or 5%).

Further, dividends paid by an Austrian company to its foreign parent company are exempt from Austrian withholding tax under the Austrian implementation of the EU Parent-Subsidiary Directive, provided that certain criteria are met.
Dividends received from foreign companies

Dividends received by an Austrian company from a foreign subsidiary are tax exempt under the Austrian international participation exemption provided that certain criteria are met.

The Austrian international participation exemption generally also applies to capital gains on the disposal of shares as well as on repayments of capital and liquidation proceeds (tax neutrality). However, Austrian holding companies may opt out of tax neutrality for the foreign participation. As a consequence, capital gains would be taxable and losses would be deductible over a seven-year period (dividends would remain tax exempt).

However, in certain cases Austrian tax authorities may deny the tax exemption for dividends and capital gains under the Austrian international participation exemption (in particular, if the foreign subsidiary derives primarily passive income and is, in its country of residence, not subject to corporate income tax at an average tax rate of more than 15% or in the case of hybrid instruments). In this case, the dividends as well as any capital gain derived from the foreign subsidiary, would be subject to 25% corporate income tax. Income taxes paid by the foreign subsidiary, as well as withholding taxes imposed on the dividends, may be credited against the Austrian corporate income tax payable by the Austrian company in such a case (switch-over-to-credit method).

Portfolio dividends (participation below 10%) from companies listed in the EU Parent Subsidiary Directive, and companies resident in other countries with which comprehensive mutual assistance in tax administration exists, are exempt from corporate income tax provided that certain criteria are met. In cases where the exemption does not apply, the dividends are subject to 25% corporate income tax, but there is a credit of the underlying corporate tax payable by the distributing company.

Interest paid to foreign corporate shareholders

Generally, interest paid by an Austrian company to non-residents including its non-resident shareholders is not subject to Austrian withholding tax (not even under domestic law).

Royalties paid to a non-resident company are subject to a 20% withholding tax, unless such rate is reduced by a tax treaty. However, under the Austrian implementation of directive 2003/49/EC (I+R Directive) royalty payments to group companies which are resident in another EU-member state are exempt from tax. Generally intra-group royalties and interest payments are not deductible from the Austrian payer's corporate tax base if such payments were effectively taxed at a rate below 10% at the payee's level.

Thin capitalisation rules

Austrian tax law does not provide for statutory thin-capitalisation rules. Debt financing on the part of the shareholder will be recognised if it is at arm's length unless the interest income is taxed at a rate below 10% at the shareholder's level. Interest paid to a shareholder will be deductible also provided that it is at arm's length. If the interest is higher than allowed by the arm's length principle, the exceeding part of the interest will be treated as dividends (being not deductible and subject to withholding tax).

However, interest will not be deductible at all if the loan is re-qualified as equity from a tax point of view, in a substance over form approach.

Controlled foreign company legislation

There is no CFC legislation in Austria. However, Austrian tax authorities may deny the benefits of the Austrian international participation exemption under the conditions outlined above (switch-over-to-credit method). Such switch-over would not lead to a deemed distribution but to a 25% taxation of actual dividend distributions of the foreign subsidiary to the Austrian company.

There are in practice other approaches of the Austrian tax authorities which may lead to results similar to those of a CFC legislation (for example, the application of income allocation principles, place of management principles and general anti-abuse rules).
Are there any transfer pricing rules? If so, please give details.
Austria has transfer pricing guidelines that are based on the OECD transfer pricing guidelines. Transactions with related parties must be conducted on an arm's length basis.

Taxation on imports and exports
Non-EU imports are covered by the EU's common customs tariff policy. The actual rates for goods imported from non-EU member states can be viewed in the online customs tariff database.

Double-tax treaties
Austria has a wide network of tax treaties with more than 90 countries. Basically, these treaties follow the OECD model, although there may be some deviations, especially in the older treaties.

Dispute resolution
Court process
The Austrian Court System consists of four different types of courts, more than 100 District Courts (Bezirksgerichte), 17 Regional Courts (Landesgerichte), including a specific Court of Commerce in Vienna, 4 Higher Regional Courts (Oberlandesgerichte), and the Austrian Supreme Court (Oberster Gerichtshof, abbrev. OGH). In civil and commercial matters, a lawsuit may pass through three levels of jurisdiction. The court of first instance is either a District Court or – if the amount in dispute exceeds EUR 10,000 – a Regional Court. Appeals against first instance decisions are either dealt with by Regional Courts or, in case the court of first instance itself was a Regional Court, by Higher Regional Courts. The third instance court in any lawsuit is the Austrian Supreme Court, which, however, may only be appealed to if legal questions of considerable importance need to be resolved and the value in question exceeds EUR 5,000. Further restrictions apply.

The Austrian civil procedure system is generally considered to be fast and efficient. District court proceedings in 2010, for example, had an average duration of 8.7 months, more than 50% of the proceedings took less than six months. One important factor in keeping proceedings short is the mandatory Order-for-payment-procedure, under which monetary claims up to EUR 75,000 are dealt with. According to this procedure, the claimant has to apply for an order for payment, which is granted without hearing the defendant. The order is served to the defendant, who may file an appeal within four weeks, thereby rendering the order of payment void and starting ordinary court proceedings. If, however, the order of payment is not appealed against, it enters into force and can be executed.

Arbitration
Pursuant to the Austrian Code of Civil Procedure, arbitration is permissible to settle any monetary civil or commercial dispute. Arbitration is very popular in Austria and has a long-standing history. In order to be valid, an arbitration clause needs to be in writing and must refer to a specific dispute arising out of a specific contract or legal relationship. Parties are relatively free as to the organisation of their arbitral proceedings. If, however, basic standards of procedure (e.g. the right of the parties to be heard) are not met, an arbitral award may be challenged in court. Just recently, this system of appeal has been revised so that challenge proceedings are substantially shorter. Unlike in most other countries, there is only one single instance of appeal, the Supreme Court itself. This has been highly appreciated and makes Austria even more attractive as a seat of arbitration.

Arbitration can either be conducted by an arbitral institution or by an ad-hoc tribunal consisting of an uneven number of arbitrators. The most important permanent arbitral institution in Austria is the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber, which provides its own – recently amended - set of rules for arbitration and conciliation proceedings (Vienna Rules). ICC arbitration is also very popular.

Competition
Since Austria's accession to the European Union in 1995, Austrian competition law has been largely superseded by the EU competition rules. Therefore, the Austrian Cartel Act is generally only applicable in parallel to the EU competition rules or in cases where the EU rules do not apply (e.g. in the absence of a cross-border effect). Since the EU competition rules are applicable in all Member States of the EU and therefore not specific to Austria, this section only outlines the Austrian Cartel Act.
Sec 1 of the Cartel Act contains a prohibition of cartels which is very similar to Art 101 TFEU and prohibits agreements between companies, decisions of groups of companies and coordinated behaviour with the actual or intended effect to restrain competition.

By way of example Sec 1 para 2 of the Austrian Cartel Act mentions prohibited forms of cartels, such as price cartels, condition cartels or anti-competitive market sharing contracts. Sec 2 of the Cartel Act contains exceptions from the cartel prohibition: cartels are not prohibited if they contribute to the advancement of production or economic development and if consumers benefit appropriately. Furthermore, in specific circumstances minor cartels only covering a marginal share of the Austrian market are excluded, as well as behaviour that affects the agricultural sector, for instance. The Federal Minister of Justice and the Federal Minister of Economic Affairs may also exempt particular groups of cartels by issuing an ordinance.

Similar to the EU rules, the Austrian Cartel Act prohibits the abuse of a dominant position. Sec 4 of the Cartel Act defines a dominant position more strictly than Art 102 TFEU (already a market share of 30% or above leads to the legal presumption of the existence of a dominant position; the burden of proof to rebut this supposition remains with the respective company). Sec 5 of the Cartel Act sets out several examples of abusive behaviour, including the restriction of production, discrimination or predatory pricing.

Jurisdiction in cartel cases lies with the Higher Court of Vienna (Oberlandesgericht Wien) as Cartel Court (KG). The Supreme Court – as Cartel Supreme Court (Kartellobergericht or KOG) – possesses appellate jurisdiction in cartel cases. According to Sec 36 para 1 of the Cartel Act, the Cartel Court only decides upon application; the Federal Competition Authority (Bundeswettbewerbsbehörde), an independent authority, is primarily empowered to file the request, though in some cases the Chamber of Commerce (Wirtschaftskammer), the Chamber of Labour (Arbeiterkammer), regulatory agencies, and any company that has a legal or commercial interest in the decision may do so. In many cases, the Federal Competition Authority has to act jointly with the Federal Cartel Attorney (Bundeskartellanwalt), an additional institution in competition matters, which is not found in many other jurisdictions. The institutional landscape is completed by the Competition Commission (Wettbewerbskommission), which has advisory functions.

According to Sec 26 of the Cartel Act, the Cartel Court (upon application by the Federal Competition Authority) has to prohibit anti-competitive behaviour and impose fines (Sec 29 provides for fines up to a maximum of 10% of the total turnover of the previous financial year).

**Intellectual property**

In Austria, protection can be sought for patents, industrial designs, designs and trademarks. Successful registration is only valid in Austria; a European or even international registration can, in most cases, be applied in addition to a local registration.

**Patents**

In order to provide legal protection for a technical invention, it is possible to register a patent (Patent) under the conditions regulated by the provisions of the Patent Act (Patentgesetz). According to the Patent Act, a patent is capable of protection if it is new, a technical invention, tradable, and if the technique does not derive from a state-of-the-art usage. The patent application needs to be filed at the Austrian Patent Office; however, before registering for patent protection, this office must examine whether the invention is adequate for a patent registration and that the invention does not already exist in the register.

Successful registration gives the owner of the patent the exclusive right to manufacture the respective product distribute and sell it and prohibit others from using, manufacturing, distributing and selling it for a maximum of 20 years. A prolongation of the period is not possible.

In case of violations, the holder has title to provisional injunction, damages, abolition and appropriate compensation.

The request can be made either by the inventor or by the applicant or by the patentee.
Inventions by employees

According to Sect 7 (3) of the Austrian Patent Act the employer has a right to inventions made by an employee if this has been agreed upon in writing and if invention falls within the activities of the company in which the employee is employed. The employee is entitled to receive an adequate remuneration for assignment of the invention and the right to use it to the employer.

The registration costs for a patent amounts at minimum to €530 and annual costs range from €100 (year 3) to €1,700 (year 20).

Utility model

If an invention does not fulfil the prerequisites required for the award of a patent, it can be registered as a utility model (Gebrauchsmuster). The Utility Model Act (Gebrauchsmustergesetz) requires a lower inventive concept to seek protection than the Patent Act but also protects inventions against imitations; it is available, for example, for food or pharmaceuticals. The Austrian Patent Office is also competent for the registration of a utility model. The maximum duration of utility model protection is ten years. A prolongation of the period is not possible.

The registration costs for a patent amounts at minimum to €330 and annual costs range from €50 (year 4) to €450 (year 10).

Design

The right of design (Geschmacksmuster) protects the appearance of a product. To be capable of protection under the Design Act (Musterschutzgesetz) a design has to be new and unique. The registration of a design has to be announced to the Austrian Patent Office. The application has to contain a detailed description of the design and an example or at least a picture of the product itself.

The right of design protects against product imitations and copies and gives the owner the exclusive right to use it and to prohibit other from using it. In case of violations the holder has title to provisional injunction, damages, abolition and appropriate compensation. Design protection lasts for five years and can be extended again for a further five years at a time. The maximum duration of design protection is 25 years. A prolongation of the period is not possible.

The registration costs for a design amounts at minimum to €125 and renewal costs amount to €125.

Under Regulation (EC) No 2245/2002, protection for a design can be sought within the European Union as a unitary industrial design (Community design). Competent for registration is the Office for Harmonization in the Internal Market (OHIM).

Trademarks

Under the Trademark Protection Act (Markenschutzgesetz), a trademark (Marke) may be protected if it can be displayed graphically and if such a sign is qualified to identify a product or service of a company. A trademark can consist of words, numbers, letters, images or words and images. Audio and 3D trademarks can also be registered. The application is filed at the Austrian Patent Office in written form and has to contain an illustration of the trademark and a declaration for which product or service class (according to the Nice Classification) the protection is aspired. A successful registration confers the owner of the trademark the exclusive right to use the trademark and to prohibit others from using it without his consent, when the trademark or even a similar trademark is used for the same or a similar product or service, in particular, if the usage is capable of confusing customers. However, the owner may also grant others the right to use the trademark. In case of violations, the holder has a title to provisional injunction, damages, abolition and appropriate compensation. The initial duration of a trademark protection is ten years. The protection may be prolonged for an unlimited number of further ten year terms.

The registration costs for a trademark amounts to a minimum of €359 and renewal costs amount to €650-850.

Copyright

Under the Austrian Copyright Law protection is granted to original intellectual creations in the fields of literature, music, pictorial art and films. The authorship rights focus on a natural person; the creator of a piece of work or art. According to Sec 23 of the Austrian Copyright Act the copyright itself is not transferable inter vivos, it just may be transferred by inheritance to
natural and/or juristic persons. The only way, hence, to transfer the possibility to use or exploit copyrights is by granting licences, which need to be carefully drawn-up. Copyrights cannot be registered.

Software

A computer program will be accorded copyright protection where the form of expression is original in the sense of being the author's own intellectual creation. The term "computer program" also contains further software components, such as object code, source code, documentation and users manual.

If the author of the computer program is an employee, who created the program in performance of his employment duties and if there is no written agreement between employer and employee about the usage rights, the employer enjoys the unlimited an exclusive right to use and exploit the software. Still, the author's right to claim authorship for him or herself remains unaffected.

Marketing agreements

Distribution by intermediaries is usually organised in the legal form of an agency, a distributorship or a franchise. For commercial agency arrangements, a specific statute was introduced in Austria, the Commercial Agents Act (Handelsvertretergesetz). Whereas the Commercial Agents Act regulates in detail the rights and duties of agents, there is no specific statutory regulation relating to distribution and franchise agreements. These forms of agreements are therefore regulated according to general contract law.

Agency

A commercial agent shall mean any person who negotiates or concludes contracts on behalf of another (called the Principal), other than contracts concerning immovable properties, in the name of and for the account of the principal on a continuous basis, and who performs this activity independently.

A commercial agent is obliged to give priority to the principal’s interests above all other business interests and is entitled to a commission if his activities were of a “meritorious” nature in the conclusion of a transaction.

A contract concluded for a specific period shall terminate on expiry of the period for which it was entered into. If the contract was concluded for an indefinite period it can be terminated by either party with observation of a specific period of notice, depending on the actual duration of the contractual relationship.

A core element of the Commercial Agents Act is the agent's right to an indemnity after the termination of the agency contract with the principal. The indemnity is due if and to the extent that the commercial agent has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers.

Distribution

Distribution agreements are regulated according to general contract law. In certain limited cases, however, provisions of the Commercial Agents Act shall be applied to distribution agreements as well.

Distributors conclude contracts in their own name and for their own account and enter into two separate transactions: one with the supplier (the Principal) and one with the customer.

Regarding the termination of the distribution agreement, the regulations of the Austrian Agents Act shall be applied by analogy. If the underlying facts and economic data of the contract demonstrate that the relationship between the parties is similar to that between a principal and a commercial agent, for example, the distributor is integrated into the sales organisation, or if the distributor has obligations similar to those of an agent, the distributor shall be entitled to indemnity after termination.
Franchising
Franchise is a form of business organisation in which the Franchisor already has a successful product or service and enters into a continuing contractual relationship with the Franchisee. The Franchisee operates under the Franchisor’s trade name and with the Franchisor’s guidance. In return a franchise fee paid to the Franchisor is to be due, usually a percentage of the turnover.

The Franchisee concludes contracts in his own name and for his own account and enters into two separate transactions: one with the Franchisor and one with the customer.

The Franchisee is free to obtain rights and assume duties on the basis of general contract law. Usually the franchise agreement states that the Franchisee shall be committed to adapt his business to the demand of the Franchisor for the reason of a unified Franchise system and, thus, the Franchisee shall, under specific circumstances, have the right of compensation of his investment and – via analogy – for the acquired customer stock after termination of the agreement.

E-commerce
The EU Electronic Commerce Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market was transformed into Austrian law and has been in force since January 2002 (E-Commerce Act). It regulates some aspects of the formation of contracts by electronic means. In particular, the service provider is obliged to be highly transparent and to provide information in respect of all aspects of business by electronic means, such as the name, the geographic address or the electronic mail address of the service provider. This information makes it possible to contact him rapidly and communicate with him in a direct and effective manner. There are also provisions regarding commercial communications and the liability of the service provider in relation to hosting and caching of data.

The Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997, on the protection of consumers in respect of distance contracts (distance selling), was also transposed into Austrian law and has been in force since June 2000. It primarily regulates information requirements of the supplier, rules on the right to and period of cancellation (e.g. the cancellation period ends on the expiry of the period of seven working days beginning with the day after the day on which the consumer receives the goods, as far as the supplier has provided the information as required by law at the time of contract conclusion) and performance (e.g. the contract has to be fulfilled within a maximum of 30 days beginning with the day after the day the consumer sent his order to the supplier). Further, there are provisions with respect to the protection of the consumer when receiving goods which are not ordered or when getting unsolicited advertising.

Data protection
The use of personal data is subject to detailed regulation under the Austrian Data Protection Act (DSG), which is based on the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Personal data are information relating to data subjects such as clients or employees, who are identified or identifiable. Data shall only be collected for specific, explicit and legitimate purposes. The purpose and the content of the data application have to be covered by the statutory competencies or the legitimate authority of the respective data controller, and the data subjects’ interest in secrecy deserving protection must not be infringed. Data processing without a legal basis as defined by the Data Protection Act is forbidden.

The law imposes an obligation to notify the data application (usually a technical system used for processing personal data for a certain purpose) to the Data Protection Authority so that it will be registered in the publicly available “Data Processing Register”. All data applications are subject to notification, unless an exception applies (e.g. if the data application contains merely published data or if processing is carried out by natural persons for entirely personal reasons or for journalistic purposes). Whoever decides to process data for certain purposes (e.g. employer processes the data of his employees for the purpose of paying their salary) is the “data controller”. The controller of the data application has to notify before commencing a data application. Some applications require a prior checking by the Authority and include especially applications which involve sensitive data or data concerning data subjects’ creditworthiness. All other data applications may be initiated immediately after the notification has been submitted to the Authority.
A data transfer to countries outside the EU, or to countries without an adequate level of data protection, needs to be approved by the Data Protection Authority, unless there is no exception as defined by law (e.g. if the data recipient is certified by the Safe Harbour Principles).

Failure to notify is punishable with an administrative fine of up to EUR 10,000. The use of personal data in violation of the data protection provisions is subject to an administrative fine of up to EUR 25,000.

Product liability
Like in many other states, Austria has implemented a specific Product Liability Law, which first entered into force in 1988 and closely follows the product liability system of the respective EU Directive. In addition, there are quite a few decisions of the Austrian Supreme Court clarifying aspects that are disputed or deliberately left out by this law.

Product liability means strict liability of the producer of a defective product, defining producer as any manufacturer of the finished product, the raw material or any person that "presents himself as the producer" and product as all moveables, also encompassing parts of immovable objects.

A prerequisite for raising any claims in this matter is the existence of a "defective product". Austrian law provides for three possible types of defect: in construction, production or instruction. Whether an ineffective product classifies as a defective product has been the subject of a great deal of litigation in Austria.

According to the Directive and the Austrian Product Liability Law, two kinds of damages are covered: personal damages encompassing injury; and death and damages to items of property other than the defective product itself, unless such a product was predominantly used by a businessman or business entity. There is a EUR 500 threshold.

The burden of proof lies with the Claimant, who has to make evident the causal relationship between the defective product and the damage caused. The time limit for raising any such claims starts with the day the Claimant first became aware of the defect, the identity of the producer and the damage. The Directive sets a standard minimum period of three years; Austrian law provides for an absolute limit of ten years.

Bribery and corporate crime
Bribery is primarily chargeable under the Austrian Criminal Code (Strafgesetzbuch, StGB). Following the Act amending the Anti-Corruption Legislation 2012 the respective provisions are located in Sec 304-309 StGB. The new legislation introduced stricter provisions and broadened their scope of application. The point of reference for the crime of bribery constitutes an official which can in particular be any person fulfilling legislative, administrative or judicial tasks at the federal, state or municipal level or persons working for state-affiliated companies (Sec 74 StGB). Another significant amendment is the criminal liability for "sweetening", i.e. where a person tries to influence the goodwill of an official initially without demanding services in return. As a result, for criminal liability to arise there does not need to be a link to a concrete official act anymore, instead it is sufficient to act with the intent to influence the official in his or her future official duties. Both the payment and acceptance of bribes are subject to criminal sanctions. Further provisions relating to bribery (providing for further legal consequences of bribery) can be found in, amongst others, the law on civil servants (Beamtenordnung).

Legal prevention of money laundering and other corporate crime
In Austria there is no single statute in place exclusively directed at preventing money laundering. The Criminal Code contains a provision at Sec 165 which prohibits money laundering. Violations of this prohibition may be sanctioned with imprisonment of up to ten years.

Further provisions directed at preventing money laundering and the financing of terrorism can be found in the Banking Act (Bankwesengesetz), the Securities Supervision Act (Wertpapieraufsichtsgesetz), the Insurance Supervision Act (Versicherungsaufsichtsgesetz), the Betting and Gambling Act (Glücksspielgesetz), as also in the Lawyer’s Act (Rechtsanwaltsordnung) and the Act on the Notarial Profession (Notariatsordnung). The majority of these provisions are based on the “know-your-customer” principle.
The most important further provisions on corporate crimes are contained in the Criminal Code (e.g. Sec 146 StGB – fraud; Sec 153 StGB – embezzlement; and Sec 168b StGB – bid rigging), the Act on Corporate Criminal Responsibility (Verbandsverantwortlichengesetz) and the Act against Unfair Competition (Bundesgesetz gegen den unlauteren Wettbewerb).

Real estate
Restrictions on foreign company ownership

The laws on the transfer of land of the federal states of Austria provide for restrictions on the acquisition of real properties, of certain rights in rem (e.g. building rights, usufruct) and on the conclusion of lease agreements concerning real properties by a foreigner or by a company in which foreigners hold the majority of the shares. Some federal states also restrict the transfer of shares or increase of the share capital of an Austrian company or an Austrian partnership owning Real estate in the relevant federal state.

For the abovementioned transactions, foreigners basically have to obtain the approval of the land transfer authorities. EU and EEA residents are exempt from this requirement.

Furthermore, the purchase of Real estate located in Austria by an Austrian citizen from a foreigner and the sale of Real estate located in Austria from an Austrian citizen to a foreigner has to be reported to the National Bank.

Types of interest in land

The different types of interest in land an owner might have are sole ownership, co-ownership and condominium ownership. Sole ownership means that the land is owned by only one person. Co-ownership means that the land is owned by two or more persons. Condominium ownership means the exclusive right in rem granted to a co-owner of a building to use certain rooms in the building and to dispose upon such room.

Furthermore, as an exemption from the principle "superficies solo cedit", a person can be the owner of a building without being the owner of the land on which the building is erected if this person is granted a building right (Baurecht) or if it is a “building on third-party land” (Superädifikat). A building right (Baurecht) is the transferable and inheritable right to construct a building on or beneath the surface of a certain piece of land. A “building on third-party land” (Superädifikat) is a building erected on third-party land with the intention that it won’t remain there permanently.

Registration requirements for land ownership

To acquire ownership in land, the purchaser has to be registered in the land register. Thus, the registration of ownership in the land register has a constitutive effect. An exemption from this principle applies in case of an act of universal succession (e.g. inheritance, merger, split-off, spin-off). In this case, the registration of the new owner into the land register has only a declarative effect.

Tax on property acquisition

The acquisition of real property triggers land transfer tax of 3.5%, based on the consideration of the sale. If the purchaser is a certain relative of the seller, the land transfer tax amounts to 2%.

Furthermore, the registration of ownership into the land register triggers a registration fee of 1.1%, based on the value of the land.

Existing law is stated as it applied in July 2014.

Useful contacts

WIRTSCHAFTSKAMMER ÖSTERREICH (AUSTRIAN CHAMBER OF COMMERCE)

+43 (0)5 90 900
Further information

CHSH is one of Austria’s leading corporate law firms, with an integrated practice in Central and Eastern Europe. With a team of over 170 lawyers, we guarantee our clients’ experience and expertise in all areas of corporate and commercial law – not only in Austria but also Central and Eastern Europe.

At CHSH, we are proud to be able to look back over a very successful history. Over the last 20 years, CHSH has been involved in virtually all of the top transactions in Austria. This is what really distinguishes us as one of the leading law firms in the fields of mergers and acquisitions, IPOs, takeovers, privatisations, financing, and Real estate and construction. We also enjoy an enviable reputation for our handling of large-scale commercial litigation and arbitration. The fact that we understand our clients’ businesses has helped us achieve a high rate of success. It is no coincidence that we are the first port of call for a number of long-term clients, whom we advise comprehensively on all of their day-to-day legal matters. We apply our litigation experience when drafting agreements, and are often able to prevent disputes with our clients’ counterparties before they arise. This expertise – combined with our years of experience in Central and Eastern Europe and our Lex Mundi network – ensures that our clients receive high-quality and sound advice, across disciplines and across borders.
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<th>CONTACT (SPECIFIC): HON.-PROF. DR. IRENE WELSER, PARTNER</th>
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<tr>
<td>+43 1 514 35 121</td>
</tr>
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<td>Fax: +43 1 5143 537</td>
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DOING BUSINESS IN THE CZECH REPUBLIC
Introduction and legal system

The Czech Republic is a Central European country with more than 10.5 million inhabitants occupying a strategic position in the heart of Europe. Its convenient location, dynamic economic development and high level of human capital make the Czech Republic a natural target for international investors in many areas of business. Large volumes of foreign investment have been directed at the automotive, engineering, chemical and pharmaceutical industries and has been a key part of the country's economic transformation. An open investment climate has always been considered a key element of the Czech Republic’s economy, which has made it one of the most successful Central and Eastern European (CEE) countries in terms of attracting foreign investment.

The Czech legal system is based on civil law and arises out of the German and Austrian legal tradition, which means that the law is created by Parliament and the judicial precedent is not binding. Civil, commercial, criminal and labour laws are codified. A number of minor acts supplement the codes in more specialised areas such as insolvency, public procurement, banking and construction law.

Fundamental changes in civil and commercial law took place from 1 January 2014, when the new Civil Code and Business Corporations Act came into effect, replacing the previous Civil Code and Commercial Code. Both of these represent a significant re-codification of the current legislation, and require a lot of attention not only from existing businesses, but also from prospective businesses. The free will of individuals is the underlying fundamental principle of the new legislation. The business sector will, undoubtedly, appreciate the wide scope of contractual freedom which allows them to negotiate agreements and make arrangements that could have been deemed invalid in the past.

The Czech Republic is a fully developed parliamentary democracy. Legislative power is bestowed on the Parliament, the Government serves as the main executive body, and justice is executed by the independent judiciary. The Czech Republic joined the European Union in 2004 and, since then, European law has played an important role in the legislative process. The Czech Republic is a member of the Organisation for Economic Co-operative and Development (OECD) and a signatory of a number of international treaties and conventions, including bilateral investment treaties and treaties for the avoidance of double taxation.

Government and policy approach

The Czech Republic maintains a consistent social and economic policy and is often referred to as one of the most successful new EU economies. Attracting and supporting foreign investment has been a national priority since the economic transformation in the early 1990s and is still considered one of the driving engines of the national economy. However, it is not only its steady legal and political environment that has made the Czech Republic a business-friendly country and an attractive and popular destination for a number of foreign investors.

One of the main reasons for the country’s success in attracting foreign investment is its workforce. The Czech labour force is highly skilled (especially in the technical and engineering sectors) and relatively low in cost. Its qualifications and efficiency are comparable to those of its western neighbours, at only a fraction of the cost.

The country is easily accessible from all European capital cities and boasts one of the best developed infrastructure and domestic supply bases in the CEE region.

The Czech taxation system favours businesses, as the corporate tax rate is fairly low (19%). The profits of default investment funds are subject to a lower tax rate of 5%, but all other types of investment funds have a tax rate of 19%. Value-added tax rates are 10% (applying to products like baby nourishment, medicaments, books), 15% (applying to products such as food and special healthcare products) and 21% (which includes most goods and services). A system of tax relief is available for large-scale investors, together with a number of other governmental investment incentives.

The Czech Republic has a highly developed industrial base, which has long been the main target of foreign investment. The service sector has also become much more developed over the past 20 years, particularly in the main urban centres and their surrounding areas. Investment is still abundant in the strong sectors of the Czech economy, such as the automotive or chemical industries, although focus is slowly shifting from investments in production and manufacturing to investment in science and Research and Development (R&D). This trend is expected to strengthen in the coming years as the country is in the process of a transformation from an industrial power into a high-value-added knowledge economy. This transition is already visible, and a growing number of international businesses are selecting the Czech Republic as a base for their R&D operations. Extensive research facilities such as science and technology parks and “business incubators” are being
developed. The country’s effort to re-brand itself as an R&D centre and hub for knowledge is being aided by extensive assistance from EU structural funds and national governmental incentives.

Foreign investment policy

In the European Attractiveness Survey, the Czech Republic regularly ranks among the top countries. Investors in manufacturing can take advantage of a system of incentives, such as tax relief and employment subsidies, granted by the Czech government. Businesses set up in the Czech Republic can also obtain support from EU structural funds under several Operational Programmes in the R&D sector.

Foreign investment plays a key role in the Czech economy. More than 173,000 Czech firms across all business sectors are supported by foreign capital. According to the Czech National Bank, the total amount of foreign direct investment reached CZK 2.77 trillion by the end of 2015 (approximately €100 billion). The biggest investors in the Czech Republic are firms residing inside the EU, mainly in the Netherlands, Germany and Austria. In general, firms from the EU constitute 86.7% of international investment. Capital from the United States and Korea also plays a significant role in the national economy.

Foreign capital is mostly concentrated in the automotive industry, software and information and communication technology (ICT) services, business support services, the aerospace industry, electrical engineering and advanced renewable energy. Investment into the advanced pharmaceutical and chemical industries is on the increase.

Most of the investments are in manufacturing industries (33.4%), followed by the financial and insurance sector (25.4%) and wholesale and retail trade and repair of motor vehicles (10.7%) This was largely due to the traditionally dominant vehicle-manufacturing sector. In 2015, the national agency, CzechInvest, mediated 78 foreign investment projects with a total value of CZK 37 billion. Twenty-two (with an aggregate value of CZK 9.7 billion) of these investment projects came from the USA and 21 (with a total value of CZK 9.2 billion) came from Germany. Other active investors were Taiwanese (two projects with a total value of CZK 4.5 billion), Korean (four projects with a total value of CZK 3.1 billion) and Swiss (six projects with a total value of CZK 3.0 billion).

The most popular current investment opportunities are to be found in the ICT sector, especially software development and electrical engineering. Electronic engineering has been linked to the Czech industry since the beginning of the 20th century. The Czech Republic has a very good domestic supply base in electronic products and is suited to more advanced projects in electronic engineering and software development. The Czech labour force includes a very high percentage of highly qualified electrical engineers and software developers, while labour costs are still well below the EU average. Moreover, foreign investors can benefit from the country’s central strategic position in Europe, with direct access to the EU market via its well-developed transport and telecommunications infrastructure.

The main foreign trade and investment agency of the Czech Republic is CzechInvest (www.czechinvest.cz). CzechInvest has advised foreign companies intending to extend their business activities to the Czech Republic since 1992 and now operates from several locations around the world.

Types of business vehicles

In the Czech Republic, business entities are governed primarily by Act. No. 90/2012 Coll., on Business Corporations (Business Corporations Act), which became effective from 1 January 2014. Some general aspects of legal entities can be found in the new Civil Code. Companies established before 1 January 2014 are, under certain conditions, governed by Act No. 513/1991 Coll., the Commercial Code, as amended. In addition, the legal regulation of certain specific business entities, such as banks and insurance companies, is contained in special laws (Act No. 21/1992 Coll., on Banks, Act No. 277/2009 Coll., on Insurance). The Business Corporations Act is the second major part of the recodification of private law in the Czech Republic and closely follows the new Civil Code.

Forms of business vehicle

In most cases, the vehicles preferred by investors for facilitating their business in the Czech Republic are either a limited liability company ("společnost s ručením omezeným" (s.r.o.)), or a joint stock company ("akciová společnost" (a.s.)).

Both of these vehicles grant its shareholders a legal separation of their assets and the assets of the company.
In reality, Czech law generally does not allow for much flexibility in terms of arrangements made by the shareholders in the Articles of Association of a company. This applies both to limited liability companies and joint stock companies.

Certain provisions of shareholders’ agreements, which some foreign investors consider as market standard, may also not be enforceable in the Czech Republic.

If individual provisions of the founding deeds of both of the vehicles of existing companies are in conflict with the mandatory provisions of the new Civil Code, then such conflicting provisions will automatically be repealed beginning with the day on which the new Civil Code came into effect (01.01.2014). The corporations must adjust these conflicting provisions to the new Civil Code regulations and file their amended founding deeds with the Collection of Deeds at the respective Register Court within six months from the effective date of the new Civil Code. Otherwise, these companies will be under the threat of compulsory winding-up by the court, including subsequent liquidation.

**Limited liability company (s.r.o.)**

The most frequently used vehicle is the limited liability company - s.r.o. Compared to the joint stock company, the process of establishing an s.r.o. is easier and there are fewer administrative requirements in relation to the management/running of the company. In addition, the minimum capital requirement is lower (CZK 1, in a one-member s.r.o.) and the s.r.o.’s members (shareholders) enjoy limited liability for the company’s obligations.

**Foundation Process**

A limited liability company can be founded either by one or more individuals or by another company (legal person). The number of members of an s.r.o. is not limited. The new Business Corporations Act revokes the prohibition on the chaining an s.r.o., thus allowing the s.r.o. to be established by an s.r.o. whose sole founder or member is an s.r.o.

There must be a record made by a notary on the establishment of the company (notarial deed).

The registration of a company or partnership in the Commercial Register is carried out by the competent courts. If all the statutory requirements are fulfilled, the court will register a company or partnership in the Commercial Register. The company or partnership is then fully incorporated as of the date of its registration in the Commercial Register. The same applies to the joint stock company.

There is a registration fee of CZK 6,000 (approximately €220), which must be paid to the registration court. Based on the recently passed amendment to Act No. 549/1991 Coll., on judicial fees, if the registration is processed by a notary, no registration fee is required.

The process of establishment of a limited liability company takes approximately two weeks.

**Share capital**

The minimal registered capital requirement for an s.r.o. is CZK 1 (provided that the s.r.o. has only one member - the Business Corporations Act requires each member to provide a contribution of at least CZK 1). A higher contribution may be determined and recorded in the foundation deed or the Articles of Association.

The members’ capital contributions to the registered capital of an s.r.o. may be paid in cash (monetary) or in-kind (non-monetary). The value of a contribution in-kind to the s.r.o. must be determined by an independent expert. The managing director or the founders (when establishing a company) select an expert from a list of experts (maintained under a special legal regulation).

The total amount of all contributions must equal the value of the company’s registered capital. The contributions must be paid up within the period set forth in the s.r.o.’s foundation deed or the Articles of Association; within five years from the incorporation (registration) of the company; or from the takeover of an obligation to pay up the contribution(s).
Corporate Bodies

A limited liability company has:

► a General Meeting (i.e. meeting of the shareholders), which is the main decision-making body of the company when it comes to general matters/matters of substantial importance and

► a statutory body (one or more managing director(s) who are empowered to act on behalf of the company in all matters), who facilitate day-to-day business of the company and represent the company in relation to third parties

A Supervisory Board is optional. Its task is to perform controlling functions.

Directors'/Shareholders’ liability

Each shareholder of an s.r.o. is jointly and severally liable for the obligations of the s.r.o. up to the aggregate amount of shareholders’ unpaid capital contributions, as registered in the Commercial Register. Once all capital contributions are paid up and registered in the Commercial Register, the members’ liability for the company’s obligations extinguish.

Joint Stock Company (a.s.)

Foundation Process

A joint stock company can be established by either one founder or several founders (legal or natural persons). The company is established upon the adoption of the articles of association (which have to meet all the statutory requirements) by all its founders in the form of a notarial deed. The founders must subscribe the total value of the company’s registered capital.

There is a registration fee of CZK 12,000 (approximately €445) that must be paid to the registration court.

The process of establishment of a joint stock company takes approximately six weeks.

Share capital

There is a minimum share capital requirement of CZK 2 million (approximately €75,000). The registered capital of the a.s. is divided into shares, the aggregate nominal value of which corresponds with the total value of the registered capital. The company may also issue only no par value shares (in Czech: “kusové akcie”). The shares are issued in the amount of the share capital and distributed among the shareholders. The shares can be either in the form of a certificate, or in the book-entry form. Further, they can be registered, or in the bearer form.

The law also recognises priority shares, which award the owners the priority rights over the dividend payments.

Non-monetary contributions to the share capital are allowed. The market value of a non-monetary contribution needs to be assessed by an independent court-appointed expert.

Corporate Bodies

The founders can decide whether to grant the company a monistic (administrative board and statutory director) or dualistic (board of directors and supervisory board) corporate structure.

Directors'/Shareholders’ liability

A Czech joint-stock company is fully responsible for its obligations towards third parties, however the shareholders are not personally liable for the company’s obligations.

Employment

Employee relations

Czech labour and employment relations are governed by laws, collective bargaining agreements and individual employment agreements. With the world-wide recession in recent years, and the introduction of austerity measurements and other cuts, the role and power of the trade unions (which have a strong history in such fields as the construction industry, the automobile industry and health services) have increased. However, country-wide and/or long strikes are rare in the Czech Republic.
Social security has a long tradition in the Czech Republic. Social security and health insurance contributions are paid from the remuneration of each employee. All employees benefit from social security and health insurance in cases where the employee is not able to work because of a reason determined by the law (such as illness, loss of a job, etc.), however, recently there has been a move to pass some of the resulting costs on to employers. Employers are obliged to provide an employee with sickness benefits for the first two weeks of an illness, with the exception of the first three working days. Only thereafter are the benefits provided by the Social Security Agency. Most parents take advantage of the two to four year parental leave option (for a single child, one parent is allowed to care for the child, but the parents may switch several times).

Employees benefit from the tendency of the judiciary to place most of the burden of proof on employers. As a result, employees often succeed in actions of wrongful termination. Invalidity of termination of an employment relationship by notice, immediate termination, termination during a trial period or termination by agreement must be claimed by both the employer and the employee in the courts within two months of the date on which the employment relationship was to end through such termination. This provision has not been changed for the past 25 years. However, since 1 January 2014, if the parties enter into settlement negotiations (entry into settlement negotiations can be informal, even an exchange of letters which demonstrates that the parties have discussed a possible settlement can be considered as an entry into settlement negotiations), the two months' term is interrupted and does not continue as long as the parties are discussing a settlement. The term then starts to run once the negotiations are over, but shall not end sooner than six months after the end of the settlement negotiations.


An employment contract must be executed in writing. However, a failure to do so does not result in invalidity.

Employment contracts can be of an indefinite duration or limited in term. Consecutive limited terms between the same parties can be agreed, in principle, for a total of three years and may be extended twice in succession for the same period of time, to a total maximum term of nine years. The same restriction applies to any other fixed-term employment relationship established by the same parties within a three-year period.

The maximum number of working hours permitted by law is 40 hours per week. In respect of jobs in two shifts or three shifts, the working hours are reduced to 38.75 hours per week or 37.5 hours per week, respectively. The number of working hours may be reduced by agreement. If the quantity of working hours exceeds the statutory maximum, employees are entitled to a bonus for overtime work, in addition to their usual wage for the work performed.

According to current legislation, dependent work is to be performed above all in an employment relationship. Dependent work means personal performance of work by an employee for his employer within the relationship of the employer’s superiority and his employee’s subordination, in the employer’s name and according to the employer’s instructions. If a relationship between an employer and employee has the aspects mentioned above, the work performed has the features of dependent work and, as such, may only be performed in a labour relation (i.e. it is not possible to perform dependent work on the basis of a mandate agreement or of other contracts stipulated in any laws other than the Labour Code). A potential breach of that rule could entail high financial sanctions for the company.

The following matters have to be set out in the written employment contract:

► the nature of the work to be performed
► the place of work and
► the date on which the employment commences

As a rule an employment contract will also contain the following provisions:

► annual leave provisions (the legal minimum is four calendar weeks)
► the period of notice of termination by the employer and by the employee
the manner of remuneration, its amount and due date and

weekly working hours

In addition, a probationary period of up to a maximum of three months may be agreed (but only in writing and before the employment commences). A longer probationary period may be agreed upon with managerial staff, however, this must not exceed six months.

Employment contracts are entered into with employees and executive staff members. There is no separate type of managerial contract, however, employment contracts for managerial staff may include some specific provisions. For example, it may be stipulated in the contract that a manager may be discharged from his/her position (provided it is also agreed that they may resign from their position). It is also usual to enter into a non-competition clause or a clause of enhanced severance payment in such contracts with managerial staff.

Apart from employment pursuant to an employment contract, it is also possible to enter into an agreement on the performance of work or an agreement on working activity for work which is of a limited scope, or for irregular, occasional or one-off work. The agreement on the performance of work differs from an employment contract primarily by the limited scope of work which may not exceed 300 hours in one calendar year. The scope of work under an agreement on the working activity may not exceed, on average, half of the set weekly working hours (that means, usually, 20 hours a week).

Collective employment relations

The most powerful employee representatives are the unions (odbory). They can be active in businesses with any number of employees, though tend to operate within medium to large enterprises, representing from a few dozen to hundreds of employees. The unions are the only employee representatives to have legal personality and the right to enter into collective agreements on behalf of employees.

The rights of unions include the right to demand information, the right of discussion with the employer regarding certain issues (such as the economical situation of the employer, workload and changes in organisation of work) and the right of co-determination in certain matters. In addition, the employer requires the consent of the unions for certain actions (for instance, the giving of notice of termination by an employee who is a member of the union).

Another type of employees’ representation is a works council. In comparison with unions, the rights of a works council are significantly restricted. A works council has no right of co-determination and no monitoring rights. The employer does not require the consent of a works council for certain measures, as is the case with unions. In principle, the rights of a works council are limited to the right to demand information and the right of discussion.

Termination of employment

An employment relationship can end with a termination agreement, a notice of termination or dismissal, termination with immediate effect, termination during the probationary period, the death of the employee or, in the case of fixed-term employment, the passage of time. Employment relationships with foreign nationals or stateless persons can also terminate due to the withdrawal of a residence permit or an order for expulsion from the country.

Whereas an employee is, in principle, entitled to terminate his/her employment at any time without justification, the employer’s right of termination is limited to strictly defined situations:

Dismissal on grounds of redundancy

dissolution of the employer in whole or in part

relocation of the employer in whole or in part to another site or

excess capacity due to a decision made by the employer to modify the substance of the tasks or technical facilities, to reduce the number of employees for the purposes of increasing labour productivity as well as other operational modifications

Termination on grounds of health
► medical certificate confirms loss of previous ability to work or

► occupational illness which arises or is long-term and which renders the previous ability to work impossible

**Termination on personal grounds**

► failure to satisfy the requirements set out in the legal provisions (which means either statutory or contractual provisions) for performance of the agreed duties, or failure to satisfy the requirements of work performance, without the employer being at fault

► existence of grounds justifying termination by the employer with immediate effect, due to a serious breach of obligations arising from the legal provisions (which means either statutory or contractual provisions) relating to the work performed by the employee. In the case of less serious breaches, termination is permissible if the matter has been communicated to the employee, along with the potential for termination in connection with future breaches of obligations, during the previous six months or

► breach of the employee’s duty to observe legal rules imposed on the employee by law during his work incapacity, in an especially gross manner

Generally, the notice period in the event of a notice of termination or dismissal is at least two months for both sides, starting on the first day of the month after the calendar month in which the notice of termination or dismissal was served on the other party. The notice period may be prolonged (for both parties as long as it is the same length) on the basis of either an employment agreement for an individual employee, or a collective agreement for all employer’s employees.

Dismissal on grounds of redundancy and termination on specific grounds of health (only in relation to occupational illnesses) constitute special cases in that they give rise to a statutory severance payment claim for the employee. In the case of redundancy, as a matter of principle, the severance payment amounts at least from one to three times the average monthly salary of that employee (the amount of the severance payment depends on the length of the employment) and in the latter case to at least 12 times the average monthly salary of that employee.

An employer is entitled to terminate the employment relationship with immediate effect in two particular cases: (i) imprisonment of the employee for more than one year due to a criminal offence, or imprisonment of the employee for at least six months due to a criminal offence committed within the context or in direct connection with his/her responsibilities as an employee; or (ii) a particularly serious breach by the employee of his/her obligations under the legal provisions (which means either statutory or contractual provisions) relating to his/her responsibilities.

Extra protection against dismissal, whether ordinary or with immediate effect, is enjoyed by certain categories of employees whose social situation is temporarily difficult. This concerns employees who are temporarily incapable of working (for instance, due to an illness), women who are pregnant, women on maternity leave (up to six months after the birth of the child) and employees on parental leave (up to the third birthday of the child).

If an employee considers an employer’s notice of termination void (for instance, the employee considers that the notice breaches the Labour Code) and informs the employer without delay, after having received the notice, that they insist on remaining employed, the relationship will continue and the employer must keep paying the employee’s salary. If the employer refuses to respect this and stops paying a salary, the employee may then file a claim for wrongful dismissal within two months of the date the relationship should have come to an end as a result of the purported termination.

The new Civil Code also introduced general legal regulations of any non-competition agreement, which also apply to non-competition agreements that prohibit the employee from competing with the employer for an agreed period after the termination of the employment relationship. Pursuant to the Labour Code, the non-competition agreement can be agreed upon for a maximum period of 12 months after the termination of the employment relationship, and the employee must receive appropriate compensation, at least in the amount of half of the employee’s average monthly earnings for each month of the obligation to not compete with the employer. According to the new Civil Code, every non-competition agreement must also specify the territory in which it is applied, the scope of prohibited activities or the scope of persons against which the employee cannot compete with the employer; otherwise it is null and void.
Collective Redundancies

Collective redundancies mean, according to the Labour Code, that an employer terminates the employment relationships of more than approximately 10% of employees (the figure differs slightly depending on the total number of employees). Before giving notice to individual employees, matters must be reported in writing to the union (if any) and the labour office (i.e. the authority with jurisdiction over employment relationships and matters connected with the Labour Code and other employment regulations).

If an employer is not able to provide employees with work due to a temporary drop in demand for the employer’s service, a special measure called “temporary layoffs” might be taken (either by agreement with the union (if any), or by the approval of the labour office). The regime of temporary layoffs does not mean that the employee is free to work for any other employer. During the temporary layoff, the employees do not work and the employer has to pay to the employees a compensatory wage at the minimum level of 60% of the respective average earnings of each relevant employee for a period during which the reasons for temporary layoff still exist.

Foreign employees

The Czech Labour Code also applies to employment relationships performed in the Czech Republic where one of the parties is foreign, unless the parties have chosen another jurisdiction as governing law (however, the mandatory rules of the Czech Labour Code would still apply).

In principle EU, EEA and Swiss nationals do not require a work permit in order to take up employment in the Czech Republic. The employer merely has to provide relevant proof and information to the competent employment exchange, while also keeping a register of all EU and non-EU nationals who are in its employment or have been seconded to it by a foreign employer. Nationals of non-EU states require a residence permit and a work permit in order to take up employment in the Czech Republic. The work permit is not required for the mere performance of executive functions, such as for managing directors (jednatel).

In accordance with EU legislation, as from May 2011, residence permit certificates also include biometric data (i.e. a depiction of the individual's face and fingerprints). The certificates are issued in the form of a card with an integrated biometric data and the procedure can take up to two months from the day on which the data was obtained.

The above-mentioned amendment regarding the residence permit certificates also introduced a Blue Card – a new type of long-term residence permit to be issued to non-Czech nationals to perform jobs which require a high level of education. Both a residence and work permits are integrated into that document.

Economy and Government

The Czech economy is export-oriented and is closely linked to the major economies of the European Union, especially Germany. The country’s GDP (PPP) per capita is the highest in Central & Eastern Europe (having surpassed Slovenia in 2014) and has surpassed a number of non-Eastern Bloc states, e.g. Portugal and Greece. It passed through the financial and economic crisis relatively unharmed and is currently on its way to a solid recovery. The annual GDP growth reached 4.3% in 2015 and the Ministry of Finance predicts 2.5% growth in 2016 and 2.7% growth in 2017. After a slight downturn caused by the crisis, the Czech economy is performing well again, with unemployment (4.1%) resting deep below the EU average (8.8%).

The legal environment continues to develop in order to minimise the administrative burden for businesses and this should make the Czech Republic even more attractive to new business. Reducing the deficit and improving the structural situation of public finances will be the fiscal policy priorities for the coming years. The main objectives of the government's fiscal policy are reducing the deficit, implementing health care and pension system reform, and increasing the effectiveness of government expenditure through a change in public procurement regulation and an introducing an efficient anti-corruption strategy.

The Czech national currency - the Czech Koruna (Koruna) - is administered by the Czech National Bank (CNB). In November 2013, the CNB introduced and put into effect a new monetary policy, whereby it started using foreign exchange interventions to deliberately weaken the Koruna. The aim of these interventions has been to curb the risk of deflation and thus preserve price stability in the Czech economy in line with the CNB’s inflation target of 2% p.a., all while further boosting exports. In exchange rate terms, the CNB is looking to impede excessive depreciation of the Koruna below CZK 27/€, and has therefore purchased foreign currency to maintain the exchange rate above this threshold. At the new, weaker level, the Koruna has
been left to float freely in response to market forces. The ultimate duration of this monetary policy will depend on the future development of inflation, as well as other factors such as the overall state of the Eurozone. From the perspective of foreign investors seeking to enter the Czech market, the weak Koruna is very favourable, due to the fact that the already modest costs of highly skilled Czech labour have now decreased even further.

There are very few legal restrictions regarding foreign investment in the country. They mainly arise out of national security considerations or foreign exchange regulation. The Czech Republic is bound by European law on free movement of capital and by bilateral international agreements on the promotion and reciprocal protection of investments. However, certain restrictions to the free movement of capital and payments are set out in the act on Foreign Exchange.

In principle, residents are permitted to undertake contractual obligations towards non-residents and to fulfil the resulting commitments in either Czech or foreign currency. Residents and Non-residents are entitled to buy foreign currency to acquire property abroad, and to export and import Czech and foreign currencies. Certain exchanges are subject to a duty to notify the Czech National Bank. Foreign exchange regulation also plays a role in the fight against money laundering, which is also targeted by specialised money laundering regulations arising out of European law. The profits of a Czech subsidiary can be repatriated to its foreign parent company freely (subject to appropriate withholding taxes) in the form of dividends, interest, royalties, management fees, return of capital on liquidation or others.

The Czech Republic offers numerous investment incentives without discriminating between domestic or foreign investors. The system of investment incentives is regulated by the act on Investment Incentives. Government incentives usually include cash incentives, such as direct financial support for creation of new jobs, long-term loans with reduced interest rates, labour-related incentives, a full or partial corporate income tax allowance for a period of up to ten years for newly established companies, production expansion, transfer of land for favourable price or professional help in dealing with necessary documentation and administrative procedures. Qualifying strategic investors can obtain direct financial subsidy of up to 10% of eligible cost (maximum CZK 1.5 billion for a manufacturing project and CZK 0.5 billion for a technology centre).

The incentives mostly target manufacturing and technological investments with a high export potential. Investment incentives for technology centres and strategic centres are also available. These cover activities such as group headquarters, call centres and R&D centres. Incentives are provided according to a regional key, which means that the size and scope of the incentive depends on the region where it is provided and used. The incentives cannot be provided in Prague. Depending on the size of the company and the location, the support can amount to between 25% and 45% of the recognised investment cost. Investments by non-SME’s can be supported with up to 25%. Naturally, the largest amounts of incentives appear to be in regions of high unemployment and those with a lack of relevant existing businesses.

The system of investment incentives is under continuous development which reflects current government policy in the industrial and economic sectors. The incentives system is to reflect the government’s goal of boosting research and development and turning the Czech Republic into a knowledge-based economy.

**Taxation**

**Employees, Business Vehicles, Other Taxes, Double Tax Treaties**

The Czech Republic is a Member State of the EU and important features of the Czech tax system have, therefore, been harmonised with EU tax law, including direct taxes, VAT, excise duties, mutual assistance and administrative cooperation.

**Employees**

**Tax Residency**

Individuals who have their permanent home or habitual abode (meaning that they are present in the Czech Republic for at least 183 days during the calendar year) in the Czech Republic are considered tax residents. Individuals who have neither their permanent home nor their habitual abode in the Czech Republic are non-tax residents and are taxable only on their income from Czech sources.

**Income Tax and Social Security Contributions: Tax Resident Employees**

Tax residents are liable for tax on their worldwide income. Tax on employment income is calculated on the “super-gross” salary, which is the gross salary increased by social security and health insurance contributions payable by the employer (34%). It is not possible to deduct employees’ social security and health insurance contributions from the tax base. The tax...
base (decreased by certain other deductions) is subject to a flat tax rate of 15%. A 7% “solidarity increase” in personal income tax on taxable income in excess of 48 times the average salary has been applied since 2013. There are various tax allowances and allowances, including a basic allowance of CZK 24,840 p.a. (approx. €920), allowance for a spouse with low income (CZK 24,840 p.a. approx. €920) and for a dependent child (CZK 13,404 p.a., approx. €500).

The tax from employment income is withheld by the employer monthly, with an annual reconciliation.

Social security contributions, where payable, amount to 45% of gross salary. The employee’s contributions to social security and health insurance of 11% must be withheld and paid by the employer. The employer’s contributions are levied at the rate of 34% (if sickness benefits are optionally treated as deductible, the rate of 35% applies). The maximum annual cap on which social security contributions are payable for 2016 is CZK 1,296,288 (approx. €48,000). There is no cap for health insurance premiums.

Income Tax and Social Security Contributions: Non-Tax Resident Employees

Non-tax resident employees are taxed on income from their work performed in the Czech Republic, if the employer is a Czech company or a Czech permanent establishment, or if he/she spends more than 183 days during any consecutive 12 months in the Czech Republic. However, most Czech double-tax treaties eliminate Czech tax on employment income if all of the following apply:

► the employee’s presence in the Czech Republic does not exceed 183 days per tax year
► the remuneration is paid by an employer (or for an employer) who is not resident in the Czech Republic and
► the remuneration of the foreign employer is not paid by permanent establishment in the Czech Republic

The taxable salary is increased by deemed social security and health insurance contributions of 34% (“super-gross” salary), regardless of the amount of contributions actually paid. The tax rate is the same as for tax residents. Tax allowances for a spouse and a dependent child are granted to non-residents if at least 90% of their income comes from Czech sources.

Tax from employment income is usually withheld by the employer. Only if an employee is seconded through a permanent establishment, which is not registered in the Commercial Register, is there no liability to withhold tax. Instead, the employee files a tax return and then pays the tax.

Non-tax resident employees are generally subject to social security and health insurance contributions under the same rules as tax resident employees. However, a social security treaty or the EU social security rules can provide that a seconded employee remains in the social security system of the home state and is not subject to the Czech system.

Business Vehicles

Tax Residency

A business vehicle is tax resident in the Czech Republic if it has a registered office or place of management in the Czech Republic. Subject to an applicable double taxation treaty, a tax resident business vehicle is subject to Czech taxation on its worldwide income.

Income Taxation

Corporations (a limited liability company - s.r.o. and a joint stock company - a.s.) are taxed at the regular corporate income tax rate of 19%.

A General Partnership (v.o.s.) is tax transparent and the profits are allocated to the partners and taxed at their level. The taxation of each partner depends on its tax status. If the partner is an individual, the profits are subject to the personal income tax rate of currently 15%. If the partner is a corporation, the profits are subject to the corporate income tax rate of 19%.

A Limited Partnership (k.s.) is tax transparent for the general partners – the above described tax treatment for General Partnerships also applies to their profit share. The Limited Partnership is treated as a corporation with respect to profits allocated to the limited partners and are taxed at the level of the limited partners at the regular corporate income tax rate of 19%.
**Tax losses** can be carried forward for a maximum of five years. The use of losses is limited if a substantial change in the direct shareholding of the company occurs, unless the company passes the “income structure test”, i.e. at least 80% of the income has been generated by the same activities as the activities performed in the year the loss accrued.

**Non-tax resident business vehicles** are subject to limited tax liability on their Czech source income. Income received through a Czech permanent establishment is regarded as Czech source income and, therefore, is subject to income tax at the general rate. Other types of Czech source income include real estate income, income from the sale of securities and shares, the collection of receivables purchased from third parties and fees for certain services. If income from a permanent establishment, real estate and sales of securities is paid to non-EU/EEA residents, a tax security advance must be withheld from the income at the rate of 10% (1% for sales of securities or collection of receivables).

**Dividends**

Dividends distributed by a Czech company to its shareholders are generally subject to a 15% withholding tax unless a double tax treaty provides for a lower rate. An increased withholding tax rate of 35% on passive income (including dividends) vis-à-vis tax havens applies as of 2016. No withholding applies to profit distributions to a general partner. Dividends received by Czech residents from a foreign company are included in a separate tax base and taxed at 15% (with credit for foreign tax).

The participation exemption regime allows for dividends received from subsidiaries resident in an EU/EEA member state or a qualifying tax treaty state to be exempted if certain requirements (legal form stated in the Annex to the EU-Parent-Subsidiary Directive, minimum participation of 10%, minimum holding period of 12 months, minimum taxation of 12% for non-EU/EEA subsidiaries) are fulfilled. Dividends distributed to a parent company resident in an EU/EEA member state can also be tax exempt under similar conditions.

**Interest**

Subject to the arm’s length test and thin capitalisation rules, interest paid to a foreign corporate shareholder is tax deductible.

Interest paid to non-tax residents is generally subject to a 15% withholding tax. An increased withholding tax rate of 35% on passive income (including interest) vis-à-vis tax havens applies as of 2016. The withholding tax can be reduced or eliminated under the rules resulting from the EU Interest-Royalties Directive or under an applicable double-tax treaty. Residents of other EU/EEA countries can file a tax return and claim a deduction for any related expenses. The withholding tax is considered an advance payment. This may result in a reduction of the tax burden as withholding tax is levied on a gross basis.

**Royalties**

Royalties paid to non-tax residents are generally subject to a 15% withholding tax. An increased withholding tax rate of 35% on passive income (including royalties) vis-à-vis tax havens applies as of 2016. The withholding tax can be reduced or eliminated under the rules resulting from the EU Interest-Royalties Directive or under an applicable double-tax treaty. Residents of other EU/EEA countries can file a tax return under the same rules as described above.

**Thin Capitalisation Rules**

According to the thin capitalisation rules, interest and other financial costs resulting from that part of related party loans which exceeds four times the equity (or six times the equity if the borrower is a bank or insurance company) are not deductible for tax purposes. Related party loans also include debt which is a part of a “back-to-back” financing arrangement with a related entity (as the “back-to-back” financing is considered financing where a related entity provides a creditor with a directly related credit, loan and/or deposit). Interest costs on profit-participating loans are not deductible even if provided by an unrelated lender.

The non-deductible interest may attract a 15% (or 35% if paid to a tax haven) withholding tax, unless the lender is resident in a EU/EEA country.

**Controlled Foreign Company Rules**

There is no controlled foreign company legislation.
Transfer Pricing rules

If the price agreed between related parties differs from the price that would have been agreed between independent parties under the same or similar terms and conditions (arm’s-length price), without such difference being properly documented, the tax authorities are authorised to adjust the tax base by the relevant difference. Income Tax Law neither specifically regulates transfer pricing methods, nor stipulates how the taxpayer may document possible departures. However, as a Member of OECD, the Czech Republic has undertaken to follow the OECD Transfer Pricing Guidelines. Advance pricing agreements (binding rulings) are also possible.

Transfer pricing rules apply, not only to cross-border transactions, but to transactions entered into by two Czech taxpayers. Related parties are defined as “persons connected through capital” (direct or indirect connection through at least a 25% share in capital or voting rights) and “otherwise connected persons” (connection through, for example: management, control, or a business relationship created for the purpose of decreasing the tax).

The excessive part of the price is reclassified as a dividend and, if paid to a non-EU/EEA resident, is subject to a 15% (or 35% if paid to a tax haven) withholding tax. The tax rate can be reduced under an applicable double-tax treaty.

Other Taxes

Supplies of goods and services

Supplies of goods and services in the Czech Republic by a business are generally subject to value-added tax (VAT). The standard rate is 21%. Some supplies are taxed at the reduced rate of 10 or 15% and some supplies are tax exempt (e.g. financial services). The taxation of imports and exports depends on whether the goods are supplied within the EU, or outside. The “reverse charge” regime applies not only to intra-EU supplies of goods and services but also to certain supplies within the Czech Republic, such as delivery of building and assembly work. For these supplies, the duty to report and pay VAT lies with the recipient.

Real estate acquisition tax

In 2014 the real estate transfer tax was replaced by a real estate acquisition tax. The tax rate is 4% and is generally levied on either the purchase price or 75% of the fair market value of the real estate (whichever is higher). Gain from the sale or exchange of real estate is subject to tax payable by the transferor and the transferee serves as the guarantor of the tax payer, unless agreed otherwise between contracting parties. For more details, see the “Real Estate” section.

Real estate tax

Real estate tax is payable by every owner of land or buildings located in the Czech Republic. Real estate taxes are calculated according to size of the property rather than based on its market value. Consequently, real estate taxes in the Czech Republic are not as significant as they may be in other countries.

A real estate tax return must be filed by 31 January of the relevant calendar year (with certain exemptions) if changes to the real estate (including a change in ownership) occurred since the previous year.

Gift and inheritance taxes

Gift and inheritance taxes were abolished in January 2014. Gifts (or unearned income) are subject to a flat income tax rate of 15% for individuals, with a variety of exemptions available, e.g. gifts to family members, and of 19 % applicable to legal entities. Unearned income from inheritance is exempt from income tax for both individuals and legal entities.

Gifts (or other unearned income) received in connection with employment and self-employment activities do not qualify for tax exemption.

Road tax

Road tax is levied on cars used for business purposes in the Czech Republic.

Road tax is calculated on an annual basis and depends on the engine capacity and number of axles of the vehicle. Quarterly road tax advances must be paid by 15 April, 15 July, 15 October and 15 December. Any outstanding tax liability must be paid by 31 January of the following year, along with filing of the road tax return by the same deadline.
Excise duties

Excise duties are payable on hydrocarbon fuels and lubricants, wine, spirits, beer, and tobacco products. Excise duties are fixed at a set amount per unit for each group of product.

Energy taxes

Energy taxes include tax on natural gas and other gases, electricity and solid fuels.

Double-tax Treaties

The Czech Republic has double-tax treaties with 85 countries including the US, Hong Kong and all EU countries.


Dispute resolution

Judicial system

Civil and commercial disputes are decided in district courts, regional courts, superior courts and the Supreme Court. The Constitutional Court stands outside this system of general courts and serves as the ultimate guarantor of the constitution. The Constitutional Court has the power to repeal laws or judicial decisions infringing constitutionally guaranteed rights. Czech civil proceedings have two instances and the possibility of an extraordinary appeal.

The main law on civil litigation is the Civil Procedure Code which contains detailed provisions regarding all aspects of a civil process. In civil litigation, the parties typically file briefs containing (amongst others) facts, legal arguments, evidence and witness statements, prior to an oral hearing. As a general rule, new evidence may not be submitted after the first hearing, except for certain specific situations in which it may be filed later - such situations are listed in the law. The Czech Civil Procedure Code does not provide for pre-trial disclosure.

As with any type of evidence (e.g. documents, items, expert opinions, reports) that has to be inspected, its evaluation is at the court's sole discretion. The parties must submit the documents referred to in their written statements. If a party is not in possession of a document referred to in its submission, the court may order the other party, or a third party, to produce the specific document.

When filing a claim, the claimant has to pay court fees calculated on the amount in dispute. If the claim is successful, the defendant is ordered to reimburse the claimant for court fees and other costs. However, legal fees reimbursement is capped, which means that reimbursement is unlikely to cover all legal fees in more complex cases. Trials tend to be rather lengthy in the Czech Republic for a number of reasons, including overloading of the judicial system with minor cases.

In 1994, Act No. 216/1994 Coll., on Arbitration Proceedings and Enforcement of Arbitral Awards was adopted. This opened the door to alternative dispute resolution with the same force as judicial decisions. The use of arbitration in the Czech Republic has grown significantly since then, especially in commercial disputes. The principal Czech arbitration institution is the Arbitration Court at the Economic Chamber of the Czech Republic and the Agrarian Chamber of the Czech Republic. Ad-hoc arbitrations are also allowed under Czech law. Mediation and other ADR tools do not yet play a major role under Czech law.

Competition

As the Czech Republic is a Member State of the European Union, domestic competition law rules apply only to the cases where there is no European Union dimension, i.e. where the EU law does not assume jurisdiction.

However, the Office for the protection of competition regularly cites the EU case law as the authority, even in purely domestic cases.

That said, basic concepts of competition law are interpreted similarly or even identically in the Czech Republic as under the EU competition law.
Antitrust

Antitrust issues are governed by Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts (Act on the Protection of Competition), as amended (Competition Act). Czech antitrust regulation is largely similar to that existing in EU law.

However, there are some differences. For example, in the Czech Republic there are lower market share thresholds in relation to de minimis vertical agreements exempted from the general prohibition of anti-competitive agreements than under EU law. Further, there are no domestic sector-specific block exemptions applicable in the Czech Republic.

Abuse of a Dominant Position

The regulation of behaviour of dominant undertakings is in line EU law.

The Czech Competition Act uses the same definition of dominance, based on the concept of market power, as has been established in EU law in the United Brands case.

In exception to EU law, the Czech Competition Act sets a rebuttable presumption that there is no dominance, if the undertaking has less 40% market share.

Merger Control

A merger/acquisition is subject to notification in the Czech Republic under the following conditions:

► the combined turnovers (for the last accounting period) in the Czech Republic of all the participating undertakings amounted at least to CZK 1.5 billion (approx. €55 million), and at least two of the participating undertakings achieved the turnovers in the Czech Republic of at least CZK 250 million (approx. €9 million) at the same time or

► the turnover of at least one of the participating undertakings (in the case of the acquisition of control, the turnover of the controlled undertaking is decisive) in the Czech Republic is at least CZK 1.5 billion, and worldwide turnover of another participating undertaking is also at least CZK 1.5 billion and

► the merger/acquisition has not been subject to notification under the EC Merger Regulation

As to the timing, the Czech competition authority has a time limit of 30 days for the first phase (Phase 1) assessment of the merger. Within this period, the authority can give a clearance to the merger, provided the merger is not subject to notification obligation, or it does not give rise to competition law concerns.

If there are some competition concerns, the authority would move to the second phase (Phase 2) assessment, where the contemplated merger would be scrutinised more thoroughly.

In any case, however, the final decision on the merger clearance must be taken not later than five months after the notification has been filed. If the competition authority does not issue a final decision after these five months, the merger is deemed to have been approved.

The Czech Competition Act also recognises a simplified notification procedure. This procedure applies to concentrations where the merging undertakings do not have more than 15% of combined market share on horizontal level, or more than 25% on vertical level. Further, the simplified procedure applies to a situation where the joint control over a company changes to the sole control.

Under the simplified procedure, the competition authority makes a one phase assessment of the concentration. The time limit for the decision on the concentration is shortened to 20 days.

For more information see: http://www.uohs.cz/en/homepage.html

Private Enforcement of Competition Law

In principle, enforcement of competition law by private parties is allowed in the Czech Republic. However, there is limited experience regarding this and there are no reported cases in the higher courts available.
Theoretically, private enforcement could be possible, regardless of whether the Czech competition authority has already ruled on the alleged breach of competition law. However, if it has already ruled on the alleged breach, civil courts would need to take such decision in the account in their own decision-making process.

**Intellectual property**

The law of intellectual property is divided into two main areas - copyright law and the law of industrial property. Industrial property can be protected by patents, utility models, trade marks, designs, industrial designs and protections of the topography of semiconductor products. Each of these parts of intellectual property law are regulated within the Czech Republic and protected by particular laws.

**Copyright**

Copyright and related rights (i.e. rights of performing artists, producers of audio and audio-visual recordings, broadcasters and also the special right of makers of databases) are regulated by Act No. 121/2000 Coll., on Copyright, Rights related to Copyright and on the amendment of other laws (Copyright Act), as amended.

The Copyright Act regulates the protection and use of copyright (and related rights such as ownership of an artistic performance, the right of the producer of an audiovisual recording to his recording and broadcasting and publication etc.). The subject of the copyright must be a literary or other work of art or scientific work, which is the unique outcome of the creative activity of the author and is expressed in any objectively perceivable manner. A computer program can also be subject to Copyright protection if it is original in the sense of being the author’s own intellectual creation. The right holder is entitled to use, licence or prevent others from using the work. Copyright protection exists automatically, without any registration requirement and lasts for 70 years after the death of the creator. According to the Czech Copyright law, only a natural person can be the creator (author) of the work. A company, as the creator's employer, is only entitled to exercise economic rights to the creator’s work. A creator may defend his rights by claiming recognition of his authorship and the prohibition of the exploitation of his rights. Appropriate remedies for infringement include the requirement to issue an apology or damages.

**Patents and utility models**

Technological inventions can be protected by patents, provided that they are new, inventive and have an industrial application. In the Czech Republic, patents can be granted under the Patent Act or under the European Patent Convention. If the invention was created by an employee in the scope of their employment, patent rights accrue to the employer (in the absence of agreement otherwise). The patent holder is entitled to use, license or prevent others from using the patent. The term of protection is 20 years from the date of the application (subject to payment of yearly renewal fees). To gain patent protection, a patent application has to be filed either with the Czech Industrial Property Office (CIPO) or with the European Patent Office. The relevant patent office then examines the patentability of the claimed invention. The Patent right can be enforced by the holder or (with the approval of holder) by a licensee. Depending on the circumstances, available remedies include injunctive relief (permanent or preliminary), damages, destruction of infringing items and criminal prosecution.

Utility models are known as “small patents”. The application procedure is much faster than with patents (just three to four months) and the fees are lower. The term of protection is four years from the filling date of the application, but this may be extended twice, each for three years (with a maximum aggregate term of ten years). Utility model applications are made to the CIPO.

**Trade marks**

Trade marks are not the outcome of a creative activity but are nevertheless protected by specific legislation.

Trademarks are governed particularly by the following legislation, which is fully harmonised with European Union law:

(a) Act No. 441/2003 Coll., on Trademarks, as amended

(b) Decree No. 97/2004 Coll., concerning the implementation of the Trademark Act

Trade mark protection covers registered signs consisting of any words, letters, numerals, drawings or the shape of goods or their packaging, or a combination of them. To be registered as a trade mark, a mark must be sufficiently distinctive and not merely descriptive of the respective product or service. A trade mark is protected for ten years from the date of the application, with unlimited extensions of ten years each. In essence, there are four types of trade marks: national trade marks registered
with the CIPO, international trade marks registered with the International Intellectual Property Office, EU trade marks registered with the European Union Intellectual Property Office (EUIPO), and unregistered marks which have obtained a secondary meaning due to their commercial use. The right holder is entitled to use, license or prevent others from using the trade mark. In order to gain protection, an application, together with the prescribed fee, must be filed. Trade-mark enforcement works in a similar way to patent enforcement.

Industrial Designs
The Czech Act on Industrial Designs defines an industrial design as the appearance of a product or its parts, incumbent signs of line, contour, colours, form, structure or material of the product or its ornamentation. Further conditions for registration by the CIPO are novelty and individual character (originality). The term of protection is five years and this may be extended for up to 25 years from the date of the application. The holder is entitled to use, license or prevent others from using the registered design. A design registration must be filed either with the CIPO or with the EUIPO. Moreover, unregistered designs are protected under the Community Design Regulation, provided that they are new and have an individual character. Protection starts upon the first use of the design and the term of protection is three years from the date the design is made public. The right holder is entitled to use, license or prevent others from copying the registered designs. Design enforcement is similar to patent enforcement.

Marketing agreements
Agency Arrangements
Agency arrangements are governed by the new Civil Code, which implements Directive 86/653/EEC on self-employed commercial agents. It contains a number of mandatory provisions to protect commercial agents. An agency contract must be in writing. A commercial agent (or commercial representative) is not permitted to complete commercial transactions, receive consideration or undertake other acts in the name of the principal. Commercial agents are liable for the discharge obligations by a third party with which they proposed that the principal enter into a commercial transaction, or if they have concluded a commercial transaction in the name of the principal, only if they have undertaken to bear such liability in writing and if they receive extra remuneration for assuming such liability. The new Civil Code allows for exclusive or non-exclusive commercial agency. A commercial agent is entitled to reimbursement of expenses related to his activity, if it is agreed and (unless the contract implies otherwise) only when he is entitled to be paid a commission on the commercial transaction to which such expenses related. If a commercial agency agreement is concluded for an indefinite period of time, it may be terminated by either party giving notice of termination. The law sets out the length of the minimum termination period on a mandatory basis where such period depends on the length of duration of the commercial agency agreement. The notice period must be the same for both parties. If the agent's agreement is terminated, he is entitled to compensation for damage if he has obtained new clients for the principal, and if the payment of such compensation is fair. It is usual to include such provisions, which prohibit the agent from performing those activities that constituted the subject matter of agency, for a certain period of time following the termination of the agency agreement.

Distribution Agreements
Czech law does not specifically regulate distribution agreements. Distribution agreements are assessed within the scope of competition law. If the distributor is not integrated into the supplier's organisation, as is the norm in the Czech Republic regarding the distribution of pharmaceutical products, a distribution agreement will be subject to the act on the Protection of Competition (APC) and its provisions on cartels and abuse of a dominant position.

Franchising
Franchise agreements, as such, are not specifically regulated under Czech law. They constitute an "unspecified type of contract" according to the new Civil Code. Unspecified types can contain elements of different types of contract, especially of a licence agreement, an agreement on the transfer of know-how, a rental or leasing contract, a commercial agency agreement, a contract of sale (where goods are supplied), or a contract on the provision of services.

Franchise agreements are also subject to the APC and its provisions are applicable to cartels and abuse of a dominant position and EU competition law.

E-commerce
In many aspects, the law applicable to e-commerce is the same as the law governing other types of trade, however, there are certain legal features of e-commerce such as special requirements for marketing and entering into distance contracts, and
liability for services and information supplied. Pursuant to the act on the Information Society (Zákon o některých službách informační společnosti), which is harmonised with EU law and the new Civil Code, the basic rules of fair trading relating to online marketing activities must be adhered to in order to prevent unfair competition.

The act on the Information Society sets out basic rules and demands for electronic business contact for the purpose of sending commercial announcements between businesses and consumers. In principle, businesses have to obtain consent from recipients (i.e. consumers) to conduct marketing activities, and comply with extensive duties to conduct any distance commercial announcements. These duties include clear marking of the message as “Commercial Announcement” and full description of the sender and valid contact business address of the sender for the purpose of de-listing from any future commercial announcements. The business is responsible for the accuracy and comprehensiveness of any data provided.

If the agreement is concluded using the means of remote (long-distance) communication, which enables the parties to enter into an agreement without requiring their physical presence, the new Civil Code extends the list of obligations imposed on goods and service providers in other types of trade, such as the restriction of freedom of contract if it leads to any aggravation of the customer’s situation in this legal relationship. Furthermore, it gives extensive rights to consumers, for example, consumers may rescind a distance contract, without giving a reason, within 14 days of the supply of the services or goods, and even longer (within three months) if the business provided them with incomplete or incorrect data on the goods or services.

In 2009, virtual electronic storage units known as “data boxes”, each with unique identification, were introduced to facilitate easy contact between entrepreneurs and State authorities. All State authorities and companies entered in the Commercial Register (as well as certain other entities listed by the law) are required to establish data boxes (this obligation applied to attorneys and tax advisors from 1 July 2012). Communication between these entities, including service of documents, now takes place in electronic form. From 1 January 2010, data boxes have also been used for mutual delivery of documents between natural persons, i.e. data boxes are no longer used to communicate with State authorities only.

The Electronic Signature Act (Zákon o elektronickém podpisu) regulates all technical and legal aspects of electronic signatures (for example, the conditions that need to be fulfilled by the e-signing person or consequences on the validity of a document, entailed by the e-signature), as well as relevant certification services and procedures (for example, the conditions that must be discharged by the holder of the certificate). This act is to be replaced by an EU regulation (eIDAS) from July 2016 which should enable smooth cross-border recognition of e-signatures, as well as several new key enablers facilitating electronic communication and transactions.

Some other Czech Laws also address the issue of e-commerce

► The act of the Civil Procedure Code permits electronic filing (podání), electronic service (doručení) and electronic payment order.

► The act on Electronic Actions and Authorised Conversion of Documents (zákon o elektronických úkonech a autorizované konverzi dokumentů) deals with those mutual actions between State authorities and persons (natural or legal) which take place in electronic form.

Data protection

The fundamental concepts of personal data protection in the Czech Republic are set out in the Declaration of Fundamental Rights and Freedoms. This document governs (in basic terms) the right to privacy, right to personal data protection, and the “inviolability” of mail.

Furthermore, the Czech Republic signed the Data Protection Convention (Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 1981 Strasbourg) on 8 September 2000. The Convention became applicable in the Czech Republic as of 1 November 2001.

The specific rules on personal data protection are set out in the Personal Data Protection Act (Act. No. 101/2000 Coll.; zákon o ochraně osobních údajů), the aim of which is to protect citizens’ right to privacy of personal data when it is processed, deleted or transferred abroad. This act fulfils all requirements of EU regulation, especially Directive 95/46/EC on data protection. However, new EU legislation on personal data protection will apply from May 2018.
The act distinguishes between “common” personal data and sensitive data. Sensitive data, such as nationality, race or religion, may only be processed with a person’s express consent. The rules for obtaining and processing other personal data are less strict.

The supervising authority for personal data protection is the Personal Data Protection Office (Office) (Úřad pro ochranu osobních údajů). Every person or legal entity that wishes to systematically collect and process another person’s data must notify the Office of such an intention, unless the processing duty is imposed by another law. According to a report by the Office, most infringements have been committed in relation to video surveillance camera operations, collection of personal data to an unreasonable extent or unsolicited communications from businesses.

**Product liability**

Product liability can result from law or contract. The most important laws governing product liability are the new Civil Code, the Consumer Protection Act, adopted in 1992, and the act on General Product Safety, adopted in 2001.

The Product Liability Act was abolished in 2013 and replaced by the new Civil Code, which implemented the European Product Liability Directive (Directive 85/374/EEC). This covers bodily injury and property damage to an item exceeding €500 (approximately CZK 13,500) caused as a result of a faulty product. The person who imported the product for the purpose of introducing the product onto the market within the scope of her/his business, shall pay the damage jointly and severally. Liability also arises from a breach of the act on General Product Safety which regulates, amongst other things, the protection of consumers from dangerous products. Under this act, the Czech Trade Inspectorate, as the administrative body supervising the application of the law, may order the manufacturer, importer or distributor to stop bringing unsafe products onto the market, issue warnings, and order the recall of the unsafe product.

**Bribery and corporate crime**

**Anti-bribery Provisions**

Corruption is perceived as one of the most significant threats to the Czech economy. At the beginning of 2010 a new Penal Code came into force, which provided for more effective criminal prosecution of bribery offences. In both the public and private sectors, it is a punishable offence to offer, promise or provide a bribe, or to ask for, accept or accept the promise of a bribe. The position or nationality of a public official or corporation are irrelevant. A bribe is defined as any unjust advantage consisting of any direct property-related enrichment, or any other advantageous treatment.

Bribery in economic competition constitutes a criminal offence under the Penal Code, or unfair competition conduct under the new Civil Code. Accordingly, a competitor may not offer any benefit to a manager or employee of any third party with the aim of receiving advantageous treatment to the detriment of other competitors.

**Laws against Money Laundering**

The Czech Republic has implemented all requirements of the EU Money Laundering Directives in the Act on Measures against the Legalisation of Proceeds from Criminal Activities and Financing Terrorism (Zákon proti praní špinavých peněz). All businesses have to report suspicious transactions. Furthermore, businesses in the financial sector and related industries, including, but not limited to, lawyers, tax advisors and accountants, have to identify their customers and maintain a monitoring system.

It is a criminal offence to conceal or disable the establishing of the origin of goods or any other property-related assets obtained or originating from criminal activities, regardless of whether the offence was committed in the Czech Republic or abroad.

**Corporate Crime – new regulation**

On 1 January 2012, a new Corporate Criminal Liability Act came into force. This act sets out, among other things, the manner of punishment for corporate bodies committing certain offences and protective measures against such offences.
Real Estate
Ownership Restrictions on Foreign Companies

The acquisition of all types of land in the Czech Republic by foreign natural persons or legal entities is no longer limited. The Foreign Exchange Act (Devizový zákon) formerly imposed numerous limitations on acquisitions of real estate in the Czech Republic. On 1 May 2011 the last restrictive rules ceased to apply to land acquisition.

Superficies solo cedit

The full ownership of real estate is recognised under Czech law. Further, ownership rights of real estate benefit from constitutional protection. The expropriation of real property is only permitted in exceptional circumstances and is subject to strict rules set forth by law.

The adoption of the new Civil Code has also affected the status of real estate in the Czech Republic. The main change is a return to the principle that applies in the rest of Europe (except for Slovakia) and which formerly applied in the Czech Republic – “superficies solo cedit” (i.e. buildings are part of land parcels).

As from 1 January 2014, buildings constructed on land parcels owned by the same owner merged with their land parcels. This means that the respective buildings cease to be separate things and become part of land parcels. However, this rule does not apply to buildings that have a different owner to the owner of land parcels on which the building has been constructed – i.e. these buildings remain separate real estate and do not merge with the land parcels underneath them. Czech law distinguishes between rights in rem (i.e. which bind the world) and contractual rights (which only bind the parties to the contract) to real estate. Only rights in rem, in particular ownership, are entered in the Cadastral Register (Katastr nemovitostí). It is not possible to have Anglo-American forms of ownership, such as leasehold or trusts, entered in the Cadastral Register. Instead a trustee is registered in the public register as the owner of the property in a trust with the note trustee (svěřenský správce).

Form and Registration Requirements upon Owning Land

Any agreement relating to the transfer of real estate (e.g. sale and purchase agreement) must be concluded in writing.

The ownership title to real estate, which is subject to registration in the Cadastral Register, is acquired (if transferred by an agreement) upon the real estate registration in the Cadastral Register.

The registration is retroactive, i.e. the transfer is effective as of the moment of submitting an application for registration to the Cadastral Office (the moment means that the buyer will become the real estate owner until the date, hour and minute when the registration is delivered to the Cadastral Office).

The ownership title to real estate which is not subject to registration in the Cadastral Register (if it is transferred by agreement) is acquired on the effective date of the relevant agreement. A real-estate transfer agreement must contain notarised signatures. If a foreign legal entity is involved as the purchaser, its existence and the authorisation of its representatives must be proven in the Czech Republic by producing a certified extract from the applicable register of companies. In principle, foreign public documents are accepted as evidence but must, as a rule, be translated into Czech and be verified by using a special procedure (verification or Apostille).

In addition to transfers under an agreement, ownership title to real estate may also be acquired:

1. based on a decision of a state authority
2. by operation of law
3. by construction (in the case of buildings) and
4. through a public auction, etc.

A decision of the Cadastral Office on the ownership title registration is needed. Under the new legislation, a decision of the Cadastral Office may have both declaratory and constitutive effect, depending on the nature of documents based on which the registration of the ownership title is to be made.
Therefore, once the relevant transfer agreement is executed, the relevant court decision is issued or another situation occurs, the relevant document has to be submitted to the Cadastral Office for registration. Subsequently, the Cadastral Office shall inform the owner of the real estate and the other entitled persons about the submission of an application for the ownership title registration. The registration cannot be approved earlier than after the lapse of 20 days following the delivery of the relevant information in accordance with the previous sentence. This rule has been adopted with the aim to protect the owners registered in the Cadastral Register from any unlawful disposition with their property. However, it will depend on the practice of the Cadastral Office to whom the information is to be delivered, as the law is unclear in this respect.

The new Civil Code has introduced a rule of material publicity. According to that rule, if the ownership title to real estate is registered in any public register (i.e. Cadastral Register), it is considered registered in accordance with the real legal status (refutable presumption).

As a consequence of the above rule it applies (with effect from 1 January 2015) that, if the status registered in a public register is not in accordance with the real (actual) legal position, the written status is deemed to be in favour of a person who has acquired the right for consideration, in good faith, from a person authorised to do so by virtue of the registered status.

Although this new principle represents a major change, it is to be taken into account that certain specific conditions must be met for its implementation. The detailed description of such conditions is beyond the scope of this document but, to provide an idea of this, we can at least mention an example where the need for due diligence is maintained. The need for due diligence is excluded only if there are no objective reasons, raising doubts over the compliance of the actual and registered status. In this regard, it is crucial to conduct a personal physical inspection of the real estate (which may detect some legal defects) before its purchase is effected.

Therefore, after 1 January 2015, potential buyers of any real estate should coordinate and discuss the purchase of that real estate with a legal advisor in order to select the most appropriate method of protecting their rights.

**Tax Payments on acquiring an interest in land**

From 2014, real estate transfer tax has been levied from the purchaser at the rate of 4%. The sum on which the tax is levied is the agreed price, unless it is lower than 75% of the administrative value of the property (as determined according to Czech valuation law by an official appraiser or by the tax authorities based on comparable key features in the case of certain commonly transferred properties including flats or family houses).

In case of purchase or exchange contracts, the seller of real estate is liable to pay the real estate transfer tax and the purchaser is the guarantor by law. However, the parties may agree that the purchaser will be directly liable for the payment of the real estate transfer tax, which might considerably simplify the transfer process.

In other cases (such as a court decision, auction), the purchaser is liable to pay the real estate transfer tax. As from 2014, the transfer of buildings is VAT exempt after five years of the granting of the first use permit, with the option to apply VAT at the seller’s discretion. The same rules regarding VAT exemption and the option to apply VAT also apply to the underlying land. A transfer of land which qualifies as a building plot and on which no building is erected is always subject to VAT (generally at the rate of 21%). A transfer of other land on which no building is erected remains VAT exempt.

**Existing law is stated as it applied in May 2016.**
### Useful contacts

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<thead>
<tr>
<th><strong>CZECHINVEST</strong></th>
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<tbody>
<tr>
<td><strong>Address:</strong> Štěpánská 15, 120 00 Prague, Czech Republic</td>
<td></td>
</tr>
<tr>
<td>+420 296 342 500</td>
<td></td>
</tr>
<tr>
<td>Fax: +420 296 342 502</td>
<td></td>
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<tr>
<td><a href="mailto:info@czechinvest.org">info@czechinvest.org</a></td>
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<tr>
<th><strong>DTIHK (GERMAN-CZECH CHAMBER OF COMMERCE)</strong></th>
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<tbody>
<tr>
<td><strong>Address:</strong> Václavské náměstí 40, 110 00 Prague, Czech Republic</td>
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<tr>
<td>+420 224 221 200</td>
<td></td>
</tr>
<tr>
<td>Fax: +420 224 222 200</td>
<td></td>
</tr>
<tr>
<td><a href="mailto:info@dtihk.cz">info@dtihk.cz</a></td>
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<thead>
<tr>
<th><strong>AMCHAM</strong></th>
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<tbody>
<tr>
<td><strong>Address:</strong> Dušní 10, 110 00 Prague 1, Czech Republic</td>
<td></td>
</tr>
<tr>
<td>+420 222 329 430</td>
<td></td>
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<tr>
<td>Fax: +420 222 329 433</td>
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<tr>
<td><a href="mailto:amcham@amcham.cz">amcham@amcham.cz</a></td>
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<tr>
<th><strong>ASSOCIATION FOR FOREIGN INVESTMENT – AFI</strong></th>
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<tbody>
<tr>
<td><strong>Address:</strong> Štěpánská 11, 120 00 Prague, Czech Republic</td>
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<tr>
<td>+420 224 911 750 1</td>
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</table>
CZECHTRADE

Address: Dittrichova 21, 128 01 Prague, Czech Republic

+420 224 907 820

Fax: +420 224 913 440

info@czechtrade.cz

Further information

Noerr s.r.o.
Na Poříčí 1079/3a
11000 Prague 1
Czech Republic

+420 233 112111

Fax +420 233 112112
## Contact Partners

### MANAGING PARTNER

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone Number</th>
<th>Email</th>
</tr>
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<tbody>
<tr>
<td>Prof. Dr. Jörg K. Menzer</td>
<td>+ 40 21 3125888</td>
<td><a href="mailto:joerg.menzer@noerr.com">joerg.menzer@noerr.com</a></td>
</tr>
<tr>
<td>Partner</td>
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<tr>
<td>Head CEE Offices</td>
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<th>Name</th>
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<tr>
<td>Barbara Kusak</td>
<td>+420 233 112142</td>
<td><a href="mailto:barbara.kusak@noerr.com">barbara.kusak@noerr.com</a></td>
</tr>
<tr>
<td>Partner</td>
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<td>Head of Prague Office</td>
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### COMMERCIAL & REAL ESTATE

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<th>Name</th>
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<tbody>
<tr>
<td>JUDr. Václav Berger</td>
<td>+420 233 112111</td>
<td><a href="mailto:vaclav.berger@noerr.com">vaclav.berger@noerr.com</a></td>
</tr>
<tr>
<td>Advokát (CZ)</td>
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<tr>
<td>Mgr. Eva Krajová, LL.M.</td>
<td>+420 233 112111</td>
<td><a href="mailto:eva.krajova@noerr.com">eva.krajova@noerr.com</a></td>
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<tr>
<td>JUDr. Halka Pavlíková</td>
<td>+420 233 112111</td>
<td><a href="mailto:halka.pavlikova@noerr.com">halka.pavlikova@noerr.com</a></td>
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<tr>
<td>JUDr. Petr Hrnčíř</td>
<td>+420 233 112111</td>
<td><a href="mailto:petr.hrncir@noerr.com">petr.hrncir@noerr.com</a></td>
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### EMPLOYMENT & PENSIONS

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<tr>
<td>JUDr. Alena Čechtická</td>
<td>+420 233 112111</td>
<td><a href="mailto:alena.cechticka@noerr.com">alena.cechticka@noerr.com</a></td>
</tr>
<tr>
<td>Advokátka (CZ)</td>
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## LITIGATION

<table>
<thead>
<tr>
<th>Name</th>
<th>Contact Information</th>
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<tr>
<td>Philip Smitka</td>
<td>+420 233 112111 <a href="mailto:philip.smitka@noerr.com">philip.smitka@noerr.com</a></td>
</tr>
<tr>
<td>Associated Partner</td>
<td></td>
</tr>
<tr>
<td>Rechtsanwalt (Germany), Advokát (CZ)</td>
<td></td>
</tr>
<tr>
<td>JUDr. Miloš Temel, LL.M.</td>
<td>+420 233 112111 <a href="mailto:milos.temel@noerr.com">milos.temel@noerr.com</a></td>
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## MEDIA, IP & IT

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<td>Philip Smitka</td>
<td>+420 233 112111 <a href="mailto:philip.smitka@noerr.com">philip.smitka@noerr.com</a></td>
</tr>
<tr>
<td>Associated Partner</td>
<td></td>
</tr>
<tr>
<td>Rechtsanwalt (Germany), Advokát (CZ)</td>
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## REGULATORY & GOVERNMENTAL AFFAIRS

<table>
<thead>
<tr>
<th>Name</th>
<th>Contact Information</th>
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<tbody>
<tr>
<td>JUDr. Miloš Temel, LL.M.</td>
<td>+420 233 112111 <a href="mailto:milos.temel@noerr.com">milos.temel@noerr.com</a></td>
</tr>
<tr>
<td>Advokát (CZ)</td>
<td></td>
</tr>
<tr>
<td>JUDr. Petr Hrnčíř</td>
<td>+420 233 112111 <a href="mailto:petr.hrncir@noerr.com">petr.hrncir@noerr.com</a></td>
</tr>
<tr>
<td>Advokát (CZ)</td>
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## TAX, ADVISORY & PRIVATE CLIENTS

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<th>Name</th>
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<tr>
<td>Ing. Dita Šulcová, LL.M.</td>
<td>+420 233 112111 <a href="mailto:dita.sulcova@noerr.com">dita.sulcova@noerr.com</a></td>
</tr>
<tr>
<td>Associated Partner</td>
<td></td>
</tr>
<tr>
<td>Advokátka (CZ)</td>
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DOING BUSINESS IN DENMARK
Introduction and legal system

The Danish legal system is a civil law system very similar to the legal systems in other continental European countries. Danish courts render their rulings with emphasis on written statutory law and derivative legislation. However, case law plays a significant role when setting out general principles of law, especially when applied to unregulated areas or when interpretation of statutory law is required.

As in many other civil law countries, Danish courts are not limited to a strict interpretation of the letter of the law but are inclined to look to the purpose of the statute. However, this does not apply to criminal law and to tax law.

Interpretation is also widely applied to private agreements, where the courts will try to establish the parties’ common intention rather than simply applying the strict wording of the agreement. In practical terms, this means that agreements and other documents are drawn up in reliance on statute as well as general contractual principles. In many cases, the lengthy and exhaustive agreements used in Anglo-Saxon jurisdictions will not be necessary or even appropriate under Danish law.

A large part of the Danish legislation is based on EU legislation. Denmark has an excellent record of timely and accurate implementation of EU Directives. In many sectors, foreign investors who are familiar with EU legislation in a particular area will find few surprises in Danish legislation. As an example, all relevant banking and insurance directives have been implemented, and Denmark has implemented a high number of the single market directives. Generally, therefore, industrial standards and a large part of corporate and commercial regulation correspond to those found elsewhere in Europe. However, when implementing the so-called “minimum directives”, the Danish Parliament occasionally sets higher standards than required according to the EU Directives, for example on environmental matters.

Denmark joined the then EEC on 1 January 1973 and currently exports some two thirds of its total exports to EU Member States.

While Denmark meets the criteria for joining the EU’s common currency, the Euro, it has, for the time being, opted out from participating. However, the Danish Krone (DKK) is linked closely to the Euro in order to ensure continuance of the fixed exchange-rate policy pursued by Danish governments since the early 1980s.

Lobbying of the Government is not as common or as organised as in some other countries, and professional lobbyists are few. Usually, professional and trade organisations will make their views known to the Government on behalf of their members, whereas lobbying by individual companies on specific matters is rare and not generally considered appropriate. Companies may express their views to the Government but would be well advised to consider carefully the form and level of approach.

The Liberal Party has been in power since 28 June 2015 and Lars Løkke Rasmussen is the current Prime Minister.

With very few natural resources, Denmark relies almost entirely on human resources. The service sector provides the vast amount of the employment and economic output which Danish industry depends on imported raw materials and foreign trade. The Danish economy has generally weathered the recession reasonably well although some industries, for example real property and farming, have seen a number of large insolvencies.

Denmark produces oil, natural gas, wind- and bio-energy. Principal exports are machinery, instruments and food products, chemical products, furniture and pharmaceuticals.

Foreign investment

Heavily dependent on foreign trade and international cooperation, Denmark pursues liberal trade and investment policies and encourages increased foreign investment. Foreign investment into Denmark has grown over the past decade with many large Danish businesses being owned by foreign private equity funds and industrial groups.

Many foreign investors have noted that Denmark benefits from a highly developed infrastructure, an advanced telecommunications system, and a highly educated, flexible and stable work force. On an international scale, Denmark maintains high standards of environmental protection and product safety and the Danish market has always shown a preference for high quality in production, finish and design. Often, Denmark serves as a test market for products which are later to be introduced on the international market.
A very high proportion of the workforce - and of the population in general - has English as their primary foreign language, and in most cases all relevant levels of the workforce will have a good command of both written and spoken English. This is also illustrated by the fact that trade marks and commercials/ advertisements in English are often used directly without translation.

Denmark's geographical location, with easy access to the other Scandinavian countries, Northern Germany, the Baltic States and other parts of Eastern Europe, means the country is well situated as a centre for activities in these areas. Many European firms have realised substantial benefits by locating their Northern European distribution centres in Denmark.

Denmark treats foreign investors on a non-discriminatory basis. Foreign firms may participate in government-financed and/or subsidised research and development programs. As a general rule, foreign direct investment in Denmark takes place without restrictions and screening. Ownership restrictions apply to a few sectors only, primarily in relation to defence/ national security interests.

Although generally considered a high-wage country, Denmark is in many areas highly ranked in terms of economic competitiveness. International surveys rate Denmark near the top with regard to transport (land, sea and air), energy, telecommunications and distribution systems. In terms of management, the surveys emphasise a consistently high quality of organisation, product quality, customer relations, credibility and social responsibility.

Denmark also offers political stability, low corporate taxation and flexible and easily manageable corporate formalities.

Types of business vehicle

Forms of business vehicle

The most commonly used forms of companies in Denmark are public limited companies and private limited companies.

Other possible corporate forms include the European company (SE), European Cooperative (SCE), limited partnerships, limited partnership companies, partnerships and, as at 1 January 2014, a particular form of entrepreneur company.

Foreign investors are most likely to deal with public and private limited companies.

Public and private limited companies

The incorporation of a public limited company ("aktieselskab" or "A/S") or a private limited company ("Anpartsselskab" or "ApS") is governed by the Companies Act. The current Companies Act conforms to EU legislation in this area implementing the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, Eleventh, Twelfth and Thirteenth Company Directives. Many foreign investors and their advisers will therefore be familiar with a number of the corporate requirements.

The Companies Act generally provides for more flexible regulation of private limited companies compared to that of public limited companies.

Private limited companies are used for all types of businesses; for smaller businesses particularly as a way to incorporate individually owned businesses, and by large international entities because they are treated differently from public limited companies for tax purposes in some foreign jurisdictions (the United States in particular). Private limited companies are not eligible for listing on a public market.

Even though the regulation of private limited companies in some ways differs from that of public limited companies in that private limited companies are subject to fewer restrictions and formal requirements than public limited companies, the most important features of both types (i.e. separate legal personality, a limitation of liability for shareholders and tax treatment) are generally the same.

Both public and private limited companies may be incorporated by any number of founders or promoters.

The Danish Business Authority registration procedures for the formation of a new company can take anything from a few days up to three or four weeks. However, the Danish Business Authority has introduced a web-based service called "Virk Indberet", which allows registered persons or entities to incorporate companies online, thereby reducing the registration time to just a few minutes. Until registration is complete, the persons acting on behalf of the company will be personally liable for all obligations undertaken by the company. Upon registration, all obligations will be assumed by the company.
In order to incorporate a limited liability company, an incorporation document has to be drawn up containing company information and information dealing with subscription for its shares. Articles of association have to be drawn up as well. The incorporation documentation must be filed with the Danish Business Authority within two weeks of its execution. As soon as possible after the formation of the company, the central management body must set up a register of all shareholders.

Public limited companies must have a minimum share capital of DKK 500,000 (or approximately EUR 67,000). Private limited companies benefit from a lower requirement for minimum paid-up share capital of DKK 50,000 (or approximately EUR 6,700).

Shares may be issued in Euros and the Danish Business Authority may, by executive order, allow the share capital to be stated in other currencies.

Shares may not be issued below par value but may be issued at a premium, and such premium is considered a distributable reserve.

Payment for shares can be made either in cash or by contribution in kind. In-kind contributions must have a value which can be expressed in monetary terms but cannot consist of an undertaking to perform work or render services. Debts owed by promoters or subscribers of shares cannot be contributed, irrespective of whether collateral security is provided for such claims.

**Governance**

Under the Companies Act, public and private limited companies may choose between the following alternative governance structures:

► the traditional Danish governance structure, where an executive board performs the day-to-day management of the company and a board of directors (of at least three members for public limited companies) exercises overall and strategic management functions as well as certain supervisory functions (the so-called one-and-a-half tier governance structure) or

► a two-tier (German-inspired) governance structure, where all management functions lie with an executive board, and a supervisory board (of at least three members for public limited companies) which performs only supervisory functions

A private limited company can also choose a one-tier (Anglo-Saxon-inspired) governance structure, where the company is managed only by an executive board. A public limited company may adopt a governance structure somewhat similar to a one-tier governance structure by allowing all members of the executive board to also be members of the board of directors; however, a majority of the members of the board of directors must be non-executive (meaning that they may not be members of the executive board).

In public limited companies, the chairman or vice-chairman of the board of directors or the supervisory board may not be involved in specific day-to-day management and the combined position of chairman and chief executive (as known in the UK) is therefore not possible.

There are no requirements regarding the nationality or residence of board members.

Foreign companies which have Danish subsidiaries often appoint foreign personnel to the supreme governing body of the Danish subsidiary. In some cases, day-to-day management is entrusted to foreign personnel posted in Denmark for short-term or long-term periods. All board members and executive officers must be registered with the Danish Business Authority and must understand the duties imposed on them by Danish legislation.

**Liability of management**

In general, the basis for management liability is the general rule of liability for negligence. Board members and executive officers must therefore exercise their duties loyally and always with due care and attention.

The typical situations where liability may arise can be categorised as follows:

► neglect of specific clearly defined duties imposed by the Companies Act, the Financial Statements Act, the company’s articles of association or fundamental legal principles
the pursuit by management of their own interests or, at least, interests not related to those of the company and

a board's failure to perform its duties in a proper and business-like manner

To date, Danish courts have been reluctant to impose liability unless clear specific duties – as in the first category above - have been neglected.

**Accounting and other reporting**

Danish companies are required to prepare an annual report in accordance with the Financial Statements Act. The annual report must give a true and fair view of the company’s (or group’s) profit or loss, its balance sheet, financial position and cash flow.

The annual report must be audited by an independent auditor and approved by a general meeting to be held in time for the annual report to be received by the Danish Business Authority no later than five months after the end of the financial year (for non-listed companies) or four months after the end of the financial year (for listed companies). The financial year must, in general, cover a 12-month period.

Corporate reporting requirements are not substantially different from those commonly found elsewhere. Any change in the company's address, in company management or of the company's auditor must be notified to the Danish Business Authority within two weeks from the date of the decision.

The annual report must be filed with the Danish Business Authority without undue delay after the general meeting's approval of it, subject to the overriding general time limit stated above.

Other changes, including amendments to articles of association, must be notified to the Danish Business Authority within two weeks from the date of the decision. Tax returns must be filed no later than six months after the end of the income year.

Listed companies are required to notify the Copenhagen Stock Exchange: Nasdaq Copenhagen as soon as possible of any change in management and of any significant matters which may influence the market price of their shares. In addition, the Nasdaq Copenhagen requires that listed companies specify in their annual reports or on their website the position taken by the board of directors on the recommendations contained in "Recommendations on for Good Corporate Governance" as of May 2013 (updated November 2014) by the Committee on Good Corporate Governance.

**Branches**

Foreign limited companies may register a branch, in which case copies of the articles of association, among other things, of the foreign company must be filed with the Danish Business Authority. Any subsequent change in the articles of association etc. must also be notified.

Branches may be established by companies domiciled in other EU/EEA Member States, in the US, Switzerland, South Korea or Georgia or in a country that allows a similar facility for Danish companies. In the latter case, a certificate from the home state's authorities will have to be provided confirming that the establishment of a branch is open to Danish companies.

A branch manager must be appointed by a power of attorney and will be responsible for all the obligations of the branch vis-à-vis the Danish authorities, in particular with regard to tax, VAT, etc. It is a statutory requirement that the branch manager be able to bind the company (i.e. the foreign company must be fully bound by all actions taken by the branch manager on behalf of the branch); signatory rules may only limit the power to bind the company to any number of branch managers having to sign jointly.

The audited annual report of a foreign company must be filed with the Danish Business Authority no later than five months after the end of the financial year.

**Public markets**

The Copenhagen Stock Exchange is owned by Nasdaq, Inc. and is regulated by the Securities Trading Act which implements Directives 2001/34/EF and 2003/71/EF. The listing requirements are contained in the Listings Executive Order of 2007. For a company to obtain listing, the following requirements must be fulfilled: the company must be suitable for listing on the exchange (as against certain prescribed criteria), the shares expected to be listed are valued at a minimum of 1 million Euros,
the company must have published annual reports for three consecutive years prior to the application for listing, 25% of the shares must be in public hands and the shares listed must be freely negotiable.

In addition, a prospectus must be published containing information on the issuer and on the shares being listed.

**Intra group financing**

Intra group loans are regulated by the Companies Act. Section 211 of that Act allows a subsidiary to grant a loan to its parent provided that the parent company is situated within the EU/EEA or in a country meeting certain classification criteria laid down by the OECD.

A loan within a corporate structure cannot be granted to the disadvantage of minority shareholders or the creditors of the subsidiary company. The board of directors of the subsidiary company is obliged to obtain reasonable lending conditions (for example security) for the grant of the loan.

**Charging of assets**

A floating charge is created by way of mortgage (a short form standard document) and perfected by registration of the mortgage in the Personal Registry. The registration must be renewed every 10 years.

There is a registration fee of 1.5% of the amount secured (i.e. the nominal amount of the mortgage) plus a fixed fee of DKK 1,660.

Floating charges may be created as (i) a general floating charge *(virksomhedspant)* covering certain of the company’s assets from time to time or (ii) a receivables floating charge *(fordringspant)* covering only the company’s trade receivables from time to time.

A floating charge cannot be granted to parent companies or other related parties of the mortgagor.

A floating charge can be granted to one or more creditors/mortgagees but each creditor/mortgagee must be specified in the floating charge.

By a general floating charge, a mortgagor may mortgage all its assets both present and future, within certain asset groups. The asset groups that can be covered by a floating charge include, inter alia:

- trade receivables (no notice to debtors is required). Trade receivables may also be separately pledged
- inventory/stock (including raw materials and finished goods)
- vehicles, which have not been previously registered in Denmark (or similar foreign registers)
- vehicles that are or have been registered in Denmark (or similar foreign registers) provided that the mortgagor does business concerning trade of vehicles
- operating equipment and machinery (vessels and aircraft and related assets) as well as assets covered by mortgages on real property are not included) and
- Intellectual property rights

Security interests in chattels can be created by (i) pledge by removal of the assets from the pledgor’s control (therefore such pledge is often impractical) or (ii) mortgage.

**Employment**

**Employee relations**

Foreign investors will - regardless of whether they set up a new or acquire an existing business - need to be aware of the rules relating to employment of personnel in Denmark.
Some areas are subject to statutory law applicable to all categories of personnel; this is the case with respect to holiday entitlement, maternity leave, parental leave, restrictive covenants and working environment.

With regard to hiring, notice periods, salary levels, etc., the applicable rules will depend on the category of employees involved: Salaried employees are subject to the Danish Salaried Employees Act and in many instances also a collective agreement whereas manual workers (blue-collar workers) are usually covered by collective agreements, most of them negotiated with the relevant trade union(s). Compared to other countries, the percentage of both employers and employees who are members of an association or union is very high. Many employers are members of the Confederation of Danish Employers or one of the special employers’ associations that exist in e.g. the financial services and agricultural sectors. Employees are often members of the relevant trade union (for example Metal Workers, Commercial and Clerical Employees, etc.), although most of these unions are also members of an “umbrella” employee confederation, the Danish Confederation of Trade Unions, a service organisation that undertakes to negotiate or co-ordinate various matters common to all trade unions. The labour market is thus regulated by a large number of collective agreements. Setting up or acquiring a business will therefore require detailed advice and information on both Danish employment law and the relevant collective agreements.

Usually negotiated between employers’ and employees’ organisations and lasting for two to four years at a time, collective agreements cover wage levels, number of working hours, and other terms.

Whatever terms any employee (white-collar or blue-collar) enjoys, such terms will have to be accepted by any acquirer of a company or business. This obligation for the acquirer is mandatory according to the Danish Transfer of Undertakings Act (implementing EC Directive 77/187 as amended by Directive 98/50). The possibilities of renegotiating employment terms should be investigated and considered carefully in advance of any acquisition.

Minimum requirements for the content of an employment agreement, which has to be in writing, are laid down in the Danish Act on Statement of Employment Particulars. If an employer does not fulfil such requirements, the employee may be entitled to compensation.

Danish companies must allow their employees to elect representatives to their supreme governing body provided that the company, over a three-year period, has had at least 35 employees. If this condition is met, the employees can demand a vote to decide whether employee representatives should join the board.

Employees are entitled to appoint a minimum of two members to the company’s supreme governing body. Employees elected under this procedure will join the body immediately after the next annual general meeting.

Similar rules apply to a parent company if it, together with its subsidiaries, meets the 35 employee requirement. However, in parent companies, the minimum number of employee representatives on the supreme governing body is three.

Employee representatives serving on a company’s supreme governing body have the same duties and obligations as the other members. They are not allowed to disclose any confidential information to their colleagues and have the same liability as the general management, as described below. Employee representatives are entitled to the same remuneration as other members of the supreme governing body.

The Salaried Employees Act regulates most of the matters relevant to the relationship between employer and employee, but, as stated above only salaried employees are subject to the Act. It is important to note that the Act cannot be derogated from to the detriment of the employee.

**Termination of employees**

Where notice of termination is given by the employer, the notice period will depend on the length of the employee’s continuous employment; the longer the employment, the longer the notice period. Statutory notice periods are:

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<tr>
<th>EMPLOYMENT PERIOD</th>
<th>NOTICE PERIOD</th>
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<tbody>
<tr>
<td>5 months (or less)</td>
<td>1 month</td>
</tr>
<tr>
<td>Up to 2 years &amp; 9 months</td>
<td>3 months</td>
</tr>
</tbody>
</table>
The six month notice period is the maximum afforded by the Salaried Employees Act.

Employees may terminate their employment by giving one month’s notice to the end of a month regardless of the length of their employment. It is possible to agree on a probationary period (the first three months of employment) during which both parties may terminate the agreement at 14 days’ notice. The 14 days’ notice must expire before expiry of the three-month probationary period.

Salaried employee is entitled to severance pay if they are dismissed - regardless of the fairness of the dismissal - and if they have been employed for a continuous period of 12 years or more on expiry of the notice period. The amount of compensation depends on the length of employment. 12 years of employment entitles the employee to a compensation corresponding to one month’s salary and 17 years of employment will attract the maximum of three months’ salary.

Notice periods for manual workers vary according to the relevant collective agreement. A typical collective agreement, "Industrial Agreement 2014-2017", provides the following notice periods:

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<th>EMPLOYMENT PERIOD</th>
<th>NOTICE PERIOD</th>
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<tbody>
<tr>
<td>Notice by the employer:</td>
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</tr>
<tr>
<td>Less than 6 months</td>
<td>No notice required</td>
</tr>
<tr>
<td>6 months</td>
<td>14 days</td>
</tr>
<tr>
<td>9 months</td>
<td>21 days</td>
</tr>
<tr>
<td>2 years</td>
<td>28 days</td>
</tr>
<tr>
<td>3 years</td>
<td>56 days</td>
</tr>
<tr>
<td>6 years</td>
<td>70 days</td>
</tr>
<tr>
<td>In respect of employees who are at least 50 years of age:</td>
<td></td>
</tr>
<tr>
<td>9 years</td>
<td>90 days</td>
</tr>
<tr>
<td>12 years</td>
<td>120 days</td>
</tr>
<tr>
<td>Notice by the employee:</td>
<td></td>
</tr>
<tr>
<td>Less than 6 months</td>
<td>No notice required</td>
</tr>
<tr>
<td>6 months</td>
<td>7 days</td>
</tr>
<tr>
<td>3 years</td>
<td>14 days</td>
</tr>
</tbody>
</table>
EMPLOYMENT PERIOD | NOTICE PERIOD
--- | ---
6 years | 21 days
9 years | 28 days

Notice periods for unskilled workers may be very short (for example three days' notice). Where no collective agreement applies, the notice period can be fixed by the employer at his own discretion, although on the one condition that the length of the notice period is “appropriate”.

The Danish Act on Collective Redundancies (implementing EC Directive 75/129 as amended by Directive 92/56) requires employers to inform the Local Labour Board at the earliest convenience of contemplated large-scale redundancies and initiate negotiations with the employees or their representatives with the intention to reach an agreement so that redundancies may be either avoided or limited, or to alleviate the effects, for example by replacing or re-training the affected employees. Where redundancies cannot be avoided after such negotiations, they must be notified to the Local Labour Board and cannot take effect until 30 days (in some cases eight weeks) after such notification. Planning and timing are therefore important where these provisions apply.

The Act applies where the redundancies within 30 days exceed:

► 10 employees in firms having more than 20 and less than 100 employees
► 10% of employees in firms having at least 100 and less than 300 employees
► at least 30 employees in firms having at least 300 employees

Compliance with these requirements is important, as any breach of the duty to negotiate is sanctioned by payment of compensation and/or possible fines. Collective agreements will often have special rules on collective redundancies.

**Immigration**

In principle, all foreign citizens are required to obtain a visa prior to entering and staying in Denmark. Citizens from a large number of countries are, however, exempt from that requirement e.g. citizens of the US and Japan do not need a visa for an initial 90 days within any 180-day period.

All foreign citizens must also obtain a residence and work permit prior to taking up employment in Denmark. Usually, the residence and work permit must be justified by professional or labour market considerations, for example professions currently experiencing a shortage of qualified professionals. However, a number of schemes have been designed in order to make it easier for highly qualified professionals to obtain a residence and work permit.

Nordic citizens do not need a residence and work permit but are free to enter, live and work in Denmark. EU/EEA or Swiss citizens may reside freely in Denmark for up to three months. If the EU/EEA or Swiss citizen is seeking employment during the stay, the stay may be extended to last six months.

If the stay exceeds the three- or six-month limit, a proof of registration from the Danish State Administration will be required. Unlike residence and work permits, which are issued under the Danish Aliens Act, proof of registration is simply proof of the rights already held by a person under the EU regulations on the free movement of labour and services.

**Taxation**

Denmark has a reputation as a high-taxation country with salaries and other personal income taxed at a rate of up to approximately 56% (2016). However, from an employer's perspective, a comparison with other European jurisdictions will show a more balanced picture.
The Danish tax regime relies predominantly on direct rather than indirect taxes. Even if direct labour costs in terms of wage levels are comparatively high, there are relatively few indirect costs and duties in the form of social security and contributions from employers, which in other jurisdictions serve to push up the combined tax and labour costs.

Danish tax law is a complicated area, which undergoes frequent changes and amendments by parliament. The extensive and detailed legislation is complemented by extensive case law and administrative practice supplemented by derivative legislation, guidance notes, etc.

Any transaction must therefore be structured carefully in order to avoid unfavourable or unintentional tax treatment.

**Individuals**

As a general rule, an individual is subject to full tax liability in Denmark either if he has his residence in Denmark or if his stay in Denmark exceed six months.

Individuals, who are not subject to full Danish tax liability may still be subject to limited tax liability in respect of income and gains deriving from certain sources in Denmark, including remuneration in respect of employment undertaken in Denmark, immovable property situated in Denmark, and dividends or royalties distributed from sources in Denmark.

In the case of dual residence and/or double taxation, Denmark has tax treaties with most jurisdictions in the world (Spain and France being important exceptions). Generally, these treaties are in accordance with the OECD Model.

The income tax rate in Denmark has a maximum marginal tax rate of 51.95% (the **tax ceiling**) and the marginal tax rate including labour market contributions (which apply to salaries etc.) is approximately 56% (2016).

State taxes are calculated as a basic tax 9.08% (2016) and a high tax of 15% which is calculated on income exceeding DKK 467,300 (2016).

The municipal tax rate varies depending on the taxpayer's place of residence, but was in average 24.91% in 2016. The health tax is 3.0% (2016).

A church tax of 0.7% (2016 average) is payable by all members of the the Evangelical Lutheran Church, the national church in Denmark.

A labour market contribution of 8% and minor contributions, for example, to the supplementary labour market pension (**ATP**), are payable as a gross tax on salaries etc.

All fully liable taxpayers are entitled to a personal allowance which in 2016 was DKK 44,000.

Employed persons have an additional employment allowance of 8.3% of their salary capped at DKK 28,000 (2016).

**Corporate tax**

Corporations resident in Denmark are liable to corporate tax on their worldwide income. However, the taxable income does not include income from permanent establishments and immovable property located abroad.

Generally, a permanent establishment is defined as a fixed place of business, from where the company carries on business. The Danish definition generally follows the definition in the OECD Model Tax Treaty.

As a general rule, the income year for companies is the calendar year. However, companies are also permitted to select an income year that differs from the calendar year albeit not in all circumstances.

An annual tax return must be filed with the tax authorities within six months following the end of the fiscal year. However, if the tax year ends between 1 February and 31 March, the tax return must be filed on or before 1 August in the relevant year.

Corporations pay taxes on a current year basis. The taxes are due as account payments on 20 March and 20 November.

The corporate tax rate is 22% (2016).
In general, all income is taxable if the company is subject to full tax liability and capital gains are added to the taxable income.

**Dividends**

Dividends received by a Danish parent company from Danish or foreign subsidiaries are generally tax exempt. However, this tax exemption only covers dividends from Subsidiary Shares and Group Shares.

“Subsidiary Shares” are generally defined as shares where (i) the corporate shareholder owns at least 10% of the shares in another company, and (ii) the company is a Danish company subject to Danish corporate taxation or a foreign company where the taxation of any dividends it pays out must be waived or reduced according to the Parent-Subsidiary Directive (2003/123/EC) or a tax treaty between Denmark and the jurisdiction where the foreign company is a tax resident.

“Group Shares” are generally defined as shares where the corporate shareholder and the company are subject to Danish national joint taxation or could elect to be subject to Danish international joint taxation (generally, this requires that the corporate shareholder controls more than 50% of the votes in the company).

The exemption also applies to foreign companies with a permanent establishment in Denmark. However, it is a condition that the company is domiciled within the EU, the EEA, on the Faroe Islands or Greenland or in a state that has concluded a tax treaty with Denmark.

The tax exemption does not cover dividends if the company paying such dividends is allowed to deduct the distribution of dividends. However, the distribution of dividends is still tax exempt if foreign taxation is waived or reduced pursuant to the Parent-Subsidiary Directive.

**Interest payments etc. to foreign shareholders**

As a general rule, Denmark does not withhold tax on interest payments. However, if the interest payments are made between controlled companies, a 22% withholding tax may apply.

Control exists if a company or an individual (or a group of affiliated companies or related persons) owns, directly or indirectly, more than 50% of the shares in the relevant company or may exercise more than 50% of the votes in the relevant company.

The definition of “control” has been extended so that shares and voting rights held by other participants must be taken into account in the determination of whether an entity holds a controlling interest in another entity, provided that the entity in question has entered into an agreement regarding the exercise of a “joint controlling influence” with such other participants (e.g. a shareholders’ agreement).

However, no withholding tax will apply if the receiving company of the interest payment is situated in the EU and considered affiliated under the Interest-Royalty Directive, or the receiving company is situated in a state that Denmark has concluded a tax treaty with where interest payments are generally tax exempt.

However, it is a condition that the receiving company shall be considered the “beneficial owner” of the Danish company making the interest payment.

A company is considered affiliated if another company owns at least 25% of the share capital or if a third company owns at least 25% of the two companies during a period of at least one year during which the payment is made.

Entities with joint management and entities where the same group of shareholders have a controlling influence are treated as affiliated companies.

The regime also applies to entities and associations, which are fiscally transparent under Danish tax law but which are governed by the rules of corporate law, a corporate agreement or articles of association (e.g. partnerships), i.e. such entities can be affiliated with and/or controlled by companies in this context.

The withholding tax does not apply if, alternatively:

- the interest is attributable to a permanent establishment in Denmark
the taxation of interest must be waived or reduced under the Interest-Royalty Directive (Directive 2003/49/ECC), and the paying company and the receiving company have been affiliated for a continuing period of not less than one year, and the time of payment is within this period

the taxation of interest must be waived or reduced under a tax treaty with the country where the receiving company is resident

the receiving company is directly or indirectly controlled by a Danish parent company (as defined under the Danish joint taxation rules) for a continuing period of not less than one year, and the time of payment is within this period

the receiving company is controlled by a company resident in a country which has entered into a tax treaty with Denmark, and the company - according to national rules - may be subject to CFC taxation on the interest or

the receiving company can demonstrate that the foreign corporate taxation of the interest equals at least three-quarters of the Danish corporation tax, and it does not forward payments of interest to another foreign company which is subject to a corporate taxation of the interest which is less than three-quarters of the Danish corporate taxation

Taxation of royalties

Withholding tax also applies to royalties. A 22% tax must be withheld for royalty payments deriving from Denmark in relation to patents, trademarks, technical know-how etc. This withholding tax may be reduced under a tax treaty. The withholding tax does not apply if the royalty is attributable to the receiver’s Danish permanent establishment (and therefore limited liable for Danish tax), or the receiver is subject to the protection of the Interest-Royalty Directive (2003/49/ECC), which prohibits EU member states from retaining withholding tax on royalty and interest payments between affiliated companies within the EU.

A company is considered affiliated if another company owns at least 25% of the share capital or if a third company owns at least 25% of the two companies during a period of at least one year during which the payment is made.

Interest limitation rules

The Danish Corporate Tax Act contains three interest limitation rules (thin capitalisation, interest ceiling and an EBIT rule).

Three tests have to be undertaken in order to determine the actual deductibility of net financing costs:

the thin capitalisation test

the “interest ceiling” test and

the “EBIT model” test

The Danish rules on thin capitalisation apply to Danish legal entities which have debt (debt is defined as the aggregate of controlled debt and third party debt) owing to Danish or foreign legal entities which control the Danish entity, which are being controlled by the Danish entity or which are under joint “control” with the Danish entity (controlled debt).

Control exists if a company or an individual (or a group of affiliated companies or related persons) owns, directly or indirectly, more than 50% of the shares of the relevant company or may exercise more than 50% of the votes of the relevant company. The definition of “control” corresponds to the definition applied in respect of interest payments to foreign companies (see above) and thus also includes:

entities and associations which are fiscally transparent under Danish tax law but are governed by the rules of corporate law, a corporate agreement or articles of association

entities with joint management and

entities that have entered into an agreement regarding the exercise of a joint controlling influence

Controlled debt also includes third party loans which have been guaranteed by the controlling shareholder(s) or its affiliates.
Pursuant to the thin capitalisation test, if the debt-equity ratio exceeds 4:1, the interest on the excess of the controlled debt is not deductible if the controlled debt exceeds DKK 10,000,000. However, this limitation only applies to the part of the debt which should have been equity in order to avoid the limitation.

The "interest ceiling" test and the "EBIT model" test only apply to the extent the net financing costs of the Danish company exceeds DKK 21,300,000 per year.

Pursuant to the interest ceiling test net financing costs (as defined) exceeding an absolute cap calculated as a standard rate of return (in 2016, 3.4%) on the tax value of the company's assets (as defined) are not deductible.

**Joint taxation**

National joint taxation is mandatory and applies to all Danish entities, including permanent establishments, under common control by an ultimate parent company.

International joint taxation (i.e. joint taxation with foreign group companies) is optional. However, if a group opts for international joint taxation, all foreign group companies as well as all permanent establishments and real property in foreign countries owned by group companies will have to be included in the joint taxation election.

If an international joint taxation election is chosen, it will be binding on the group for a period of 10 years. However, a group may terminate it prior to the expiry of the 10-year period against taxation of the full amount of losses deducted under the joint taxation election.

**Transfer pricing**

Danish transfer pricing legislation is based on the arm's length principle. Accordingly, all transactions between related parties ("connected transactions") must be concluded on general market terms as if the parties to the transactions had been independent entities. The definition of "control" corresponds to the definitions applied in respect of the thin capitalisation test (see above). Accordingly, control exists if a company or individual owns, directly or indirectly, more than 50% of the shares of the relevant company or may exercise more than 50% of the votes of the relevant company.

The concept also includes:

- entities and associations which are fiscally transparent under Danish tax law and which are governed by rules of corporate law, a corporate agreement or articles of association
- entities with joint management and
- entities that have entered into an agreement regarding the exercise of a joint controlling influence

The Danish transfer-pricing regime is in accordance with OECD Guidelines.

The Danish parliament has adopted rules on transfer pricing documentation. The legislation requires that affiliated companies provide information in their tax return as to the nature and extent of transactions with associated enterprises. In order to ensure compliance with the arm's length principle, connected parties are subject to a duty of disclosure (i.e. a duty to provide information in the tax return of the nature and extent of controlled transactions), and a documentation duty (i.e. a duty to prepare written documentation on how prices and other terms have been fixed).

**Taxation of outbound dividends**

As a general rule, dividends distributed from a Danish company to a foreign shareholder are subject to 27% withholding tax. However, if the foreign shareholder owns at least 10% of the share capital and is resident within the EU and/or a state that has concluded a tax treaty with Denmark, dividend will generally be tax exempt. In other cases, withholding tax on dividend may be reduced under the relevant tax treaty.

The withholding tax does not include dividends received by participants in parent companies named in the list of companies under article 2(1)(a) of the Parent-Subsidiary Directive, and which are considered transparent entities in respect of Danish taxation. It is a condition that the company participant is not domiciled in Denmark.
The benefit of the exemption may be denied with respect to dividends distributed by Danish companies to intermediary holding companies if, in the opinion of the Danish tax authorities, the reality of the arrangements is that dividends flow through that entity to another entity resident usually in a tax haven jurisdiction. In recent years, the Danish tax authorities have adopted an approach that actively scrutinises such "beneficial ownership" issues. To this end, they are preparing a number of cases on the issue.

**General Anti Abuse Rule**

A new general anti-avoidance rule (GAAR) has been introduced by parliament and has recently come into force. The GAAR applies to all cross border transactions and situations where one or more fictitious arrangements are carried out for the main purpose of (or with one of the main purposes being) tax avoidance.

The GAAR applies to all arrangements deemed fictitious, e.g. the transaction/arrangement is not supported by well-founded commercial reasons that reflect the financial reality. The GAAR is applicable to all cross-border transactions, including those under the Parent-Subsidiary Directive, the Interest-Royalty Directive and under double tax treaties (future and already concluded).

If the GAAR applies, the taxpayer will be denied any benefit that the above mentioned Directives (and other) and tax treaties would otherwise grant, and the counterparty would be denied to make a reclaim of any withheld taxes.

**Dispute resolution**

**Court process**

The ordinary Danish courts are staffed by professional, legally qualified judges. Except for criminal court cases, lay judges are not used in the Danish legal system.

The Danish court system is composed of three levels: Lower courts, the High Courts (eastern and western divisions) and the Supreme Court. The lower courts are first instance works for all matters. A party can request that the High Court adjudicate the dispute at first instance if the matter is of fundamental importance from a legal perspective. As a general rule, the parties can only appeal a court ruling once. A second appeal requires permission from the Danish Appeals Permission Board. Permission can be given if the case raises issues of legal principle.

In certain commercial matters, the Maritime and Commercial Court in Copenhagen can be chosen as venue, for example if the dispute requires in-depth knowledge of international business, of competition law, or of Intellectual property law. In this court, two expert judges with relevant experience preside together with a trial judge who is also a legally qualified judge.

**Arbitration/ alternative dispute resolution (ADR)**

The parties to a dispute may agree on alternative dispute resolution in the form of arbitration. The Danish Institute of Arbitration (Copenhagen Arbitration) is a well-established permanent institute in relation to both national and international arbitration and it has its own set of procedural rules, which are comparable to those of International Court of Arbitration.

**Competition**

The Competition Act aligns Danish competition law with EC competition law and is enforced in accordance with the case law of the European Courts. Accordingly, the Act prohibits anti-competitive agreements and the abuse of a dominant position and creates a merger control regime based on the same principles as those enshrined in EU Merger Regulation.

The Competition Council oversees the Competition and Consumer Authority's enforcement of the act. Decisions made by the Competition Council and the Competition and Consumer Authority can be appealed to the Competition Appeals Tribunal.

In accordance with Article 101 of the Treaty on the Functioning of the European Union (TFEU), section 6 of the Act prohibits agreements, concerted practices and decisions having as their direct or indirect object or effect the prevention, restriction or distortion of competition. The term "agreement" is broad and includes informal understandings, "gentlemen’s agreements" and standard terms and conditions of sale. A "concerted practice" may exist if two undertakings, without entering into an actual agreement, undertake co-ordinated behaviour that restricts or distorts competition in the market.
The Act provides a non-exhaustive list of examples of prohibited behaviour, which includes direct or indirect fixing of prices, limitation or control of production, markets, technical development or investment, sharing of markets or sources of supply, applying dissimilar conditions to equivalent transactions with other trading parties, making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts, co-ordination of competitive practices by two or more undertakings through the establishment of a joint venture, and resale price maintenance.

Other agreements or practices which are likely to be prohibited include collective boycotts, the exchange of sensitive market and business information between competitors as well as certain sale restrictions such as, excessive non-compete clauses.

Pursuant to section 11 of the Act (which mirrors Article 102 TFEU) dominant companies are not allowed to abuse their dominant position through practices such as excessively high prices, predatory prices, tying and exclusionary price discrimination.

Intellectual property

A multitude of Intellectual property rights are protected covering patents, utility models, trademarks, copyright, designs, know-how and employees’ inventions.

Patents

Denmark is party to the 1970 Patent Cooperation Treaty (PCT), the European Patent Convention (EPC) and the London Protocol.

As a result of Denmark’s adherence to these conventions, an application for the grant of a European Patent may designate Denmark, and national Danish patents may be obtained either through designation of Denmark in a PCT application or by means of a national application submitted to the Danish Patent and Trademark Office (PTO). Foreigners hold a substantial number of the patents currently in force on Danish territory.

Patents may be obtained for all inventions that are capable of industrial application, provided that the subject matter is not expressly excluded from patent protection. To this end, the provisions of the EU Directive on the Legal Protection of Biotechnological Inventions have been implemented in the Danish Patents Act. In addition to the matters barred from patent protection under the directive, the Patents Act excludes also, inter alia, discoveries, scientific theories, business methods and computer programmes as such. Plant species may be granted protection either under the Danish Act on Plant Variety Protection or under the EU Council Regulation on Community Plant Variety Rights.

Patents will be granted if the invention possesses novelty involves an inventive step and is susceptible to industrial application. As a main rule, these requirements are similar to those applied in other European countries and the Danish PTO has expressly stated that it intends to rely on the precedents of the European Patent Organisation in its examination of patent applications.

Trademarks

Denmark has implemented the EC Trademarks Directive, and the Danish Trademarks Act is almost identical with it.

Trademarks can be claimed for any symbol distinguishing one undertaking’s products or services from another’s. They can be words or a phrase, letters, figures, depictions of shape, get-up, packaging or even sounds, provided they can be reproduced graphically.

Trademarks may be obtained either by registration or through the use of a particular mark in the course of trade. Alternatively, one may register a Community trademark that will have effect on Danish territory as well as in other EU member countries.

The protection period for a registered trademark is 10 years from the registration date, and the registration is renewable. However, a trademark owner must exploit a registered trademark in order to retain his / her exclusive right. If the mark has not been used for five years, the registration (and protection) may lapse, rendering the trademark unenforceable against third parties.

Trademarks established through use will remain in force until no longer used.
Copyright

Denmark is party to most of the international conventions related to copyright and neighbouring rights, and Denmark has implemented all of the EU copyright-related directives currently in force.

Copyright protection is not contingent on any form of registration, and there is no copyright register available. Copyright exists as soon as a particular work is created, provided that the work is the result of the author's own intellectually creative contribution.

Copyright protects traditional works of literature and artistic works as well as maps, drawings, manuals, certain types of catalogues and databases, applied art (designs) and computer programmes. Copyright protection of computer programmes covers the specific programme (but not the idea or algorithm) and reverse engineering is allowed when necessary to ensure compatibility between programmes. Special rules regulate the transfer of copyright to computer programmes between an employee and his employer.

Protection is given for the lifetime of the author plus 70 years.

The Danish Copyright Act also protects performers, producers of sound recordings and motion pictures, manufacturers of catalogues and databases, and various other neighbouring rights. The neighbouring right protection is more limited in scope and duration than the copyright protection of literary and artistic works.

Enforcement of Intellectual property rights

The Danish judicial system provides for efficient enforcement of Intellectual property rights.

Proprietors may obtain interlocutory relief at the Enforcement Court if able to prove on the balance of probabilities that the conduct of the opposing party necessitates the granting of the injunction and the ability of the party to enforce his right will be lost if the party has to await a full trial. Proprietors can also request that Enforcement Court execute a search of the alleged infringer's premises in order to seize evidence of infringement and to establish the extent of the infringement.

If interim relief and/or a court-ordered search is granted, the proprietor needs to initiate an action on the merits (confirmatory action). An action on the merits may also be initiated as the first move against an infringer. In an action on the merits, the proprietor may claim damages and compensation.

Marketing agreements

Agency

Implementing the EU Directive on Commercial Agents, the Danish Act on Commercial Agents closely reflects the provisions of the Directive. With respect to the issue of indemnities or compensation payable to the agent upon termination of the agency agreement, Denmark has opted for the indemnity model. A substantial number of the provisions of the Act on Commercial Agents are mandatory and will therefore supersede any contradictory provisions in an agency agreement.

The Act stipulates a right for the agent to receive a reasonable commission and certain limitations on non-competition (restraint of trade) clauses, which inter alia cannot exceed two years in duration and cannot extend to geographical areas, groups of customers or kinds of goods not covered by the agency agreement.

If an agency agreement has been entered into for an indefinite period of time, the principal and the agent will both have to comply with a minimum notice period. The notice period is required to be at least one month in the first year of the contract and is increased by one month for each subsequent year until reaching the maximum notice period of six months. It may, however, be agreed that the agent is entitled to terminate the agency on three months' notice for the third year commenced and subsequent years. Agency agreements may be expressly limited in time, in which case they will expire on the agreed date. However, if an agency agreement entered into for a fixed period of time is renewed or continued upon expiry, either by express or tacit agreement, the agency will be considered an agency formed for an indefinite period of time and the above-mentioned minimum notice provisions will apply.

Agents are, in most cases, entitled to an indemnity upon termination. Payments under the indemnity must be made if and to the extent the agent has brought new customers to the principal or has significantly increased business with existing
customers from which the principal continues to derive substantial benefits, and if and to the extent payment of sums under the indemnity is equitable having regard to all circumstances of the case. The amount of payments made pursuant to the indemnity cannot exceed a figure equivalent to the remuneration for one year calculated on the basis of the agent’s average annual remuneration over the preceding five years.

Distribution

There is no statutory law relating to distribution agreements (save for the relevant national and EU competition rules including the relevant group exemptions). The parties are, therefore, to a large extent free to agree the terms of a distribution agreement.

Most suppliers and distributors include specific termination notice provisions in their agreements but, in the absence of a specific agreement, the courts will look at the length of the relationship and determine the notice period on this basis. In most cases, the required notice period will not extend beyond six months.

Danish case law on distribution agreements does not, in general, provide for indemnity or compensation payments to be made to the distributor in cases where the supplier terminates the agreement in accordance with the provisions set out therein. If the distribution agreement is lawfully terminated, compensation to the distributor will only be awarded under special circumstances.

E-commerce

The Danish E-commerce Act implements Directive 2000/31/EF and applies to all commercial services provided online. Services provided from Denmark must comply with Danish law irrespective of whether the service is only intended for foreign consumers. On the other hand, Denmark acknowledges the authority of another EU member country with regards to services provided from its territory.

Denmark does, however, maintain the right to take precautions when deemed necessary because of public order, public health, public security or consumer consideration. Any precautionary measures must be proportionate to those objectives.

A provider of services must supply its name, physical address, its email and postal address and its registration number. In addition, a provider may have to supply information on relevant trade organisations and reference to any trade law.

The price and what is contained therein (for example, VAT, transport costs etc.) must be supplied in a clear and accessible manner. Technical information in relation to the contract formation must also be supplied to the consumer in advance.

Data protection

The Danish Data Protection Act implements Council Directive 95/46/EC on the protection of individuals with regard to the collection and processing of personal data.

Pursuant to the Data Protection Act, data may be collected only for specified, explicit and legitimate purposes and any subsequent processing must be compatible with those purposes. It is not permissible to collect personal data which is not strictly necessary.

The Data Protection Act contains stringent rules on the collection, processing and, particularly, the disclosure of data for marketing purposes.

In addition to the Data Protection Act, Danish law contains special legislation regarding the collection and processing of specific types of data, for example the Danish Act on Information Databases Operated by the Mass Media and the Danish Financial Business Act.

Product liability

Product liability in Denmark is regulated by two sets of rules. Firstly, the Danish Product Liability Act, implements Council Directive 85/374/EEC (as amended) which deals with liability for defective products. Pursuant to this Act, a manufacturer must indemnify a claimant for injury or damage caused by a defective product manufactured or supplied by him. A product is defective if it does not meet reasonable standards of safety. Thus, blame is not a prerequisite for imposing liability on a
manufacturer. Furthermore, a distributor has a strict liability towards a claimant and any other distributors further down the chain of distribution if loss contemplated by the Act results from negligence on the part of the manufacturer or distributors further up the chain of distribution.

Product liability may also arise for personal injury or physical damage by virtue of Danish case law. In these circumstances, fault on the part of the manufacturer must be established in relation to a product which is defective; that is one which is considered to be ‘unreasonably dangerous’. Liability may also attach to a distributor of the product.

Damage to the defective product itself will be subject to the liability rules in Danish contract law.

**Bribery and corporate crime**

The criminal offences set out the punishment for bribery to 4 years.

Danish money laundering regulations are contained in the Money Laundering Act which implements the Third Money Laundering Directive. The Act is applicable to all entities and persons involved in any kind of financial activity.

Every entity covered by the Act has a duty to investigate complicated and/or large transactions and, in the event that a transaction is suspicious, the entity has a duty to report it to The Danish Money Laundering Secretariat (Public Prosecutor for Special Economic Crimes) if the suspected offence is punshible by a prison sentence of more than one year.

When an entity covered by the Act initiates a commercial relationship with a customer, it has to conduct “customer due diligence”. The purpose of the due diligence is to establish the identity of the customer and, if the customer is a business, the ultimate owner of that business. Finally, the purpose of the commercial relationship must be clear. The monitoring of the customer must continue for as long as the relationship is maintained.

**Real estate**

In Denmark, real property (land and buildings) is typically conveyed by a sale and purchase agreement, followed by a deed of conveyance, which is registered in the Danish land register. The deed of conveyance is a digital document and all registrations are only made online.

Whereas in some countries extensive and time-consuming pre-contract enquiries and reviews are necessary before an acquisition, the Danish Land Registration Court serves to remove most concerns and uncertainties when dealing with Danish properties.

All Danish properties are registered in the land register, kept by the Land Registration Court in Hobro, and all properties are identified by a property number.

The land register provides information about owner’s identity, all registered mortgage deeds and other rights such as right of first refusal, owner’s bankruptcy, etc. In most cases, all other easements and encumbrances such as rights of way, local restrictions on construction etc. will also be recorded.

Registration of deeds of conveyance is subject to a registration fee of DKK 1,660 with the addition of 0.6 % of the purchase price or the official property valuation, whichever is higher. The fee for registration of a mortgage deed is 1.5% of the principal of the secured amount plus the fixed fee of DKK 1,660.

Non-Danish citizens who have not previously been domiciled in Denmark for an aggregate period of at least five years can only purchase real property in Denmark with the permission of the Danish Ministry of Justice. The same goes for companies, associations, etc. which are not domiciled in Denmark.

EU citizens, citizens of EEA countries, and EEA companies may, however, purchase real property in Denmark without permission from the Ministry when certain requirements are met, but only if the property is intended to serve as a necessary permanent residence for the purchaser, or when the purchase of it is a prerequisite for operating the purchaser's own business or for supplying services. Holiday residences may only be purchased by non-Danish residents with the permission of the Ministry, which is rarely granted.
The Danish Business Lease Act introduced a high degree of contractual freedom. The Act governs leases entered into before and after 1 January 2000, but does contain different provisions for leases entered into prior to 1 January 2000.

Almost all terms and conditions of commercial leases are subject to negotiation between the parties, including provisions on rent, adjustment of rent, maintenance obligations, rights of assignment, subletting, etc. However, with respect to the lessor’s rights of termination and payment of damages/compensation, the Business Lease Act still provides extensive protection for lessees.

Rent is paid ordinarily monthly or quarterly in advance. It is also commonly agreed that the annual rent will be adjusted (sometimes upwards only) every year in accordance with either the changes in the official Danish “Net Price Index”, a certain percentage, or a combination based on the Danish Net Price Index and a certain percentage.

According to the Danish Business Lease Act, rent may be adjusted (increased or decreased) on the basis of the concept of a “market rent”. Such adjustment cannot take place until four years after commencement of the lease and these provisions in the Act can be set aside or varied by express agreement.

Existing law is stated as it applies in April 2016.

Useful contacts

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<th>USEFUL CONTACTS</th>
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<td>The Danish Business Authority</td>
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<td>Association of state authorised public accountants</td>
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<td>Invest in Denmark</td>
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Further information

Kromann Reumert contacts

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<tbody>
<tr>
<td>Copenhagen, Sundkrogsgade 5, 2100 Copenhagen Ø</td>
</tr>
<tr>
<td>Arhus, Rådhuspladsen 3, 8000 Århus C</td>
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<td>London, 42 New Broad Street, London EC2M 1JD</td>
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<td>Helene Amsinck</td>
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<td>Arne Møllin Ottosen</td>
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<td>Flemming Horn Andersen</td>
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<td>Jens Rostock-Jensen</td>
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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 an independent business without the influence of a 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 in 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 (TUPE) 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:

<table>
<thead>
<tr>
<th>Financial Years Starting On or After</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 April 2015</td>
<td>20%</td>
</tr>
<tr>
<td>1 April 2017</td>
<td>19%</td>
</tr>
<tr>
<td>1 April 2020</td>
<td>17%</td>
</tr>
</tbody>
</table>

**Patent Box and other reliefs:** The UK operates a concessionary 10% rate of corporation tax for companies exploiting patented products or similar intellectual property under the Patent Box regime.

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’.

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 £45,000 the 40% rate for higher rate taxpayers to income in excess of £45,000 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 £2.85 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 £8,164 up to and including £45,000 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, exceed £45,000, whereupon the 20% rate applies. Rates of 28% and 18% apply to basic and higher rate taxpayers respectively in relation to carried interest and gains on non-exempt residential property. Most taxpayers are entitled to an annual exemption. For the tax year 2017/2018, the annual exemption is £11,300.

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.

For rates of Scottish Income Tax, see our "Doing Business in Scotland" manual.

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

Companies

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.

Individuals

The residence test for individuals is 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 paying company.

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 — for account periods beginning after 1 April 2017 a complex set of new rules was intended to be introduced to 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. However, as a result of the snap general election, the new rules have not yet been introduced.

► 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 which disallowed interest deductions where UK net debt of a group exceeds 75% of the group’s worldwide gross debt was intended to 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 (NICs) on employment income are accounted for by employers to HMRC under the Pay As You Earn (PAYE) system. The employer deducts income tax and national insurance contributions from the employee's income and pays the deductions to HMRC on behalf of the employee.

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 2017/18 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). The amount of tax for properties valued at over £20m is £220,350 from 1 April 2017.

Since 1 April 2015, the land and buildings transaction tax replaced stamp duty land tax in Scotland and different tax rates now apply to transfers of land in Scotland. From April 2018, different rates may also apply in Wales when the Land Transaction Tax (LTT) replaces stamp duty land tax.

**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 Queen’s 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 resells 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 online 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).

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


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.


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 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 £50 million 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

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<th>Financial Conduct Authority</th>
<th>Competition and Markets Authority</th>
<th>Confederation of British Industry</th>
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<td>Victoria House</td>
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<td>E14 5HS</td>
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<tr>
<td>(+44) 20 7066 1000</td>
<td>(+44 20 3738 6000)</td>
<td>(+44) 20 7379 7400</td>
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<tr>
<td><a href="http://www.fca.org.uk">www.fca.org.uk</a></td>
<td><a href="mailto:general.enquiries@cma.gsi.gov.uk">general.enquiries@cma.gsi.gov.uk</a></td>
<td>Fax: (+44) 20 7379 7200</td>
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<td><a href="mailto:enquiries@cbi.org.uk">enquiries@cbi.org.uk</a></td>
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<th>HMRC</th>
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<td>Euston Tower</td>
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<tr>
<td>113 Chancery Lane</td>
<td>Wycliffe House</td>
<td>286 Euston Road</td>
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<td>Water Lane</td>
<td>London</td>
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www.cbi.org.uk
Further information
Key contacts at Addleshaw Goddard LLP

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

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

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

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

<p>| COMPETITION           |  |  |
|-----------------------|  |  |
| Bruce Kilpatrick      | (+44) 20 7544 5214 | <a href="mailto:bruce.kilpatrick@addleshawgoddard.com">bruce.kilpatrick@addleshawgoddard.com</a> |
| Partner               |  |  |</p>
<table>
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<th>Section</th>
<th>Name</th>
<th>Title</th>
<th>Contact Details</th>
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<tr>
<td>LITIGATION</td>
<td>Michael Barnett</td>
<td>Partner</td>
<td>(+44) 20 7544 5302</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><a href="mailto:michael.barnett@addleshawgoddard.com">michael.barnett@addleshawgoddard.com</a></td>
</tr>
<tr>
<td>REAL ESTATE</td>
<td>Adrian Collins</td>
<td>Partner</td>
<td>(+44) 20 7160 3048</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><a href="mailto:adrian.collins@addleshawgoddard.com">adrian.collins@addleshawgoddard.com</a></td>
</tr>
<tr>
<td>EMPLOYMENT</td>
<td>Malcolm Pike</td>
<td>Partner</td>
<td>(+44) 20 7788 5566</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><a href="mailto:malcolm.pike@addleshawgoddard.com">malcolm.pike@addleshawgoddard.com</a></td>
</tr>
<tr>
<td>INTELLECTUAL PROPERTY</td>
<td>James Whittaker</td>
<td>Partner</td>
<td>(+44) 161 934 6329</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><a href="mailto:james.whittaker@addleshawgoddard.com">james.whittaker@addleshawgoddard.com</a></td>
</tr>
<tr>
<td>E-COMMERCE</td>
<td>Emma Armitage</td>
<td>Partner</td>
<td>(+44) 20 7788 5521</td>
</tr>
<tr>
<td></td>
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<td><a href="mailto:emma.armitage@addleshawgoddard.com">emma.armitage@addleshawgoddard.com</a></td>
</tr>
<tr>
<td>PRODUCT LIABILITY</td>
<td>Louisa Caswell</td>
<td>Partner</td>
<td>(+44) 20 7788 5174</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td><a href="mailto:louisa.caswell@addleshawgoddard.com">louisa.caswell@addleshawgoddard.com</a></td>
</tr>
<tr>
<td></td>
<td>Erin Shoesmith</td>
<td>Legal Director</td>
<td>(+44) 161 934 6554</td>
</tr>
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<td></td>
<td><a href="mailto:erin.shoesmith@addleshawgoddard.com">erin.shoesmith@addleshawgoddard.com</a></td>
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Introduction and legal system

Judiciary

The Finnish legal system originated before Swedish rule and is based on statutory law which is supplemented by case law.

The Finnish judiciary consists of two systems, regular courts and administrative courts, these are headed by the Supreme Court and the Supreme Administrative Court respectively. Regular courts deal with civil suits and criminal cases, while administrative courts regulate the actions of the administration and handle litigation between individuals and the administration. Like other Nordic countries, there is no constitutional court. The constitutionality of a law can be contested when applied to an individual court case. Finland has also established specialised sector courts, such as the Market Court and Labour Court. The Chancellor of Justice and the Parliamentary Ombudsman are responsible for overseeing the justice system.

Government and EU Status

Finland is a democratic republic with a multi-party system of parliamentary representation. Legislative power is vested in the Parliament of Finland and the government has limited rights to amend or extend legislation. Executive power is exercised by the government, of which the Prime Minister is the head. The President of Finland is the head of state, leading foreign policy in co-operation with the government and is also the Commander-in-chief of the Finnish Defence Forces. The President has the power of veto over parliamentary decisions, although, the veto can be overturned by parliament.

EU law is an integral part of the Finnish legal system and Finland is the only Nordic country to have joined the Eurozone. Finland has also acceded to several international treaties and conventions, including the UN Convention on the International Sale of Goods.

Economy

Finland has a highly industrialised free-market economy with a per-capita output equal to other western economies such as the UK, Germany, France and Sweden. Finland has integrated into the global economy and international trade constitutes a third of the gross national product (GDP). Finland also has sophisticated financial markets.

Notable companies include Nokia; Stora Enso and UPM-Kymmene, the largest and third-largest paper manufacturers in the world; Neste Oil, an oil refining and marketing company; and KONE, a manufacturer of elevators and escalators.

Foreign investment policy

Finland has a strategic location between the markets of East and West. Although foreign investment is not especially high in Finland, around seventy to eighty per cent of the equity quoted on the Helsinki Stock Exchange is owned by foreign registered entities. Generally, the ownership of companies is quite concentrated because (as with elsewhere in Western Europe) the environment is less favourable to small companies and small shareholders than in the US and the UK. However, several key politicians from all sides of the political spectrum have begun advocating for improvements to the business environment, especially for start-ups.

The Ministry for Foreign Affairs of Finland (Foreign Service) endeavours to market Finland as an attractive target for foreign direct investment and to increase the flow of foreign capital and direct investments. The Foreign Service supports the activities of Invest in Finland, which is the government agency that promotes foreign investments in Finland and assists international companies in finding business opportunities, as well as providing all relevant information and guidance required to establish a business in Finland. This and other programs promote and attract foreign direct investment in Finland.

There are several types of financial incentives available to encourage Finnish and foreign-owned companies to commence or develop business in Finland. Such incentives include grants, loans, credit guarantees, etc.

Types of business vehicles

Foreign companies most commonly conduct business in Finland through limited liability companies. These are divided into ‘private’ and ‘public’ limited liability companies. Foreign companies may also conduct business in Finland through a Finnish branch office. It is possible, but rare, for foreign companies to conduct business in Finland through general or limited partnerships or co-operatives.
An operating licence is not usually required for conducting business in Finland. Exceptions apply to areas such as insurance, banking and financial services.

**Limited liability company**

The limited liability company (Osakeyhtiö, abbreviated Oy) is the most commonly used company form for subsidiaries of foreign companies. A private limited liability company is established by one or more persons (individuals or legal entities). The minimum share capital of a private limited liability company is €2,500. The shares of a private limited liability company may not be subject to public trade, but can be transferred between different parties. Only certain limitations to the transferability of shares are permitted. A public limited liability company (Julkinen osakeyhtiö, abbreviated Oyj) is set up by at least one natural person or legal entity, which must provide a minimum share capital of €80,000. Besides the amount of share capital, the main difference between private and public limited liability companies resides in the shares' negotiability. Only a public limited liability company may offer its shares for public trading. The shareholders of a private or a public limited liability company bear no personal liability for the company's debts and obligations.

No limitation for maximum share capital exists.

**Registration formalities**

The formal incorporation of a limited liability company occurs through registration. A company must be registered at the Finnish Trade Register of the Finnish Patent and Registration Office within three months of signing the memorandum of association. The share capital must be paid in full before registration of the company. The original memorandum of association and a copy of the articles of association must be attached to the registration notice. The company may start its business activities prior to completion of the registration but persons acting on behalf of the company will be held liable for their actions until the company is registered. The registration process of a limited liability company generally takes from two to four weeks.

**Issuing shares against non-cash consideration**

Shares can be issued and the subscription price of shares can be paid in full, or in part, against non-cash consideration. At the time of conveyance the assets will have a financial value to the company which is at least equal to the subscription price. A statement from an independent auditor is required for the valuation of such considerations in kind. Only assets can be used as a consideration in kind; an undertaking to perform work or services cannot be used as a consideration in kind.

**Restrictions on the rights that can attach to shares**

All shares carry equal rights in the company unless otherwise provided in the company’s articles of association. Different classes of shares, e.g. preference shares and non-voting shares are possible.

**Restrictions on foreign shareholders**

There are no restrictions regarding the place of residence or domicile for the owners of the shares in a limited liability company.

**Management structure and foreign directors**

The management of a limited liability company is the responsibility of the company’s board of directors, which is entitled to represent and sign on behalf of the company. Unless the company’s articles of association stipulate otherwise, the board must consist of one to five ordinary members. If the board consists of less than three ordinary members, at least one deputy member must be elected. All board members must be natural persons. The board is responsible for the management and proper arrangement of a company’s operations.

At least one member and one deputy member of the board of directors must have his or her place of residence in the European Economic Area (EEA), unless the Finnish Patent and Registration Office grants an exemption.

The company may have a managing director. The managing director is responsible for the day-to-day management of the company in accordance with the instructions and orders given by the board. The managing director must be a natural person and have his/her place of residence in the EEA, unless the Finnish Patent and Registration Office grants an exemption.
The company may also have a supervisory board. A stipulation concerning the existence of a supervisory board must be included in the company’s articles of association. The supervisory board shall consist of a minimum of three members. Its duties include supervising the board of directors and the managing director. The articles of association may stipulate that the supervisory board will elect the members of the board of directors. Supervisory boards are common in Finnish companies.

**Directors’ liability**

The board of directors and the managing director have a duty to act with due care, in the best interests of the company and in accordance with both the articles of association and the Finnish Companies Act. In principle, a member of the board or a managing director is not liable for the acts or omissions of the company; for example, they are not liable for the company’s debt. Such liability can only be formed by a specific provision or through a separate agreement. However, the Finnish Companies Act contains certain provisions that may lead to the liability of a member of the board or a managing director towards the company, its shareholders or third parties. A board member and a managing director are liable to compensate any loss that he/she has deliberately or negligently caused to the company by violating their duty of care, the provisions of the Finnish Companies Act, or the articles of association of the company. Furthermore, they may also become liable to a shareholder or a third party by violating the provisions of the Finnish Companies Act or the articles of association of the company. Directors can incur criminal liability for breaches of the Finnish Companies Act, the Securities Markets Act or other legislation.

**Parent company liability**

Shareholders or a parent company are not generally liable for the debt of a company/subsidiary unless guarantees have been given for such liabilities. Shareholder liability is limited to paid share capital.

A shareholder (i.e. a parent company) will be liable for damages for any loss that he/ she has deliberately or negligently caused to the company, another shareholder or a third party by contributing to a violation of the Finnish Companies Act or the articles of association of the company.

**Reporting requirements and costs of compliance**

All limited liability companies must file a copy of their audited annual accounts with the Finnish Trade Register without delay.

Any changes regarding the company’s members or deputy members of the board of directors; managing director; auditor(s); articles of association; share capital or number of shares must be registered with the Finnish Trade Register.

Some smaller companies may choose not to appoint an auditor, provided that the articles of association do not require the appointment of an auditor and no more than one of the following criteria is met for the financial year ended and the two preceding financial years: (i) their balance sheet total exceeds €100,000; (ii) their turnover exceeds €200,000; or (iii) they employ more than three persons on average.

**Details for opening a branch office**

The branch office of a foreign entrepreneur refers to the part of a foreign corporation or foundation that engages in continuous business or trade activities in Finland from a permanent establishment in Finland in the name of the foreign corporation or foundation.

If the corporation or foundation is from outside the EEA, it must apply for an exemption permit from the Finnish Patent and Registration Office to establish the branch.

The branch must submit a basic start-up notice to the Trade Register maintained by the Finnish Patent and Registration Office.

A branch is not a separate legal entity. Auditors are elected in accordance with the type of office of the foreign entrepreneur and the appropriate regulations. The Auditing Act contains an obligation to audit the accounts. In practice, the auditors of a branch are usually elected by the entrepreneur's representatives in Finland.

The branch of a foreign entrepreneur must have a representative domiciled in Finland. The representative cannot be a legally incompetent or bankrupt person. The representative must be submitted for registration in the Trade Register maintained by the Finnish Patent and Registration Office.
Listing on local stock exchange

As an EU Member State, public offerings in Finland are regulated by the EU Prospectus Directive and Prospectus Regulation, complemented by the relevant provisions of the Finnish Securities Markets Act, the Rules of the Helsinki Stock Exchange and the orders and instructions of the Finnish Financial Supervisory Authority, among others.

In accordance with the Finnish Limited Liability Companies Act, only shares of a public company can be admitted to public trading on a stock exchange. Furthermore, shares of a listed company must be entered as book-entries into the book-entry system maintained by Euroclear Finland Oy, which is the Finnish central securities depository.

There are various listing requirements, which concern the legal form of the company, the company’s operating history within the business area and sufficient working capital. Furthermore, the shares must be freely transferable, must fulfil the criteria of sufficient price formation, and their market value must be at least €1 million.

The listing company must prepare a detailed listing application appended with various corporate documents, consents and authorisations; pay a registration fee; prepare a comprehensive listing prospectus in compliance with the said EU legislation and submit it to the Finnish Financial Supervisory Authority for approval. The listing decision is made by the Listing Committee operating under the Helsinki Stock Exchange based on the listing application.

On the Helsinki Stock Exchange, which is a part of the NASDAQ OMX Group, the companies may choose to have their primary listing on either the main market or the growth market, First North – an alternative market place designed for smaller growth companies. First North applies less extensive reporting requirements and provides a starting place for companies to work towards listing on the main market.

Issues relating to upstream guarantees

The granting of guarantees in favour of group companies is governed by the general principles of the Finnish Companies Act. There are no express provisions, apart from an obligation for company to include information on loans, liabilities and commitments to group companies in its annual report. The relevant principles governing the granting of guarantees in favour of group companies focus on the fundamental purpose of a company (being to generate profits for its shareholders), the equal treatment of the shareholders and the management’s duty of care towards the interests of a company. The principles are applied with regard to an individual limited liability company. The interests of the parent company or other group companies do not affect the assessment (however, this approach can be criticised as in many cases subsidiaries do not, in practice, operate independently from their parent company). Consequently, inner circle transactions may not be motivated by the interests of the group. It is essential that the decision concerning the transaction is based on sound business reasons, i.e. corporate benefit.

In financing transactions it is common (especially in leveraged buy-outs) that Finnish companies grant upstream and cross-stream guarantees for the debt of their parent companies and sister companies. However, pursuant to the provisions of the Finnish Companies Act, the company in question must derive sufficient corporate benefit from such arrangements, otherwise the granting of the guarantee may be considered as an unlawful distribution of assets. Under Finnish law, the existence of corporate benefit is, ultimately, a question of fact, and it is the board of directors’ duty to assess whether there is sufficient corporate benefit before the company enters into such arrangements. Further, a Finnish company may not grant funds, loans, security or guarantees for the purposes of facilitating the acquisition of its own shares or shares in its (Finnish) parent company by a third party. A guarantee granted in breach of the above rules shall constitute prohibited financial assistance.

Laws relating to the charging of assets

In Finland you may take out a security not only over individual assets but also over the movable business assets of a security provider. This form of security is called a ‘business mortgage’ or ‘enterprise mortgage’ and is regulated by the Finnish Act on Business Mortgage and the Finnish Decree of Business Mortgage. The security position of the holder of a Finnish business mortgage is rather weak, as it ranks second to any security lawfully created over individual assets in the form of a pledge or (if such assets are capable of being mortgaged under other specific legislation) mortgage.

All assets that can be separately mortgaged fall outside the scope of a business mortgage. Such assets include real estate (freehold and registered leasehold), ships, aircrafts and, if actually mortgaged separately, certain types of motor vehicles. A business mortgage covers receivables, securities, trademarks and patents but the Act allows them to be separately pledged in spite of the business mortgage. Therefore, if receivables and securities are separately pledged (whether before or after registration of the business mortgage), or if trademarks and patents are separately pledged (before the registration of the
business mortgage), they fall outside the scope of the business mortgage. In insolvency proceedings, only half of the proceeds of a disposal of assets, falling within the scope of the business mortgage, is allocated to, and shared with, priority by the holders of pledged business mortgage notes, the balance being shared by all creditors pro rata in relation to each creditor’s claim.

**Employment**

**Employee relations**

Employee relations is stable in Finland and is quite favourable to foreign investors. The collective bargaining agreements concluded under the provisions of the Finnish Collective Agreements Act (436/1946, as amended) play a central role in maintaining industrial peace in Finland. These agreements on the terms and conditions of employment are binding on the signatory parties (the employers and associations that have signed them). In addition to this, most collective bargaining agreements have been declared as generally binding. This means that, if the branch where the work is done belongs in the scope of application of the generally binding collective bargaining agreement, the terms and conditions of employment are binding even though the employer has not signed the collective bargaining agreement and the employee is not a member of any employee association. Thus, approximately 70% of private sector employees are within the scope of collective agreements.

The signatory parties and their affiliated associates (members of the signatory parties) shall not undertake any industrial action while the collective agreement is in force. These associates must also ensure that their members (i.e. employees) do not undertake industrial actions. The most common industrial actions are strikes, work-to-rule and boycotts (used by employees), and lock-outs (by employers).

Industrial actions mainly occur while negotiations for new collective agreements are going on. Employees use industrial actions to pressure employers to include certain kinds of provisions in the new collective agreement. Unlawful industrial actions on the part of employees are not unheard of and usually occur when an employer announces redundancies.

**Main laws and regulations**

In Finland, employment relationships are regulated by several laws. The main laws regulating employment relationships are the Employment Contracts Act (55/2001, as amended) (ECA); the Working Hours Act (605/1996, as amended); and the Annual Holidays Act (162/2005, as amended).

In addition, there are many other relevant employment-related laws, such as the Act on Co-operation within Undertakings (334/2007, as amended); the Occupational Safety and Health Act (738/2002, as amended); the Collective Agreements Act (436/1946, as amended); the Posted Workers Act (1146/1999, as amended); the Non-discrimination Act (1325/2014, as amended); and the Act on Equality between Women and Men (609/1986, as amended).

In addition to the above, collective bargaining agreements also have an essential role in employment relationships in many branches.

**Establishment of employment**

In Finland, it is not mandatory to have a written employment contract. An employment contract may be concluded through an oral or silent agreement. It is also possible to conclude the contract electronically. However, it is highly recommended to have an employment contract in writing.

If the employment contract is not written, the employer must present the employee (whose employment relationship is valid until further notice or for a fixed term exceeding one month) with written information on the principal terms of work. The employer must fulfil this obligation by the end of the first pay period (at the latest). This obligation is intended to increase transparency in relation to working conditions. The employer has fulfilled its obligation mentioned above if the terms are laid down in a written employment contract.

There are no actual formal requirements, even for fixed-term employment contracts. In practice, however, approximately 90% of employment contracts in Finland are written. This makes it easier to prove the agreed provisions of the contract.

Collective bargaining agreements are also likely to govern the employment relationship. For instance, the employee may be entitled to certain benefits based on a collective bargaining agreement.
Employee representation and negotiation

Pursuant to the Finnish Act on Co-operation within Undertakings (334/2007, as amended) (COA), the employer has to negotiate with employees or their representatives before making certain decisions that may affect personnel. The employer must observe this procedure if the undertaking regularly employs at least 20 employees in Finland. In co-operation negotiations, personnel are usually represented by shop stewards.

According to the COA, general personnel planning and principles of personnel management must be discussed in a co-operation procedure. The employer also has to comply with the co-operation procedure when changing the way in which business is conducted. The scope of the procedure depends on the subject matter concerned. Chapter 8 of the COA contains the most extensive co-operation procedure, which has to be complied with before making any decisions on redundancies or lay-offs, or changing an employment contract into a part-time contract on collective grounds. The employer has to provide a written proposal for negotiations at least five days before beginning the negotiations. The COA sets forth the provisions regarding the precise procedure and the timeline for the negotiations. The COA does not require that the parties agree on the planned measures. The employer only has the obligation to negotiate with the employees or their representatives. During the negotiations, the employer has to provide the grounds for, the effects of and the alternatives to the planned measures. After the negotiations are properly carried out, the employer may decide on the measures unilaterally.

The provisions of the Finnish Act on Co-operation within Finnish and Community-wide Groups of Undertakings (335/2007, as amended) concerning international co-operation within groups of companies are applied to Finnish companies and groups of companies with at least 1,000 employees in the EEA. In addition, the company or group of companies has to employ at least 150 employees in at least two different EEA countries.

The EEA comprises the EU Member States along with Norway, Iceland and Liechtenstein. The purpose of the said act is to improve the rights of employees to obtain information and to be consulted with in regard to the operation of undertaking/groups of undertakings and their future prospects, especially on decisions that affect the position of the employees and their employment within the undertaking/the groups of undertakings.

Termination of employment

An employment contract in force until further notice may be terminated either on grounds related to the employee’s person, or on financial and production-related grounds. Notwithstanding the grounds for termination, the employer may not terminate an indefinitely valid employment contract without a proper reason. This is a general provision in the ECA.

Furthermore, pursuant to the ECA, serious breaches or neglect of obligations arising from the employment contract or the law that have an essential impact on the employment relationship, as well as essential changes in the conditions necessary for working related to the employee’s person that render the employee no longer able to cope with his or her work duties, can be considered proper reasons for termination arising from the employee or related to the employee’s person.

In addition, the employer’s and the employee’s overall circumstances must be taken into account when assessing whether a reason is valid. However, the overall assessment applies only for termination on grounds related to the employee’s person. The ECA includes a list of issues that cannot under any circumstances be regarded as valid reasons for termination, such as the employee’s illness (with certain exceptions), participation in industrial action, or political opinions.

In connection with the termination of employment on individual grounds, an employee who has neglected his/her duties arising from the employment, or committed a breach thereof, may not be given notice before he/she has been warned and, thus, given the chance to amend his or her conduct. However, obligation to give notice does not have to be observed if the reason for termination is such a grave breach related to the employee as to render it unreasonable to require that the employer continue the contractual relationship. Moreover, the ECA provides that the employee has to be heard before terminating his/her contract of employment.

The ECA and collective bargaining agreements contain provisions regarding notice periods. Depending on the length of the employment, the notice period may vary between 14 days and six months. The parties to the employment relationship may also agree on the length of the notice period, provided that the notice period applicable to the employer shall not be shorter than the employee’s notice period. Generally speaking, in practice, if a notice period of longer than six months has been agreed upon, a six month notice period shall be observed instead.
Redundancy and mass layoffs

Employers may also terminate employment contracts on financial and production-related grounds. The ECA provides that an employer may terminate an employment contract if the work offered has diminished substantially and permanently, for financial or production-related reasons or for reasons arising from a reorganisation of the employer’s operations.

However, there are no grounds for termination if, either before termination or thereafter, the employer has employed a new employee for similar duties even though the employer’s operating conditions have not changed during the equivalent period. Accordingly, if no actual reduction of work has taken place as a result of the reorganisation of work, no grounds for termination exist.

It should also be taken into account that the employment contract may not be terminated if the employee can be placed in or trained for other duties, as provided in the ECA.

Furthermore, the ECA provides that, in the case of termination of employment relationship on financial or production-related grounds, the employer has a re-employment obligation to the employee for nine months after the employment relationship has ended if the employer needs to recruit employees for the same or similar duties that the former employee had been doing (provided that this former employee continues to seek work via an employment office).

In Finland, there are no specific regulations regarding mass layoffs. Pursuant to the ECA, the employer is entitled to lay off an employee if the employer has a financial or production-related reason for terminating the employment contract, as clarified above. The employer may also lay off an employee if the work or the employer’s potential for offering work have diminished temporarily and the employer cannot reasonably provide the employee with other suitable work or training corresponding to the employer’s needs. The work or the potential for offering work are considered to have diminished temporarily if they can be estimated to last a maximum of 90 days.

In addition to the aforementioned, there are specific regulations regarding termination in the case of the employer’s bankruptcy or death, as well as a restructuring procedure.

It is also worth mentioning that, if the employer regularly employs at least 20 employees in Finland, the COA shall apply. This act regulates the mandatory co-operation procedure the employer has to follow in case of redundancies and lay-offs as stated above.

Employment of foreigners

EU citizens and citizens of Liechtenstein and Switzerland can freely work in Finland if the work lasts for a maximum of three months. After three months they have to register their right to reside in Finland, but they do not need a special residence permit. Citizens of the Nordic countries have to be registered if they stay in Finland for longer than six months.

Pursuant to the Finnish Aliens Act (301/2004, as amended), foreign employees who are non-EU citizens and other equivalent persons need a residence permit for an employed person if they intend to work in Finland. In certain cases, an alien has an unlimited right to work in Finland if, for instance, he or she has been granted a permanent or continuous residence permit based on family ties. An alien who has been granted a resident permit for study purposes also has a limited right to work in Finland. Under certain regulations of the Finnish Aliens Act, an alien has the right to work without a residence permit for an employed person. These persons do still need to have a valid visa if they are otherwise required to have one.

The exact processing time for applications is difficult to estimate as the processing time varies. In clear and simple cases, the processing time is quite short. The average processing time of a resident permit for an employed person in 2014 was 41 days.

Economy and Government

Information about the current state of the economy/government influences.

Since joining the EU, Finland has enjoyed a period of sustained growth and political stability. Finland is one of the most open, competitive and successful economies in Europe.

Finland has established a reputation for innovative high-tech industries (Nokia being the flagship). The infrastructure is well-developed, and the workforce is highly educated and skilled. According to the World Economic Forum (WEF), Finland has the
best education system in the world. Foreign workers are welcomed because there are several sectors where the country is facing labour shortages, due to its aging population.

Finland has a mixed presidential/parliamentary system with executive powers divided between the President, who has primary responsibility for national security and foreign affairs, and the Prime Minister, who has primary responsibility for all other areas, including EU issues. The Government of Finland consists of the Prime Minister and a number of other ministers. The current government is led by Prime Minister Alexander Stubb (National Coalition Party) and is a majority coalition of the National Coalition Party, the Social Democratic Party, the Swedish People’s Party in Finland and the Christian Democratic Party. The government consists of 17 ministers in total.

Restrictions / regulations

Foreign investment in Finland is widely encouraged by local and central government. Thus, there are no restrictions on foreign investment. As Finland is one of the most open and competitive economies in the world, it has a great deal to offer foreign investors and much to gain from foreign direct investment.

There is no exchange control and currency regulation. Finland was part of the first wave of EU Member States to adopt the Euro on 1 January 1999. Euro banknotes and coins were introduced in Finland in January 2002.

Grants and Incentives

There is a wide range of financial incentives available for both Finnish and foreign-owned companies to establish and expand their business in Finland. These incentives are given in the form of investment grants, loans at reduced interest, or state guarantees for exporters. Occasionally, benefits are granted in the form of a combination of an investment grant and low-interest loans, depending on the geographical location of the investment and the size of the investing company. As far as tax incentives are concerned, the Finnish government grants tax benefits only to small and medium enterprises.

Loans and guarantees are granted through a state-owned corporation, Finnvera Oyj. These benefits include cheap finance and the provision of guarantees both for business development purposes and for the encouragement of exports.

Research and development grants are provided by Tekes, the national technology agency of Finland. The benefits are granted in the form of grants and low-interest loans to all types of companies. Tekes also provides expert services and creates networks between companies and researchers.

Taxation

The right of taxation in Finland belongs to the state, the municipalities and to the Evangelical-Lutheran Church and the Greek-Orthodox Church. Payable taxes are either direct or indirect taxes. Direct taxes include state income tax (paid by both companies and individuals), gift and inheritance tax, transfer tax, municipal tax and church tax. Indirect taxes include value-added tax, excise tax and custom duties.

Direct taxes

State income tax can be determined either as a progressive or proportional tax. A state tax on earned income (such as salaries and pension income) is levied according to a progressive tax scale. A proportional tax rate is utilised and levied in relation to the capital income of individuals and income tax of companies. In municipal taxation, income tax is levied according to a proportional tax rate. A church tax is levied based on a proportional tax rate.

Individuals, legal entities and estates of deceased persons resident in Finland are subject to unlimited income tax liability in Finland, which means that they are liable to tax in Finland on their worldwide income. Non-residents are subject to limited taxation in Finland, generally only on their Finnish-sourced income.

Indirect taxes

Value-added tax (VAT) is a general multi-stage, non-cumulative tax on consumption. VAT is a broad-based tax on most goods and services; it is levied at each stage in the production and distribution of goods and services, and the accumulation of the tax is prevented by means of a deduction system. When a person liable to tax purchases taxable goods or services, the supplying enterprise charges VAT. The person liable to tax may deduct the tax paid on purchases (input tax) from the tax charged for his taxable supplies (output tax). The difference between the output tax and the input tax is paid to the State. The final tax is borne by the consumer.
In Finland, VAT replaced Sales Tax at the beginning of June 1994. As an EU Member State, Finland has subsequently harmonised its VAT system entirely with the EU rules by amending the VAT Act. Currently, the general VAT rate is 24%.

Employee tax residency

An individual is deemed to be resident in Finland if he or she maintains his or her main abode in Finland or if he or she stays in Finland for a continuous period of more than six months. The stay in Finland may be regarded as continuous despite a temporary absence. If an individual stays in Finland for more than six months but less than a year, he/she is taxed as a resident (unlimited tax liability) during his/her stay in Finland and taxed as a non-resident (limited tax liability) for the rest of the year.

A resident national who has left the country may be deemed to be resident in Finland for tax purposes even if he/she is not physically present in Finland for a continuous period of more than six months. Usually the unlimited tax liability is abolished within three years following the move abroad. However, a Finnish national may provide evidence to the Finnish Tax Authorities that he/she has not maintained substantial ties to Finland and unlimited tax liability may be abolished from day one.

Tax and social security contributions

Tax-resident employees

Finnish resident employees are subject to income taxation in Finland on their earned income. Earned income includes salaries, wages, fringe benefits, premiums of voluntary insurance schemes taken by the employer, bonuses and options based on the employment. Income tax consists of state tax, municipal tax and church tax (if applicable). Further, employees are liable to pay the employee’s share of pension premium (5.55–7.22% in 2015), the employee’s share of unemployment insurance premium (0.65%) and the employee’s share of accident insurance premium.

Non-tax-resident employees

A foreign employee is subject to income taxation in Finland if the stay in Finland exceeds six months.

If a non-resident employee holds a certificate E101 or other certificate of a posted employee, the employee is subject to the social security system in his/her home state, and no social security contributions are due in Finland. If the employee does not hold a certificate E101 or other certificate of a posted employee, he or she will be subject to same payments as a Finnish resident employee.

Employers in relation to their employees

If a foreign company (as an employer) does not have a permanent establishment for Finnish tax purposes, it does not pay income tax in Finland. Furthermore, if the payment of wages only takes place as a direct electronic transfer of funds from a foreign bank, the company does not have to withhold any tax from the wages paid out, and it is not obliged to request registration in the Tax Administration’s employer register. If an employee of a foreign company stays in Finland for longer than six months, the company must file an employer payroll report to the Finnish tax authority. Furthermore, employers are expected to give instructions to their employees to contact the local tax office in Finland in order to impose advance taxes.

If a foreign company (as an employer) has a permanent establishment for Finnish tax purposes, it is subject to similar employer obligations as domestic companies. In such cases, Finnish employers are liable to register in the employer’s register maintained by the Finnish Tax Authorities. Further, the foreign companies are liable to withhold taxes on paid salaries. The employer pays the pension insurance company a pension insurance premium, which is over 20% of wages. The premium includes the employee’s portion, which the employer must withhold from the employer’s salary in connection with each salary payment. Foreign employers usually have the obligation to arrange pension insurance (TyEL) as prescribed in the Employees Pensions Act (395/2006) for employees working in Finland in the same way as Finnish employers. The Finnish Centre for Pensions may, on application, exempt a foreign employer from the obligation to arrange TyEL pension insurance for the employees, if certain specific conditions are met. The employer may also have to take out accident insurance, unemployment insurance and group life insurance for employees, from an appropriate insurance company. In addition to the above, a foreign company may be obliged to pay the employer’s social security contribution (työnantajan sosiaaliturvamaksu) of 2.08% in 2015. The social security contribution is paid to the Tax Administration.
Corporate tax residency

According to tax practices, a corporate entity is regarded as Finnish if it is registered (incorporated) or otherwise established under Finnish domestic law. Further, the Finnish Income Tax Act includes a list of entities that are regarded as domestic entities. A corporate entity that is registered abroad or otherwise established under foreign laws is not resident in Finland and, thus, is only subject to limited tax liability in Finland. The place of management is not relevant in determining the residence of an entity.

Taxes on resident business vehicles

Tax resident business vehicles are subject to corporate income tax (20% in 2015). The calculation of the taxable profit (loss) of a business entity is based on the profit-and-loss statement of the company. However, certain adjustments are made based on tax legislation. Generally speaking, all income is taxable and all expenses incurred in obtaining or preserving taxable income are deductible in taxation. If the net result of the business entity is negative, the verified tax loss may be carried forward and used to offset business income for ten subsequent fiscal years.

A foreign company is liable to pay income taxes in Finland in case it is deemed to have a permanent establishment in Finland. Permanent establishments are taxed similarly to the resident corporate entities. By way of exception from this rule, certain types of income received by a foreign company will always entail tax liability, even if it has no permanent establishment in Finland. Examples of such income include rental income and capital gains related to holdings of real property and buildings.

Transfer tax

Transfer tax is levied in Finland in relation to real estate transfers (4% of the sale price or other consideration) and to share transfers (1.6% of the sale price or other consideration, however, 2.0% in case of shares in a predominantly real estate company or in a company holding shares in such company). The tax base in a sale of shares also includes the target company’s debt obligations transferred in a share deal. No transfer tax is levied on the transfer of shares against cash consideration subject to trade in a regulated public exchange.

As regards real estate, transfer tax is only levied on the sale of real estate situated in Finland. With regards to shares, the main rule is that transfer tax is only levied on the sale of shares in Finnish companies, and only if the seller or the buyer, or both, are Finnish residents. However, on the transfer of shares in a Finnish holding company holding Finnish real estate investments, transfer tax is levied even if the seller and the buyer are both resident abroad. Transfer tax is also levied in the case of a transfer of shares in a foreign company, if one of the parties engaged in the transaction is a Finnish resident taxpayer or a branch of a foreign financial institution and provided that over half of the foreign company’s total assets consist of immovable property located in Finland.

Dividends paid to foreign corporate shareholders

Finnish-source dividends are subject to a withholding tax in Finland at a rate of 20% in 2015, unless they qualify for a domestic/EU exemption or an applicable tax treaty provides for a lower rate.

Dividends received from foreign companies

Dividends received by Finnish corporate entities are regarded as either wholly tax exempt or partly tax exempt, depending on the proportion of ownership and whether the company distributing dividends is a listed or a non-listed company.

Interest paid to foreign corporate shareholders

Interest paid to non-resident corporate entities is, generally, not subject to Finnish withholding tax under Finnish domestic legislation.

Intellectual property (IP) royalties paid to foreign corporate shareholders

Finnish-source royalties are subject to a withholding tax in Finland at a rate of 20% in 2015, unless they qualify for a domestic/EU exemption or an applicable tax treaty provides a lower rate.

Thin capitalisation rules

Generally, all arm’s length business related interest payments are tax deductible by Finnish companies (or permanent establishments).
However, the right of companies to make deductions from net interest expenses has been significantly restricted as of tax year 2014.

The limitations are not applied:

► to interests paid to a non-related party

► to companies whose operations are not taxed under the Business Income Tax Act (i.e. in practice e.g. real estate companies are in most cases exempted as their income is usually taxed under the Income Tax Act)

► to financial, insurance and pension institutions

► to companies whose net interest expenses (interest income deducted by interest expenses) do not exceed €500,000 during the tax year

► to companies whose equity ratio is equal to or higher than the corresponding ratio of the group consolidated balance sheet

In case of companies to whom the restrictions apply, when the net interest expenses of the company exceed the annual €500,000 threshold, the expenses are only deductible to the extent that they do not exceed 25% of an adjusted business result, calculated specifically for this purpose. Net interest expenses exceeding this amount would not be deductible. The amount of non-deductible interest is, however, restricted to the amount of interest paid to related-parties during the tax year.

Controlled foreign company legislation

Finland, like many other states, has taken special legislative action in order to avoid the loss of tax revenue due to the growing use of controlled foreign corporations. Finnish domestic tax legislation includes a special controlled foreign corporation or CFC regime, the Act on the Taxation of the Shareholders in Controlled Foreign Corporations. The Act may be applied if one or more Finnish residents control a foreign corporate entity in a low-tax state. The profits of the controlled, separately taxable, foreign corporate entity may be taxed as income of the Finnish resident shareholders or other beneficiaries.

Transfer pricing rules

Finnish domestic legislation in respect of transfer pricing is based on the so-called “arm’s length” principle. Under this principle, the Finnish Tax Authorities may adjust the income of a Finnish corporate entity if its taxable income in Finland is reduced as a result of contractual or other provisions that differ from those that would have been agreed by unrelated parties.

Finnish companies are obliged to maintain transfer pricing documentation for transactions with affiliated parties. Generally, small and medium-sized companies are exempt from the documentation liability.

Taxation on imports and exports

Generally, Finland levies import duties from products arriving from outside the EU. No export duties are levied.

Double-tax treaties

Finland has a wide network of double-tax treaties. Currently, Finland has over 70 double-tax treaties in force, and is both negotiating new treaties, and updating older treaties. The tax treaties that Finland is bound to are based on the OECD Model Tax Convention.

Dispute resolution

The Finnish court system is divided into general and specialised courts of law. The general courts are then divided into administrative courts and courts dealing with civil and criminal matters. The specialised courts are the Labour Court, which handles collective labour agreement related matters; the Insurance Court, which handles income security matters; and the Market Court, which handles matters relating to the public enforcement of competition law, public procurements, unfair marketing practices and civil IPR cases.

In commercial matters, the respondent’s domicile or primary place of business typically determines the District Court, however, parties are normally free to enter into a forum selection agreement. The Courts of Appeal preside over the first
appeal, while the Supreme Court presides over the second and final instance of appeal. Appealing to a Court of Appeal requires leave to appeal when the quantum of the dispute (i.e. the difference between the final result of the District Court’s decision and the claim presented in the appeal) is €10,000 or less. A leave of appeal is always required for the Supreme Court. Typically, it takes three to five years to go through all appeals, with longer durations to be expected for complex cases.

Proceedings include a preparatory phase, with the idea that all party submissions and supporting evidence is introduced before the main hearing. Interim relief, such as document production orders, asset freezes or prohibitive injunctions, are available (anti-suit injunctions are not). As a standard rule, witnesses are heard orally. Generally, court hearings are public and documents filed to the courts become public upon being submitted.

As a general rule, the losing party shall bear the costs of the proceedings, including the opponent’s costs of legal representation up to a reasonable amount.

Arbitration / alternative dispute resolution

Arbitration is a popular dispute resolution method in Finland, particularly in commercial cases. Construction, franchising, shareholder and distribution/agent agreements and M&A-related agreements often include arbitration clauses. Procedurally, arbitrations in Finland tend to be relatively informal and straightforward.

The Finnish Arbitration Act (967/1992) contains the principal statutory provisions applicable to arbitration proceedings, both domestic and international, taking place in Finland and provides for the recognition and enforcement of foreign arbitral awards. It is largely compatible with the UNCITRAL Model Law on International Commercial Arbitration. Finland is a signatory to the New York (no reservations), Washington and Geneva Conventions.

The Arbitration Institute of the Finland Chamber of Commerce received 80 requests for arbitration in 2013, and 63 in 2014. The institute adopted new arbitration rules, including emergency arbitrator rules, during 2013. The new arbitration rules came into force on 1 June 2013 and their provisions, with certain exceptions, apply to all arbitrations commenced on or after that date, regardless of when the arbitration agreement was concluded.

Competition

Prohibited agreements and practices

The Finnish Competition Act (948/2011) prohibits agreements and other collusive practices between undertakings that restrict competition and abuse a dominant market position. The provisions of the Finnish Competition Act have been substantially harmonised with Articles 101 and 102 of the Treaty on the Functioning of the EU. In accordance with the principle of parallel application, EU competition rules may also be applied in Finland. The main prohibitions in the Competition Act can be divided into the following:

► agreements between undertakings, decisions by associations of undertakings and concerted practices that either (as their object or effect) prevent, restrict or distort competition are prohibited and

► abuse of a dominant market position by one or more undertakings or associations of undertakings

Explicit agreement is not necessary in order to apply the prohibition of competition restricting agreements. The Competition Act also covers, among other things, the exchange of sensitive information between competing undertakings. Certain competition-restricting agreements and practices are not condemned where they generate overriding efficiency gains, i.e. benefits to consumers. These may include the improvement of production or distribution of products, or the promotion of technological or economic progress. Formal individual exemptions are no longer granted by the Finnish Competition Authority, but liability and the burden of proof for the legality of an arrangement lies exclusively with the parties.

The legal form of the infringing entity does not affect the applicability of the Competition Act, because the Competition Act applies to practically all undertakings, which includes any private, legal or public persons who are engaged in economic activity.

The definition is broad and involves practically all economic activities aimed at creating profit and which embody risk-taking to achieve this. In addition to agreements between competitors, competition restricting vertical agreements (e.g. marketing agreements between undertakings operating at different levels of production or distribution chain) fall under the prohibitions of the Competition Act.
Enforcement

The main public body responsible for the enforcement of the Competition Act is the Finnish Competition and Consumer Authority (FCCA) which investigates competition matters and proposes sanctions for infringements to the Market Court which, in turn, has the authority to impose fines. The main public enforcement instruments available to the FCCA are an order to refrain from the anti-competitive practices or a proposal to the Market Court to impose administrative fines on the infringing parties.

Private enforcement remedies available in Finland include the unenforceability of agreements and awards of damages to third parties. According to the Competition Act, private parties who have incurred damages as a result of an infringement are entitled to seek claims for damages against the infringing parties. Claims for damages are handled by the Finnish District Courts in the first instance.

Intellectual property

Finnish law provides for the same main forms of intellectual property as most other EU jurisdictions. In practice, the most important forms of IP rights are copyrights and neighbouring rights, trademarks and patents.

Finnish law also provides for utility models, design rights and a number of less commonly used IPRs, such as plant breeders’ rights. In addition to these national IPRs, all EU-level IPRs fully apply in Finland. Finland is also a party to the European Patent Convention, allowing for European patent applications to designate Finland.

In most cases, a copyright runs for 70 years after the year of the death of the author or, in the case of shared authorship, from the death of the last author. Neighbouring rights, such as performers’ and photographers’ rights (in the event the photograph is not protected by copyright proper), generally expire 50 years after the year of performance or creation. Works by foreign authors, and non-EU authors in particular, may not be protected under Finnish law if protection has expired in the country of origin.

Trademarks are valid for ten years after the application date, but may be indefinitely renewed in successive ten-year periods. Patents are valid for ten years from the date of application and are not subject to renewal. In the case of medicinal products, however, the patent holder may apply for a supplementary protection certificate (SPC).

SPCs are in force for the period between the filing of the patent application and the product being granted its first marketing authorisation, minus five years. The duration of an SPC cannot exceed five years. Properly speaking, SPCs do not extend the life of the underlying patent, but are a specific form of sui generis protection available under EU law.

Marketing agreements

Agency

The mandatory provisions of the Act on Commercial Representatives and Salesmen (417/1992) apply to agency agreements for goods, but not for services, in Finland. The main restrictions to the parties’ freedom of contract are:

► unless entered into for a fixed period, the minimum notice period of agency agreements is one month during the first year, thereafter one month is added per each year up to a maximum of six months

► the agent and the principal have a duty to disclose certain information to each other

► the agent shall always be entitled to commission on a transaction concluded during the period of validity of the agency agreement, even in certain situations where the actual transaction has not been directly concluded between the agent and the final customer

► in certain cases, the agent shall be entitled to a commission on a transaction concluded after the expiration of the agency agreement

In addition to the above, several general Finnish statutes need to be adhered to, such as the Contracts Act, the Unfair Business Practices Act and the Competition Act.
The Contracts Act imposes a general duty on the parties to be loyal and reasonable. Unreasonable agreements may be rendered more equitable by the general courts by adjusting the terms of the contract. It follows from general contractual principles that the parties may not engage in misrepresentations during the negotiations on the conclusion of the agreement.

The Unfair Business Practices Act prohibits false and misleading expressions concerning the business operations of a party which may affect the demand or supply or otherwise cause harm to business.

Finally, the Competition Act and the EU competition rules apply to marketing agreements as they would to any other type of commercial agreements, thus, price fixing, resale price maintenance, territorial restrictions and any other competition restrictions are generally prohibited.

However, in contrast to other marketing agreements, certain competition restrictions imposed on the agent in relation to the contracts concluded and/or negotiated on behalf of the principal may be permissible under the EU competition rules.

Distribution

Distribution agreements are not regulated in Finland, nor is there a requirement for formal registration in connection with distribution agreements. However, some Finnish statutes need to be adhered to. Essentially, the same principles apply in the context of distribution agreements as with agency agreements.

Franchising

Franchising agreements are not regulated in Finland, nor is there a requirement for formal registration in connection with franchising agreements. However, several Finnish statutes need to be adhered to. Again, the same principles apply to franchising agreements as they do to distribution and agency agreements. The power of the courts to adjust unfair contract terms should also be borne in mind; the courts are, in many cases, more likely to find terms unfair where one of the parties has significantly less bargaining power than the other (as is often the case in franchise agreements). In contrast to the other marketing agreements, certain IPR-related obligations in franchise agreements may be permissible under the EU competition rules. In addition, the Finnish Franchise Association has published a general Code of Ethics, which deals with the offer and sale of franchises and includes certain disclosure requirements.

E-commerce

The Finnish Consumer Protection Act (38/1978) contains most of the relevant rules for distance selling online. Pursuant to the act, a consumer must be provided with an order-confirmation containing the basic details of the order, as well as certain other information on the terms of the contract, applicable guarantees, the consumer’s right to withdraw from the purchase and so on.

A consumer has the right to withdraw from the purchase within 14 days from having received the above mentioned order confirmation or, in the case of physical goods, the receipt of the goods, whichever occurs later. The consumer’s right to withdraw, generally speaking, cannot be limited by contact, but the law does allow for certain limitations for certain products such as perishables, customised goods etc.

The consumer is, in most cases, entitled to test a product purchased online before deciding whether to withdraw from the purchase, thus, with the exception of CD or DVD discs, the seller may not require any seals or labels to be kept intact and unbroken. The general rule is that a consumer is entitled to test the product to the same extent that he or she could do with an in-store sample or display product.

At present, Finnish law also requires that the seller provide free return shipping to consumers who exercise their right to withdraw. However, this rule is expected to change in the future.

In addition to the above, the Information Society Code (917/2014) contains some rules applicable to e-commerce. The rules have an informational tone and the Act is a straightforward implementation of the EU E-Commerce Directive (2000/31/EC).

Finnish law also provides a number of mandatory rules applicable to the terms of the sales agreement itself. These rules limit, for instance, the trader’s ability to disclaim liability or to give jurisdiction over the agreement to non-Finnish courts. Many of these rules are transpositions of rules contained in EU consumer directives, but many are also local in origin.
Both online and offline traders should note that Finnish advertising law can be fairly strict in comparison with the law of other jurisdictions.

**Data protection**

The Finnish Personal Data Act (523/1999) is an implementation of the Data Protection Directive (95/46/EC), including its essential data protection principles such as those of fair and lawful processing, purpose specification, adequacy and necessity. However, while not required by the Directive, the Personal Data Act requires that any outsourcing of personal data processing activities must be notified to the Finnish Data Protection Ombudsman at latest 30 days prior to the contemplated outsourcing. This obligation applies independently to both the outsourcing data controller and the data processor as an outsourcee.

In addition to the Personal Data Act, the Finnish Information Society Code (917/2014), sets forth the rules regarding the confidentiality of electronic communications and privacy of such communications. The Code provides for a variety of telecommunications, media and privacy related regulations. The privacy specific parts mainly focus on the regulation of processing of identification data, meaning communications data which can be associated with a subscriber or user of a communications service. This data may be accessed and processed by intermediary actors (e.g. telecom operators, third party applications and services or software providers, and corporate service subscribers) under grounds specifically stipulated in the Code.

Among other grounds, the act allows corporate service subscribers (e.g. employers) to monitor the use of an individual’s (e.g. an employee) communications in order to detect, investigate and prevent misuse of a particular service (e.g. email or internet). This right to process identification data is, however, heavily restricted and requires many preliminary measures, including prior notification to the data protection ombudsman.

In addition, employers’ access to the contents of employees’ e-mails is restricted and regulated by the Act on the Protection of Privacy in Working Life (759/2004), which requires additional procedural steps to be taken before any access may be legally allowed.

**Product liability**

Product liability is regulated by the Finnish Product Liability Act (694/1990). The Act applies to compensation for injury or damage caused by a product to a person or property, where the product is meant for private use or consumption and when the product is primarily used for such purposes by the injured party. As such, damage suffered by businesses or damage to the defective product itself, for instance, fall outside the scope of the Act. Furthermore, the Act only relates to liability for damages – issues such as criminal liability fall outside its scope.

Under the Act, the manufacturer, importer or seller of a product can be held liable for injury or damage caused by the product, provided that it is determined that the product was not as safe as it should have been.

When assessing the safety of a product the time when the product was put into circulation, its foreseeable use, the marketing of the product, and instructions for use (as well as other circumstances) are taken into consideration. As such, a product free from defects may be considered unsafe on the grounds that the instructions are deemed insufficient.

If a product is deemed unsafe, the Finnish consumer safety authorities can also order the product to be withdrawn from the market or recalled. Such procedures are subject to a number of rules which, to a certain extent, depend on the nature of the product. In practice, such procedures are a more common consequence of having sold unsafe products than monetary product liability in the strict sense. The financial and public relations implications of recall procedures may, however, also be significant.

**Bribery and corporate crime**

The Finnish Criminal Code (39/1889) criminalises both the offering and accepting of bribes in business activities, perpetrators face fines or imprisonment of up to two years. In the case of an aggravated crime (the bribe is of considerable value, causes significant loss or harm, or is of significant benefit), imprisonment may extend up to four years. The offender can be a company, representative, or someone carrying out a duty on behalf of a company. The Criminal Code also criminalises offering bribes to public officials and politicians (the acceptance by a public official of a bribe is also illegal), with fines or imprisonment of up to two years and, in the case of aggravated crime, of imprisonment of up to four years.
Money laundering is criminalised in the Criminal Code, perpetrators receive fines or can face imprisonment of up to two years. For an aggravated crime (the property acquired is of considerable value or the crime has been committed in a very planned and intentional manner), imprisonment may be up to four years. Additionally, the Finnish Act on the Prevention and Detection of Money Laundering and Terrorism (503/2008) seeks to prevent money laundering by: enacting a duty for service providers (such as credit institutions) financing institutions, insurance companies, real estate agents and accountants, amongst others; identifying clients and actual beneficiaries; obtaining information regarding the purpose and nature of the business transaction in question; and reporting suspicious client activity to the Money Laundering Clearing House of Finland, a unit functioning under the Finnish National Bureau of Investigation (NBI).

This duty also concerns law firms that do transactional work or provide advice in connection to managing funds or securities, opening accounts, founding companies or planning and executing their business.

With regard to other corporate crime, the Criminal Code criminalises business offences such as bribery (as discussed above), marketing offences, unfair competition offences, business espionage, violation and misuse of business secrets and accounting offences, as well as security market offences, such as abuse of insider information.

In addition to company representatives, a company can be liable for the crimes listed and sentenced to pay a company fine varying between €850 and €850,000.

Real Estate

There are very few restrictions on a foreign incorporated company’s right to own stock in a Finnish real-estate company, or to own real property in its own right. There are two forms of real-estate companies available in Finland: ordinary real-estate companies (REC) and mutual real-estate companies (MREC). These are both private limited liability companies. A REC is a standard limited liability company, whereas an MREC is a company whereby a share entitles the shareholder to possess a specific space or area of the building or property owned by the MREC.

All transfers of freehold property must be registered with the National Land Survey of Finland (NLS). Some transfers of leasehold estates and other rights pertaining to real property must or may also be registered with the NLS.

Real-estate acquisitions in Finland are subject to transfer tax; usually the purchaser is liable for the payment of this. The amount of transfer tax levied is 4% of the acquisition price when real property or a leasehold is acquired, and 2% of the (debt-free) acquisition price when the object of the purchase is shares.

Types of Interest in Land

There are commonly two forms of interests in land: i) the freehold estate; and ii) the leasehold estate. However, commercial property is usually held through real-estate companies. Most Finnish freehold estates are absolute and in the form of a fee simple absolute. Most Finnish leasehold estates are formed for a specific time, or for the time being. Other rights pertaining to real property, like a registered right of way, may be permanent in nature.

Existing law is stated as it applies in February 2015.

Useful contacts

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<tr>
<th>USEFUL CONTACTS</th>
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## USEFUL CONTACTS

<table>
<thead>
<tr>
<th>The Finnish Bar Association</th>
<th>Finnish Venture Capital Association (FVCA)</th>
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<tbody>
<tr>
<td>P.O. Box 194</td>
<td>P.O. Box 800</td>
</tr>
<tr>
<td>Simonkatu 12 B 16, 2nd floor</td>
<td>Aleksanterinkatu 17, 6th Floor</td>
</tr>
<tr>
<td>00101 Helsinki</td>
<td>00101 Helsinki</td>
</tr>
<tr>
<td>+358 9 6866 120</td>
<td><a href="mailto:firstname.lastname@fvca.fi">firstname.lastname@fvca.fi</a></td>
</tr>
<tr>
<td><a href="mailto:info@barassociation.fi">info@barassociation.fi</a></td>
<td><a href="http://www.asianajajalitto.fi/english">http://www.asianajajalitto.fi/english</a></td>
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## Further information

### MERGERS & ACQUISITIONS

<table>
<thead>
<tr>
<th>Jan Kuhlefelt</th>
<th>+358 20 7765 338</th>
<th><a href="mailto:jan.kuhlefelt@castren.fi">jan.kuhlefelt@castren.fi</a></th>
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<tr>
<td>Partner</td>
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<tr>
<th>Jan Örndahl</th>
<th>+358 20 7765 438</th>
<th><a href="mailto:jan.orndahl@castren.fi">jan.orndahl@castren.fi</a></th>
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<td>Partner</td>
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### CAPITAL MARKETS & FINANCIAL REGULATION

<table>
<thead>
<tr>
<th>Merja Kivelä</th>
<th>+358 20 7765 405</th>
<th><a href="mailto:merja.kivela@castren.fi">merja.kivela@castren.fi</a></th>
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<tr>
<th>Janne Lauha</th>
<th>+358 20 7765 419</th>
<th><a href="mailto:janne.lauha@castren.fi">janne.lauha@castren.fi</a></th>
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### PRIVATE EQUITY & VENTURE CAPITAL

<table>
<thead>
<tr>
<th>Kimmo Rekola</th>
<th>+358 20 7765 382</th>
<th><a href="mailto:kimmo.rekola@castren.fi">kimmo.rekola@castren.fi</a></th>
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<tr>
<th>Jarno Tanhuanpää</th>
<th>+358 20 7765 441</th>
<th><a href="mailto:jarno.tanhuanpaa@castren.fi">jarno.tanhuanpaa@castren.fi</a></th>
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<td><strong>BANKING &amp; FINANCE</strong></td>
<td>Tero Tuomisto</td>
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<td>Pekka Lehtinen</td>
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<td><strong>CORPORATE ADVISORY &amp; TAX</strong></td>
<td>Sari Laaksonen</td>
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<td>Pauliina Tenhunen</td>
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<td><strong>INTELLECTUAL PROPERTY</strong></td>
<td>Arto Linnervuo</td>
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<td>Kimmo Rekola</td>
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<td><strong>LIFE SCIENCES</strong></td>
<td>Anna Kuusniemi-Laine</td>
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<td>Managing Partner</td>
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<tr>
<td><strong>TECHNOLOGY, MEDIA &amp; COMMUNICATIONS</strong></td>
<td>Arto Linnervuo</td>
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## EU & COMPETITION

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<tr>
<td>Sari Hiltunen</td>
<td>+358 20 7765 384</td>
<td><a href="mailto:sari.hiltunen@castren.fi">sari.hiltunen@castren.fi</a></td>
</tr>
<tr>
<td>Partner</td>
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<tr>
<td>Anna Kuusniemi-Laine</td>
<td>+358 20 7765 423</td>
<td><a href="mailto:anna.kuusniemi-laine@castren.fi">anna.kuusniemi-laine@castren.fi</a></td>
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<tr>
<td>Partner</td>
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<tr>
<td>Hannu Pokela</td>
<td>+358 20 7765 380</td>
<td><a href="mailto:hannu.pokela@castren.fi">hannu.pokela@castren.fi</a></td>
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## INSOLVENCY & RESTRUCTURING

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<th>Name</th>
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<tr>
<td>Pekka Jaatinen</td>
<td>+358 20 7765 401</td>
<td><a href="mailto:pekka.jaatinen@castren.fi">pekka.jaatinen@castren.fi</a></td>
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<tr>
<td>Partner</td>
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<tr>
<td>Pauliina Tenhunen</td>
<td>+358 20 7765 406</td>
<td><a href="mailto:pauliina.tenhunen@castren.fi">pauliina.tenhunen@castren.fi</a></td>
</tr>
<tr>
<td>Managing Partner</td>
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<tr>
<td>Mika Ilveskero</td>
<td>+358 20 7765 403</td>
<td><a href="mailto:mika.ilveskero@castren.fi">mika.ilveskero@castren.fi</a></td>
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## DISPUTE RESOLUTION

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<tr>
<td>Marko Hentunen</td>
<td>+358 20 7765 416</td>
<td><a href="mailto:marko.hentunen@castren.fi">marko.hentunen@castren.fi</a></td>
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<tr>
<td>Partner</td>
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<tr>
<td>Tuomas Lehtinen</td>
<td>+358 20 7765 369</td>
<td><a href="mailto:tuomas.lehtinen@castren.fi">tuomas.lehtinen@castren.fi</a></td>
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<tr>
<td>Niklas Langenskiöld</td>
<td>+358 20 7765 476</td>
<td><a href="mailto:niklas.langenskiold@castren.fi">niklas.langenskiold@castren.fi</a></td>
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## EMPLOYMENT

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<tr>
<td>Anu Waaralinna</td>
<td>+358 20 7765 372</td>
<td><a href="mailto:anu.waaralinna@castren.fi">anu.waaralinna@castren.fi</a></td>
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## REAL ESTATE & CONSTRUCTION

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<th>Name</th>
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<tr>
<td>Matias Wallgren</td>
<td>+358 20 7765 333</td>
<td><a href="mailto:matias.wallgren@castren.fi">matias.wallgren@castren.fi</a></td>
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<td><a href="mailto:mika.ilveskero@castren.fi">mika.ilveskero@castren.fi</a></td>
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<tr>
<td>Uwe Uusitalo</td>
<td>+358 20 7765 336</td>
<td><a href="mailto:uwe.uusitalo@castren.fi">uwe.uusitalo@castren.fi</a></td>
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## SHIPPING, TRANSPORT & LOGISTICS

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## INTERNATIONAL CONSTRUCTION & PROJECTS

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## SERVICES IN RUSSIA

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<tr>
<td>Heidi Paalanen-Koev</td>
<td>+358 20 7765 358</td>
<td><a href="mailto:heidi.paalanen-koev@castren.fi">heidi.paalanen-koev@castren.fi</a></td>
</tr>
<tr>
<td>Partner</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sergei Lee</td>
<td>+7 812 325 0185</td>
<td><a href="mailto:sergei.lee@castren.ru">sergei.lee@castren.ru</a></td>
</tr>
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DOING BUSINESS IN FRANCE
Introduction and legal system

Since the appointment of Emmanuel Macron as Minister of the Economy in 2014, France has launched numerous reforms to modernise its economy and simplify the French legal, financial, tax and commercial framework to emphasise its attractiveness to foreign investors. As Emmanuel Macron was elected President in May 2017, this modernisation trend should be reinforced in the coming years, in particular regarding labour law which is one of his priorities.

As a civil law country, France is subject to a detailed set of rules and regulations with a precise hierarchy of norms. At the pinnacle, the Constitution is the fundamental law of the country. International treaties and European community law evidence France's participation in international organisations and the influence of the European integration on law in France. Finally, national laws and decrees are interpreted by courts through case law.

A clear advantage of the civil law system that helps to make France an interesting place to do business is the accessibility and predictability of the set of rules, often codified and (almost) always flexible, governing contractual arrangements between corporations. An ambitious contract law reform which entered into force on 1 October 2016, has modernised the French Civil Code to make it far more accessible.

As an organ of the State, the Courts have a key role in France's economic activity. This system is composed of judicial (civil and criminal) courts on the one hand and administrative courts on the other hand.

The French Supreme Court (Conseil Constitutionnel) has exclusive jurisdiction to review the constitutionality of laws. Although sometimes criticised on the basis of the designation of its members (who are appointed by the executive and legislative branches of the government), the French Supreme Court has, in truth, shown its independence and professionalism, as a result of which criticism has generally abated. Traditionally, cases before the French Supreme Court may only be brought by the French president, the presidents of the upper and lower houses, the government or MPs prior to the enactment of laws. However, a major breakthrough was made in 2008 when individuals were entitled to challenge the constitutionality of a statute already in force on the grounds that it infringed rights and liberties guaranteed by the constitution.

The highest judicial court is the Cour de Cassation which rules on issues of law with a view to ensuring a uniform interpretation of laws within the country. Lower courts are: Cours d'Appel (courts of appeal), which have second-degree jurisdiction; Tribunaux de Grande Instance (courts of general jurisdiction); Tribunaux d'instance (courts of limited jurisdiction); and various specialised jurisdictions, such as commercial courts (Tribunaux de Commerce) and labour courts (Conseils des Prud’hommes and Tribunal des Affaires de Sécurité Sociale).

On top of the administrative legal system is the State Council (Conseil d'Etat), which also acts as adviser to the executive branch in the preparation of statutes. Lower administrative courts are the Tribunaux administratifs and Cours Administratives d'Appel (courts of appeal for administrative matters).

Doing business in France

Although not a founding father of the revolution of liberal capitalism which has been taking place for some decades and led to globalisation, France is still, undisputedly, a good place to do business.

At the crossroads of Western Europe between Benelux, Italy and the Iberian Peninsula, France benefits from a strategic geographical situation. The number and diversity of trucks driving on French roads is evidence that France is a global hub.

Ever since 1957, France and Germany have been the driving forces behind European integration; the European Parliament having its principal seat in Strasbourg. Thanks to its position as the fifth-largest economy in the world, France is a member of all the key economic organisations where international business and trade are designed: the G-20, the OECD and the World Trade Organisation.

With a population of 67 million, France is the second-largest consumer market in Europe (right after Germany). Thanks to a world class education system, the population is highly skilled, which enables a workforce with high productivity. As a result of the traditional involvement of the French State in the economy, business investors enjoy an efficient and well maintained infrastructure, network for health, transport, telecommunications and energy.

After decades of the predominance of the civil service model among students, recent polls reveal that more and more young professionals try to create their own businesses. As a first step towards economic recovery, entrepreneurship is culturally back
in France. Business incubators boom while innovative projects (concerning digital matters, renewable energy and green commerce) receive both local and national support.

This trend is made possible by the low costs and short time frame of setting up a business and the limited administrative formalities required: for the most widespread types of companies, minimum capital requirement is equal to €1; paperwork is limited to the choice of the manager and a registered seat plus written articles of association. Consequently, incorporating a company takes no more than a couple of days.

France is recognised by foreign investors as an attractive destination in Europe: approximately 45% of the equity of companies listed on the CAC 40 (the index of the 40 largest companies listed on Euronext Paris) is owned by foreign investors.

Foreign investment

Regulations and incentives are the same for all investors, regardless of their nationality (subject to a limited number of exceptions when dealing with “sensitive” areas as detailed below).

Having being confronted by the economic crisis for several years (illustrated by a relatively high level of unemployment), foreign investment in France is more than welcomed. Indeed, the French operations of foreign groups contribute significantly to the national economy with a notable impact on job creation.

According to the Banque de France, non-resident equity holdings in CAC 40 companies rose to 45% at the end of 2015, or €517 billion (compared with 41.9% at the end of 2010). Even though this share decreased compared to 2014, it is still larger than the average of these last ten years.

From a legal standpoint, there are no limits to investors, who are entitled to acquire existing companies or set up greenfield operations. No minimum investment or job creation requirements apply, except when subsidies are granted by public authorities.

Foreign investments, merger control regulations and regulated activities

A merger transaction occurs when two companies that were previously independent merge together, when they create a joint venture or when a company takes control of one or several others. The French Competition Authority “FCA” (Autorité de la Concurrence) does not issue an opinion on all mergers taking place in France. Some of them have a European dimension, in which case they must be notified to the European Commission which may, however, decide to refer them to the FCA in certain cases. Others are below the thresholds requiring notification.

The French Commercial Code sets out sales thresholds that activate the notification requirement of the operations to the FCA namely: (a) the worldwide (ex VAT) combined turnover of all the parties concerned exceeds 150 million Euros; and (b) the aggregate (ex VAT) turnovers achieved in France by at least two parties to the transaction exceeds 50 million Euros. Note that specific lower thresholds apply in the retail distribution sector.

Once the operation has been notified to the FCA, the latter proceeds to its reviewing more or less quickly depending on the nature of the transaction and the difficulties it raises. The operation is examined by the FCA in the context of an initial “Phase 1” review. The clearance process usually takes 25 working days unless the contemplated transaction is likely to adversely affect competition. In such a case, the parties can submit commitments (maximum duration of phase 1 in such cases is 55 working days). If such commitments are not considered sufficient, a second phase will be undertaken by the FCA to investigate the transaction in depth and possibly subject its clearance to the granting of undertakings from the parties (maximum duration of this phase 2 is 105 working days).

It should be noted that, after the first phase, the minister for the economy has 5 working days after the notification of the Authority’s clearance decision to ask the Authority for an in-depth examination. The Authority has a discretion as to whether to allow this request or not.
Note also that, after the second phase, within 25 working days from the notification of the decision of the Authority to the minister for the economy, the latter has the power to review the case and take the final decision on the concentration on public interest grounds.

These two powers have not been implemented so far.

Aside from merger control issues, domestic and foreign investments in certain areas, such as banking, insurance or portfolio management, may be subject to prior authorisation from relevant French authorities.

Further, acquisition of equity interests in listed companies, whether on a friendly basis or through unsolicited bids and regardless of the nationality of the purchaser, must comply with regulations on takeovers (this can include disclosures to the market for transparency purposes and, if the acquisition of an equity stake exceeds certain thresholds, the acquirer may need to launch a compulsory tender offer for the entirety of the share capital).

Restrictions on foreign investment

There are no restrictions on foreign investments in France, subject to a few exceptions for investments made in “sensitive” areas which must be authorised prior to the completion of the relevant transaction.

The regime governing foreign investment in non-sensitive sectors was simplified by a recent decree dated 10 May 2017. Prior to this decree, certain types of foreign investments had to be declared to the Treasury Department of the French Ministry of Economy. This requirement no longer exists.

Nonetheless, it should be noted that foreign investments exceeding €15 billion and resulting in the acquisition of minimum 10% of the shares or voting rights of a French company are still subject to a declaration obligation for statistical purposes.

As in many other countries, foreign investments in “sensitive” business areas are subject to the prior approval of the Ministry of the Economy, whose decision must be given within two months following receipt of the full application of the investor. Investments made without such approval are null and void. Once the authorisation is obtained, the investment must be declared in conditions set up by the French Ministry of Economy.

When they are made in “sensitive” business areas, investments are subject to governmental approval as follows: as regards investors belonging to the EU and the EEA - for the acquisition of a majority of voting rights of a company or acquisition of whole or part of a French company’s business sector; as regards, investors outside the EU and EEA - for the acquisition of a majority of voting rights of a company, the acquisition of whole or part of a French company’s business sector or for the acquisition of interests exceeding one third of voting rights of the concerned entity.

Since Decree no.2014-479 dated 14 May 2014, the business sectors requiring such an approval include gambling activities; private security services; production of goods or provision of services relating to the security of information systems; activities involving public safety or health; businesses under contract with national defense authorities; the production and trade of weapons and ammunition; activities in relation to the security of national sources of supply in water or electricity, oil or any other form or energy; activities in relation with the security or operation of transportation networks and services; and activities in relation with the security or operation of digital communication.

There are no exchange control restrictions, although certain returns have to be filed with the Banque de France for statistical purposes.

Incentives available to investors

Within the legal framework laid down by EU law in respect of state aid, the French government has made a wide range of support schemes available, designed to stimulate investment. The eligibility and form of incentives depends upon the nature of the investment (such as research and development, innovation, creation of jobs), its location (such as in priority development zones or regional aid zones) and the size of the companies concerned (such as small and medium-size business).

Incentives are granted either at a national level or by local authorities (communes, départements, régions) or public entities such as the “chambres de commerce et d’industrie” which operate at the regional level. They take the form of subsidies, tax relief or tax credit or a combination of both.
Support can be received for investment and job creation within regional aid zones through grants for industry and services (primes d’aménagement du territoire) or for the hiring of certain minorities of the population (disabled, young people etc.).

In the field of innovation, research and development on which a strong emphasis is placed by French economic policy, support is mainly provided via the research tax credit calculated on a percentage of total R&D costs incurred, which is one of the most favourable within Europe. Specific grants or interest-free loans can also be obtained from public institutions. It should also be noted that the French regulator established in 2014 a new mechanism called “partenariats d’innovation” concerning research and development contracts concluded between public and private entities. This regime aims at fostering research and development in France by reducing the level of risk taking that private operators faced under the old regime. Indeed, the latter forced public entities to resort to a competition procedure at the end of the R&D phase in order to acquire the products or services that resulted from it. With the “partenariats d’innovation”, the risk taking is limited to the achievement of the goals defined and negotiated with the public entity at the moment of the competition procedure.

Incentives for environmental investments are also being developed. For instance, the ADEME (“Agence de l’environnement et de la maîtrise de l’énergie”) offers financial aids for investment projects in energy efficiency, renewable energies or waste recycling.

In a video of 10 February 2017, soon to be elected President Emmanuel Macron called American researchers, entrepreneurs and engineers working on climate change and environmental issues to come and develop their ideas and projects in France (http://www.evem.fr/emmanuel-macron-invite-chercheurs-americains-en-france). During his campaign, he also promised 15 billion euros of public investment to accelerate the energy transition.

State support and incentives are the same for all investors, regardless of their nationality. Various governmental bodies such the “Invest in France Agency” (Agence Française pour l’Investissement) promote foreign investment and advise investors in order to identify the most appropriate support available.

Types of business vehicles

There are several choices when establishing a business in France. A foreign investor planning to do business in France needs to choose between opening a branch or a representative office, or incorporating a legal entity.

Registration formalities

Several formalities are required in order to create a French company. Creating a company firstly requires the signature of the articles of association, which determine the company’s characteristics and functioning rules. Then, a company’s incorporation requires the publication of a notice containing its main characteristics in a legal publication.

In France, the procedure to establish a company is fast and simple in as much as the entire process is managed by a single organisation: the Centre of Business Formalities (CFE- Centre de Formalités des Entreprises). All the formalities in order to create a company can be performed at the nearest CFE, which handle all administrative details in one place (documents regarding the company’s creation, modification or termination) and deliver them to the relevant authorities (Commercial Court Clerk’s Office, the National Institute of Economic Statistics and Studies – INSEE, fiscal and social securities administrations).

A company only becomes a legal entity once it is registered with the Trade Registry (Registre du Commerce et des Sociétés or RCS). It is highly recommended to register the company as soon as the articles of association are signed and the publication of a notice in a legal publication is done. It only takes a few days to register a company.

Main forms of French companies

French corporate law provides for numerous forms of business vehicles. However, the most common forms of entities are the following:

► The société à responsabilité limitée – SARL (limited liability company)

► The société par actions simplifiées – SAS (simplified joint stock company), which is very flexible and allow statutory arrangements. It can be set up by a sole shareholder (SAS unipersonnelle – SASU)
The société anonyme – SA (joint stock company), which is the most sophisticated type of French company and is able to be listed on regulated markets and to launch a public offering.

Other options may be considered, such as general partnerships (sociétés en nom collectif – SNC), non-trading partnerships (société civile), partnership limited by shares (société en commandite par actions – SCA) and economic interest groupings (groupement d'intérêt économique – GIE). However, they are less common as they require a higher level of partner liability in case of financial difficulties.

Another form, the société européenne – SE (European company) – may be very interesting for a group operating in at least two countries in the European Union. Member states have to treat a SE as if it were a national joint stock company. The SE benefits from EU-wide rules relating to share capital, internal regulation, accounts, and worker participation. Yet, it is not widely used.

**Comparative chart**

<table>
<thead>
<tr>
<th>Key advantages</th>
<th>SARL</th>
<th>SAS</th>
<th>SA</th>
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</thead>
<tbody>
<tr>
<td>It is easy to set up and run.</td>
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<tr>
<td>The legislative framework of the SARL (compared to the flexibility of the SAS) ensures more safety (especially for minority shareholders).</td>
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<tr>
<td>It may have a sole shareholder (SARL unipersonnelle) and capital is freely fixed by the by-laws.</td>
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<tr>
<td>It is commonly used by small to medium size companies.</td>
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<thead>
<tr>
<th>Management</th>
<th>SARL</th>
<th>SAS</th>
<th>SA</th>
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<tbody>
<tr>
<td>It may have one or several managers (gérants), chosen among the partners or a third party. It has to be a natural person (it cannot be a corporate entity). They are appointed for the duration of the company unless otherwise stipulated in the articles of association or in the decisions of appointment.</td>
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<tr>
<td>This is defined in the articles of association. It has to have at least one Chairman (which can be an individual or corporate entity). It may have a board with other members (for example executive committee, board of directors, supervisory board, etc.) whose organisation is freely determined. In addition to the Chairman, the company may also be represented and managed by one or several persons empowered by the articles of association. General Manager (&quot;Directeur General&quot;) and</td>
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<tr>
<td>A choice has to be made between a one tier system, or a two tier system.</td>
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<tr>
<td>A one tier system is managed by a Board of Directors (Conseil d’administration) that can comprise 3 to 18 directors. There are two available types of management:</td>
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<tr>
<td>► with a President Directeur General, which means that the General Manager also chairs the Board of Directors;</td>
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<tr>
<td>► with a General Manager who does not chair the</td>
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</tbody>
</table>
## Deputy General Managers

Deputy General Managers ("Directeur General Délégué"), if such appointments are stipulated in the articles of association.

## Board

Board (the Board being chaired by a Président du Conseil d’administration).

In a two tier system, there is:

- a Management Board (Directoire) comprising between 2 to 5 members; and
- a Supervisory Board (Conseil de Surveillance) made of 3 to 18 members.

### Appointment and dismissal of directors

**SARL**

Decision of partners representing more than half the company shares (unless the articles of association provide for a larger majority).

Compensation for dismissals without due cause.

**SAS**

Defined by choice in the articles of association. The term of office is stipulated in the articles of association or in the decisions of appointment.

- For a member of the Board of Directors: by a shareholder’s decision.
- For a member of the Management Board: by a shareholder’s decision and, if provided for in the articles of association, by the Supervisory Board;
- For a member of the Supervisory Board: by a shareholder’s decision.

**SA**

### Number of shareholders

**SARL**

From 1 to 100.

**SAS**

At least one (individual or corporate entity).

**SA**

At least 2 shareholders, except in a specific case: at least 7 shareholders for listed companies. There is no upper limit.

### Minimum share capital

**SARL**

There is no minimum, but the capital has to be sufficient regarding the level of investment. The capital is freely fixed by the articles of association.

A SARL may have a variable capital.

**SAS**

There is no minimum. The capital is defined in the articles of association.

A SAS may have a variable capital.

**SA**

A minimum of at least 37,000 euros is required. A SA may have a variable capital only for cooperatives and SICAV (open-ended collective investment scheme).

### Nature of contributions

**SARL**

It may be in cash or in kind. It may also be an individual’s know-how (apport en industrie), such as provisions of services, labour, or technical knowledge, but in this case, the know-how

**SAS**

It may be in cash, in kind or of an individual’s know-how. The same rule for individual know-how applies here.

**SA**

It may be in cash or in kind. Individual’s know-how is possible, however does not give right to allocation of capital shares.
<table>
<thead>
<tr>
<th>SARL</th>
<th>SAS</th>
<th>SA</th>
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<tbody>
<tr>
<td>does not give access to voting rights.</td>
<td>It cannot undertake a public offering or be listed on a regulated stock exchange.</td>
<td>Stock exchange listing is possible and public offerings are permitted.</td>
</tr>
</tbody>
</table>

**Corporate finance**

A SARL cannot undertake a public offering or be listed on a regulated stock exchange.

**Shareholder(s) decisions**

Collective decisions are, in general, taken in assembly.

An ordinary shareholders’ meeting is required for approval of annual accounts, for appointment/replacement of the gérant and the auditor, for the approval of allocation of profits/losses.

An extraordinary shareholders’ meeting is required in order to change the by-laws.

Shareholders’ decisions are required, amongst others, for approval of annual accounts, appointment of auditors, mergers or spin off, dissolution or conversion into another corporate form.

The articles of association may provide that other decisions have to be taken by shareholders.

An extraordinary meeting is required for any change in the article of associations.

Ordinary meetings are in charge of the approval of annual accounts and of other decisions, as provided by the law and the articles of association.

**Quorum and majority requirements**

For ordinary meetings, a simple majority in capital or as provided in the articles of association.

For decisions modifying the articles of association (extraordinary decisions):

- Quorum of ¼ of the shares upon first convening;
- Majority of 2/3 of the shares (or as provided by the articles being specified that they cannot impose unanimity) for all SARL established after 2005 (3/4 before 2005).

However, unanimity is legally required for:

- Changing a company’s nationality;
- Conversion into a SAS or a société en nom collectif;

Majority and quorum are determined by the articles of association.

Some decisions require unanimity, such as for temporary restrictions on the transfer of shares or for approval process regarding the transfer if shares or.

Some decisions, such as the extension of the company’s duration, or a modification of the articles of association, may require unanimity if not otherwise provided for in the articles.

Some other decisions require unanimity in accordance with specific legal provisions (amendment of the articles of association on non-transferability of shares, prior approval for shares transfer, exclusion of

Ordinary meetings:

- Quorum of 1/5 of the shares upon first convening;
- Simple majority of the shares.

Extraordinary meetings:

- Quorum of ¼ of the shares upon first convening;
- Majority of 2/3 of the shares.

Unanimity is required for:

- The conversion into a SAS or a société en nom collectif;
- Any increase in the shareholders’ financial undertakings.
<table>
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<tr>
<th>SARL</th>
<th>SAS</th>
<th>SA</th>
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</thead>
<tbody>
<tr>
<td>▶ Any increase in the shareholders’ financial undertakings.</td>
<td>shareholders, change of control of a shareholder, change of nationality of the company) and for any increase in the shareholders' financial undertakings.</td>
<td></td>
</tr>
<tr>
<td>Blocking minority</td>
<td>“50% + 1” for ordinary meetings and “1/3 + 1” for extraordinary meetings.</td>
<td>According to the articles of association.</td>
</tr>
<tr>
<td>Transfer of shares</td>
<td>Transfers of shares are subject to a 3% filing fee. Transfer of shares between shareholders is free, except if provided otherwise in the articles of association. Transfer to a third party is legally subject to the consent of ½ of the shareholders representing ½ of the capital. The articles can provide for a greater majority vote.</td>
<td>Transfers of shares are subject to a 0.1% filing fee with exception for companies within the same fiscal unity or same group (controlling or controlled companies). According to the articles of association, which can impose a period of non-transferability of the shares, preemption rights, prior approval for transfer, etc.</td>
</tr>
<tr>
<td>Auditors</td>
<td>External auditor required if a company exceeds 2 of the following 3 thresholds: (i) total balance sheet over €1.55 million, (ii) pre-tax turnover over €3.1 million, (iii) more than 50 employees.</td>
<td>External auditor required: ▶ for a company controlling or controlled by another company; or ▶ if a company exceeds 2 of the following 3 thresholds: (i) total balance sheet over €1 million, (ii) pre-tax turnover over €2 million, (iii) more than 20 employees.</td>
</tr>
</tbody>
</table>

**Restriction on the rights attached to shares**

Voting is a fundamental shareholders’ prerogative according to which every shareholder has the right to take part in collective decisions. In most cases, the principle of “one share one vote” applies: for each share corresponds one voting right.

Articles of association of the SA and the SAS can provide for other types of voting rights such as shares with double voting rights or preference shares. Articles of association can also provide for limitations on the voting rights of certain categories of shares but they must comply with legal requirements.
Restrictions applying to foreign citizens

Since Law no. 2014-1 dated 2 January 2014, an administrative authorisation is not needed any more to become a manager of a French company operating in France.

If the manager is not on French territory there are no formalities. If he/she is staying in France, a valid visa (titre de séjour) authorising all commercial activities, including the appointment as corporate officer in a commercial company, is required.

This restriction does not apply to citizens of a country in the European Economic Area (EEA) or to citizens of the Swiss Confederation, or to citizens of Monaco:

Reporting requirements

At the end of each accounting year, an ordinary shareholders’ meeting must be held to approve the audited accounts.

Each year, SA, SCA, SAS and SARL must also file the following documents with the Trade Registry (RCS): annual financial statements, an annual report (for listed companies), a financial auditor’s report (when there is an auditor) and consolidated accounts (when they are mandatory).

Any amendment of the articles of association has to be published in a legal newspaper and filed with the Trade Registry.

Opening a branch or a representative office

Instead of incorporating a legal entity, foreign companies can do business in France by setting up a branch or a representative office.

Branch

A branch (succursale) does not have a legal personality. The setting up of a branch involves fewer formalities but it is not an independent entity. As such, it presents certain disadvantages, mainly because, in the case of financial difficulties, the foreign entity becomes liable for all branch debts.

A branch’s activities must not take place in the same premises as the head office. The branch and its head office must be geographically separated.

The branch’s manager is authorised to represent the company with respect to third parties. The branch’s manager enjoys an important delegation of powers but he must act under the direction of the head office.

In France, a branch must be registered. A foreign company establishing a branch in France must:

► present a certificate of location
► file a copy of the articles of association, translated in French and
► fulfil all the mandatory formalities (administrative, tax, employment)

Representative office

A representative office (bureau de représentation or bureau de liaison), which cannot undertake commercial activities, can be used in order to carry out preliminary operations such as establishing contacts, collecting data, advertising, etc.

It does not have legal personality. It is not considered a permanent establishment for tax purposes. Registration is not mandatory for representative office.
## Capital Markets

### Listing on a French stock exchange

In France, companies can be listed:

- On the regulated market “NYSE Euronext”, which is mainly used by large companies
- On the organised market “NYSE Euronext Growth” for small and mid-sized companies (formerly Alternext)
- On the “NYSE Euronext Access” for small companies (formerly marché libre) and
- On the “NYSE Euronext Access+” for both start-ups and SMAs.

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<thead>
<tr>
<th></th>
<th>NYSE EURONEXT</th>
<th>NYSE EURONEXT GROWTH</th>
<th>NYSE EURONEXT ACCESS</th>
<th>NYSE EURONEXT ACCESS+</th>
</tr>
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<tbody>
<tr>
<td><strong>Minimum distribution</strong></td>
<td>Minimum of 25% of share capital. However this ratio can be between 25% and 5% if Euronext deems the share is liquid enough.</td>
<td>2.5 million euros (public offer).</td>
<td>Free.</td>
<td>1 million euros (public offer).</td>
</tr>
<tr>
<td><strong>Financial statements</strong></td>
<td>Certified financial statements for the last 3 years.</td>
<td>2 years financial statements (with the last year certified).</td>
<td>It is recommended to have 2 years annual accounts.</td>
<td>2 years financial statements (with the last year certified).</td>
</tr>
<tr>
<td><strong>Accounting standards</strong></td>
<td>IFRS mandatory.</td>
<td>Domestic or IFRS.</td>
<td>Domestic or IFRS.</td>
<td>Domestic or IFRS.</td>
</tr>
<tr>
<td><strong>Documents to be provided</strong></td>
<td>Prospectus approved by the AMF.</td>
<td>Prospectus approved by the AMF. Issuers of securities may be exempted of prospectus’ publication if the criteria provided in the Article 3 (2) of the Directive 2010/73/UE are met.</td>
<td>Prospectus mandatory in case of public placement.</td>
<td>Commitment to regularly communicate towards the market.</td>
</tr>
<tr>
<td><strong>Declaration of breaches of threshold</strong></td>
<td>5%, 10%, 15%, 20%, 25%, 30%, 33.3%, 50%, 66.6%, 90% and 95% of share capital and/or voting rights.</td>
<td>50% and 95% of share capital.</td>
<td>None.</td>
<td>None</td>
</tr>
<tr>
<td><strong>Listings Sponsors</strong></td>
<td>None</td>
<td>Appointment mandatory as from the Ipo.</td>
<td>Appointment mandatory for the Ipo.</td>
<td>Appointment mandatory as from Ipo.</td>
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</table>

1 Taking into account the new measures entered into force on 19 June 2017.
The French supervising authority is the Authority for the financial markets (AMF), which is in charge of:

- enforcing the AMF General Regulation that determines general principles regarding the organisation of the regulated markets and especially the rules regarding public offerings
- supervising operations on the regulated market
- approving intermediaries
- initiating sanctions procedures, which are then transmitted to the AMF Enforcement Committee

**Public offerings**

Public offerings may be either voluntary or mandatory.

A public offering is mandatory when a shareholder breaches the threshold of 30% of the capital or voting; or when a shareholder already holding 30% of the capital or voting rights increases his participation of more than 1% in less than a year.

Public offerings must respect the following main steps:

- The initiator submits an information notice project to the AMF, which presents the offer’s main characteristics. The AMF may require additional information
- In parallel, the initiator publishes a release summarising the information notice project
- The target company submits a notice in response (with the board’s opinion and the offer), which is communicated to the public and controlled by the AMF

A public offering’s calendar depends on the type of offer:

- When the initiator holds less than 50% of share capital or voting rights of the target company, the regular procedure applies and the public offer is open for 25 trading days (but it can be subject to a reopening, a counter-offer or an overbid)
- When the initiator holds more than 50% of share capital or voting rights of the target company, the simplified procedure applies and the public offering is open for at least 10 trading days (15 for exchange offers)

It should be noted that Law no.2014-384 dated 29 March 2014, also nicknamed Loi Florange, brought substantial reforms to the public offerings procedure. Firstly, the work council’s role is enhanced in as much as it can now enter into dialogue with the offer’s author and be assisted by an accounting expert (expert comptable). Secondly, a new “nullity threshold” set at 50% has been introduced; at the end of the offer, the author must have obtained at least 50% of capital or voting rights otherwise the offer is void. Finally, a public offering is now mandatory when a shareholder already holding 30% increases his participation of more than 1% in less than a year, against 2% before the law.

The Loi Florange empowers the management of the target firm to take any necessary measure to defeat a public offer, where previous regulations gave all powers to the shareholders’ meeting, in defiance of possible manipulation by the management trying to oppose the filing of offers.

**Liability**

The manager’s acts bind the company depending on the form of the company and the nature of the acts. A manager’s or a company liability may be civil or criminal.

**Civil and criminal liability**

French law holds that a company can incur civil liability for any fault or negligence committed by the management acting in the course of their corporate duties.
Companies, as with any legal person, can be also held criminally responsible under article 121-2 of the French Criminal Code, when the following requirements are met:

► the offence has been committed by one or more natural persons constituting either a body or a representative of the legal entity and

► the offence has been committed on behalf of the legal entity.

The criminal liability of legal entities does not exclude the criminal liability of individuals acting as perpetrators or accomplices of the offence (Article 121-2 of the French Criminal Code).

Fines up to 5 times the maximum amount of the fines on individuals can be imposed on legal persons (article 131-38 of the French Criminal Code).

Under the provisions of the French Commercial Code, managers are personally subject to civil liability for any violation of the provisions of either the law or the company by-laws and for acts of mismanagement (article L.225-251 of the French Commercial Code).

In practice, most cases involve acts of mismanagement which can vary from fraud to simple negligence.

Legal action on these grounds is generally initiated by the company shareholders or by the company itself. It can also be brought by a single shareholder when personal and actual damage is suffered. Managers can be held liable to third parties only in the event that the act of mismanagement is an intentional fault that does not fall within the exercise of their corporate duties.

Managers can also be subject to civil and criminal penalties in the event of insolvency of their company. Among civil sanctions, article L.651-2 of the French Commercial Code provides that the debts of the legal entity can be partially borne by managers who have contributed to a management fault when the management fault has contributed to the excess of liabilities over assets. Criminal bankruptcy is punishable by imprisonment up to 5 years and a fine of €75,000 (article L.654-3 of the French Commercial Code). Other insolvency-related offences are listed by article L.654-8 of the French Commercial Code.

### Upstream guarantees within corporate groups

While granting security over assets to secure the commitments of the borrower itself is not an issue, charging assets to secure another person’s commitments (such as an affiliated company) is more complex.

The “golden rule” is that the grantor of the security interest must derive clear benefit from granting such security interest. In an LBO context, in particular where such guarantees and security interests are frequently asked of the borrower’s French subsidiaries, such guarantee or security interests can only be obtained up to the level of actual benefit received, directly or indirectly, by the said subsidiaries. This means, in practical terms for such transactions, that the French subsidiary will grant security interest up to the level of cash received from its parent (the borrower) as a result of the acquisition finance.

Two main rules explain the limitations on upstream guarantees:

► First, France strictly prohibits any kind of “financial assistance”; therefore, a company may not advance funds, grant loans or security in view of the subscription or purchase of its own shares by a third party

► Second, management and, to a certain extent, majority shareholders must always act in the corporate benefit (“intérêt social”) of the company

The violation of the corporate benefit rule: (i) is criminally punished under French law as a misuse by management of a company’s assets or credit (“abus de biens sociaux”) and misuse by management of its authority (“abus de pouvoir”); (ii) may give rise to damages against majority shareholders under the misuse of voting rights theory; and (iii) may result in the security interests or guarantee being void.
French case law in the Rozemblum decision, however, recognises that in some circumstances, a “group interest” may exist to justify a company guaranteeing obligations of an affiliated entity (upstream, cross stream and/or down-stream guarantees) to that end and granting security over certain assets. This is however subject to certain conditions, namely:

► the companies must belong to the same group, within which a common strategy is to be implemented for the achievement of a specific purpose

► the guarantor must have an economic, corporate or financial interest within the framework of a policy implemented for the group and

► the guarantee should not be granted without any form of compensation and should not exceed the financial capacity of the guarantor

These conditions are not fundamentally different from the “golden rule” detailed above, but are useful in the context of cash pooling or other similar arrangements.

**Charging of assets**

French law provides for a broad range of *in personam* and *in rem* security interests. The French law on security interests underwent a significant overhaul in 2006, which homogenised the regime of collateral, strengthened the attachment of future assets, simplified their perfection and reinforced creditors’ rights in enforcement actions.

By way of example, French share pledges in a borrower-lender situation can be enforced if the following three conditions are met:

► lenders must have a claim against the borrower that is valid, assessable and past due (*certaine, liquide et exigible*), which means, in practice, that the loan must be accelerated before any enforcement can take place

► lenders must send a prior enforcement notice to the borrower (and to the pledgor if it is not the borrower) requesting payment of the sums due (pursuant to the loan acceleration) or the share pledge will be enforced

► a “reasonable” period of time must exist between the notice sent to the borrower and the actual enforcement. Unless otherwise provided in the said notice or by law (see below), French law will set this period of time to 8 days

The actual enforcement of the share pledge can be done in the three following ways:

(a) **Auction sale** (*vente publique*)

An auction sale may be implemented within eight days of an official demand for payment having been sent to the borrower. The auction sale itself is undertaken by a regulated professional auctioneer. The proceeds of enforcement will be paid to the lenders subject to certain other liabilities/creditors (e.g. court costs for judicial proceedings, the French Treasury in relation to overdue taxes having first priority (i.e. income taxes and value added taxes), etc.). This method avoids the difficulty raised by the payment by lenders of the “soulte”, if any, arising from the judicial foreclosure and private foreclosure methods described above, but is rarely enforced.

(b) **Judicial foreclosure** (*attribution judiciaire*)

Lenders may request the Court to order the transfer of the pledged assets in satisfaction of the secured debt. The Court will generally appoint an expert to assess the value of the securities. The transfer of the securities to the lenders will be deemed to extinguish the secured debt up to the amount of the value of the assets. Should the value of the assets exceed the amount of the secured debt, lenders (jointly) will have to pay the balance to the borrower (*soulte*).

2 Article L 211-20 of the French Financial and Monetary Code

3 Article L. 521-3 of the French Commercial Code.

4 Please note that with respect to the enforcement by auction sale such official demand of payment must be served by a French bailiff (signification par huissier).

5 Article L.521-3 of the French Commercial Code.
Private foreclosure (pacte commissoire)\(^6\)

Lenders can become the owners of the pledged securities by private foreclosure (i) immediately, if the shares are not listed on an exchange; and (ii) eight days after the enforcement notice for listed shares (unless otherwise provided by the parties). Cash dividends, if any, trapped in a special bank account for both listed and unlisted securities can only become the lenders’ property eight days after the enforcement notice is sent to the borrower. Should the value of the assets exceed the amount of the secured debt, lenders (jointly) will have to pay the balance to the borrower (soulte). French law introduced the “fiducie”, a civil law trust mechanism, in 2007 which gives French law a structure which is highly competitive with the Anglo-Saxon trust for the purposes of, for example, obtaining security over assets.

Under a fiducie agreement, the secured asset of the obligor is actually transferred in full ownership to the trustee (fiduciaire) for the purposes of securing a debt obligation. Since the secured asset belongs to the trustee for the life of the fiducie agreement, creditors may be able to enforce their rights over an asset, and not be constrained by the rules of the automatic stay of all enforcement proceedings, in case of bankruptcy proceedings of the obligor.

Due to its versatile nature (all assets can be secured under a fiducie, including Real estate), the fiducie regime is rapidly expanding in recent secured lending and restructuring transactions.

Overview of the French insolvency proceedings

French insolvency proceedings can only be commenced by French companies. However, a French Court can acknowledge the transfer of foreign companies’ main centre of interest (COMI) in France in order to open a bankruptcy proceedings in France and, therefore, prevent the enforcement of foreign pledges due to the automatic stay on all enforcement proceedings.

To determine whether the COMI is in France, French courts would base their decisions on concordant pieces of evidence such as the location of the directors and shareholders meetings, the nationality and the residence of the directors and shareholders and the location of the real centre of decisions. This situation is particularly sensitive with so called “double luxco” schemes in French LBOs.

Pre-insolvency procedures: out-of-court proceedings

A French debtor, or a debtor with its COMI acknowledged in France, in financial difficulties has the following options available to it when not insolvent.

These out-of court proceedings:

► are confidential – only the debtor and his major creditors and lenders take part in the discussion

► preserve the confidentiality of commercially sensitive information that could alert the competitors, and frighten the customers

► are opened upon request from the debtor – the judge appoints an “Administrateur Judiciaire”, who assists the company in reaching a settlement with the creditors with a view to ensuring the sustainability of the company.

The mandat ad hoc: confidential

The mandat ad hoc is a preventive and confidential proceeding of amicable settlement of business difficulties, which aims at restoring the company’s position before it reaches a situation of cessation of payments.

The mandat ad hoc is a very flexible tool, which can vary in its impact from a temporary solution offered in order to solve the business’s cash flow problems to being a large scale restructuring of the business, its capital and shareholdings as well as its business activity. It generally takes from one to several months under the supervision of a special commissioner (mandataire ad hoc) appointed by the President of the Commercial Court. The mission of the mandataire ad hoc is, generally, to assist the managers who remain in office with full powers to manage the company. However, because of the purely contractual nature of the mandat ad hoc, solutions that have been reached during the procedure cannot be enforced upon parties who do not consent to the proposals.

\(^6\) Article 2348 of the French Civil Code.
Article L. 611-15 of the French Commercial Code provides that the *mandat ad hoc* is confidential. The nomination of a *mandataire ad hoc* is not followed by any legal disclosure.

**The conciliation: confidential**

The conciliation proceeding, also confidential, aims at reaching an amicable agreement between the undertaking and its major creditors and partners, in order to solve the difficulties it may face.

- Binding for the signatories only
- Recognition ("*constatation*”) or Certification ("*homologation*”) by the commercial court.

A debtor that is not insolvent but which faces "legal, economic or financial difficulties", or that is insolvent but has been so for less than 45 days, may file a petition for the commencement of a conciliation procedure that results in the appointment of a conciliator by the President of the Court. The conciliation procedure is intended to allow the debtor and its creditors to reach an acceptable compromise on a consensual basis within four months, extendable by one month, under the supervision of the conciliator.

**The safeguard procedure (procédure de sauvegarde)**

The safeguard procedure is a judicial procedure that can be initiated by a company when, “without being unable to pay its debts, the debtor proves [to the Court that it encounters] difficulties it is not able to overcome”. It should be noted that the procedure cannot be initiated when the company is insolvent, i.e. has become unable to pay all its debts as they fall due.

As from the time of the Court order initiating the safeguard procedure and throughout its duration, creditors are barred from initiating legal proceedings or taking actions against the company including enforcement of any security interest they may have. The claims that are subject to such automatic stay are those that arise before the commencement of the proceedings, as well as certain claims that arise after the commencement of the proceedings but are not within the ordinary course of business of the debtor.

**The judicial administration procedure (redressement judiciaire)**

Most of the above-mentioned provisions introduced in the safeguard procedure apply *mutatis mutandis* to the judicial administration procedure. Unlike the safeguard procedure, the judicial administration procedure will only be applicable in the event that the company is unable to pay its debts when they fall due. Directors are under an obligation to file for a judicial administration within 45 days of the cessation of payments.

Under the judicial administration procedure, the administrator appointed by the Court will assist the directors to make all or some of the management decisions and may also be empowered by the Court to take over the management and control the company.

As from the commencement of the judicial administration procedure, potential buyers may submit purchase offers during this process, and these offers would be considered by the Court alongside the debtor’s own reorganisation plan (*plan de redressement*). If the Court considers at the end of the observation period (6 months maximum renewable for 6 months, as from the commencement of the judicial administration procedure) that the continuation of the business is not possible, it will require the sale of all or part of it.

Claims arising after the judicial administration procedure order benefit from the "super priority" lien securing the payment of all debts validly incurred by the insolvent company after the judicial administration order and ranking ahead all other liens and security, with the exception of certain preferred debts (e.g. general lien in favour of employees, the costs of the proceedings, etc.).

In order to benefit from this priority lien, the debts must be validly incurred by the company for the purposes of implementing the procedure or the observation period or in consideration for a service rendered to the debtor in connection with its business operations, during the observation period.

It should be noted, however, that these preferred debts will rank after the payment of debts due to creditors who have made new money, goods or services available to the insolvent company under a conciliation agreement sanctioned by the Court.
Under a new reform to be applicable as of 1 July, new money extended during the mandat ad hoc or conciliation will also benefit from such regime.

**Employment**

**Recent French labour law developments**

Relationships between employers and employees are governed by the French Labour Code, employment contracts, and also by collective labour standards. Depending on the company’s main activity, the relationship between such company and its employees is governed by national collective bargaining agreements negotiated by employee trade unions and employer organisations.

Since 2007, many French Labour law reforms have been implemented in order to make France more economically attractive. The labour market has gradually become more flexible regarding as regards working time and labour management.

In order to facilitate the negotiation of company collective agreements and increase the legitimacy of its key individuals, the trade union election process has been significantly modified. The Act of August 20, 2008 strived to achieve this and improve union representativeness (capacity of trade union organisations to negotiate and sign, with employers or employer representatives, agreements applying to all the employees of a company or business sector at local or national level, or to all employees of all business sectors).

The Act of August 14, 2013 modernised redundancy plans with a strengthened role for the collective bargaining and with a control of the French administration over the procedure and its content.

The latest major reform enabling labour relationships to be more flexible was implemented on 21st July 2016, so-called “El Khomri law” and dealt with:

- **Collective bargaining and referendum:** There is now a primacy of company level agreements signed by representative trade-unions having obtained the majority of the votes in the first round of the last professional elections. Otherwise trade unions that obtained 30% of the votes in the first round of the elections can sign a company collective agreement and have the agreement approved by referendum.

- **The consequences of the termination of the company agreements:** The new law limits the notion of “individual advantages acquired”, that the employees would conserve in case of termination of a company agreement, to the compensation whose amount cannot be less than the compensation paid during the last 12 months, considering an equal working time sets forth according to the employment contract.

- **Economic difficulties:** The new law provides for objective indicators in order to demonstrate the existence of economic difficulties: declining orders or declining turnover, operating losses or the degradation of the treasury or of the gross operating profit are considered as an economic indicator appreciated over a period which depends on the size of the workforce concerned.

- **Preservation or development of employment agreements:** The new law provides for the possibility to conclude a business agreement for the preservation or development of employment whose provisions will be substituted automatically to contrary employment contract terms, including on remuneration and working hours, except with regard to the monthly salary of the employee concerned.

- **New medical examination requirements:** The mandatory pre-hire medical exam is replaced by a new ‘visit of information and prevention’. This can take place within 3 months of hiring.

- **Employees’ right to disconnect from IT devices:** New provision that consecrates the right for employees to disconnect from IT devices outside working hours. It also provides for an obligation to discuss the use of IT devices during the annual negotiations with employee representatives (in the part relating to professional equality and work-life balance), and to review means of ensuring a reasonable use of such devices. Unless there is an agreement on that matter with the unions, companies employing at least 50 employees will have an obligation to put in place a charter which provides for specific training of executives and directors on the reasonable use of IT devices.
Standards governing employment relationships

Employment relationships in a company are increasingly based on negotiation, whether collective or individual.

Individual negotiation leads to the conclusion and existence of an employment contract. Such contracts can take the form of a fixed-term contract, or of an indefinite-term contract. It should be noted that amending an employment contract remains possible during the performance thereof. The applicable system differs according to the desired amendment:

► The amendment of an essential element of an employment contract, such as the salary or the number of working hours, requires the relevant employee’s express consent. Should an employee refuse, the employer can renounce to the amendment of the contract or initiate a dismissal procedure under specific circumstances.

► As the modification of working conditions does not call into question an essential clause of the employment contract, it is subject to a different system. In such circumstances, an employee can only object to a modification if the latter proves that there has been an excessive violation of its privacy or a change related to a discriminatory motive. This can be, for example, a new task entrusted to the employee which corresponds to the latter’s qualification or another allocation of the working hours of an employee working full time. Should the employee refuse, he or she may be dismissed.

The indefinite-term employment contract is the most common type of employment contract in France. It is generally a written contract, although it does not have to be. The contract must state the salary and functions of the employee, the working hours and the workplace. In principle, the other clauses are freely negotiable. There are a number of other common clauses, such as purpose clauses, mobility clauses, non-compete or non-solicitation clauses, invention and Intellectual property clauses and clauses relating to a trial period. The clauses of an employment contract must comply with labour legislation but also with the collective bargaining agreement applicable to a particular company.

Fixed-term employment contracts (hereinafter referred to as CDD) serve as an exception. The purpose thereof cannot be to durably fill a position related to the normal and permanent activity of the company. Such contract is strictly governed by the French Labour Code. A CDD may notably be used in the event of:

► a temporary increase in activity

► seasonal work

► “common practice” fixed-term contracts (CDD “d’usage”)

► the performance of a duty by an executive or an engineer under certain terms and conditions

► the replacement of a temporarily absent employee

► the replacement of an employee who has been temporarily put on a part-time contract and

► filing a vacancy whilst waiting for a new employee to take up his/her position.

A CDD is renewable twice and can last for a maximum of 18 months. Within the framework of a CDD, an employee is entitled to an end-of-contract indemnity of 10% of the overall gross salary paid if an offer to continue the relationship through an indefinite-term contract has not been made to him.

Labour relationships are also governed by many collective agreements such as:

► Inter-professional agreements: entered into at national level so that all levels of negotiation are coherent

► Branch agreements: these contain rules common to one industry. Certain provisions of branch agreements must be complied with: minimum salaries, classification, rules relating to provident schemes (prévoyance) etc

► Company or establishment-level agreements: these allow provisions to be negotiated so as to match as closely as possible the interests and specifics of a company. Such agreements can depart from the provisions of a branch agreement.
Staff representation under French law

Employees are represented by three bodies elected according to the number of employees in the company: the employee delegates, the works council and the hygiene, safety and working conditions committee.

Employee delegates are elected in establishments or companies with at least 11 employees. They represent the staff vis-à-vis employers whom they inform of individual or collective claims regarding labour regulations (Labour Code, Collective bargaining agreement, salaries, working hours etc.). In the absence of a works council, such delegates are also consulted regarding dismissals for economic reasons, working time, professional training etc. Employee delegates can also make suggestions regarding the general organisation of a company.

A works council is set up in establishments or companies with at least 50 employees. The council is made up of staff representatives and is chaired by the employer. It benefits from funding provided by the employer and therefore has economic, social and cultural powers.

A hygiene, safety and working conditions committee is set up in establishments and companies with at least 50 employees. The committee aims to include the staff in the actions preventing professional risks and improving working conditions. As the committee must frequently be informed and consulted on a range of issues, it tends to become an essential body within a company.

For companies employing up to 300 employees, it is possible, after consultation with the staff representatives, to set up a single employees’ representative body called the “délégation unique du personnel”. This singly body combines all 3 representative bodies.

For companies of at least 300 employees such possibility must be provided by a specific collective agreement signed at the company’s level and the new body can combine all 3 or only 2 representative bodies.

The staff representatives’ role in French companies is essential. The works council is an emblematic body. Pursuant to Article L. 2323-1 of the French Labour Code, the works council must be kept informed of, and consulted on all issues relating to the organisation and general running of the company. Furthermore, pursuant to Article L. 2323-2 of the French Labour Code, the works council must be consulted prior to the employer making any decisions. When consulted, the works council issues opinions. The deadline to do so is set by agreement with the employer, failing which, the works council has one month (except in special cases where such deadline can be longer (e.g. 3 months when the CHSCT must be consulted as well)) to issue such opinion as of the submission to the employer of the information necessary for the works council to be consulted. Beyond that, the council is deemed to have been consulted and issued a negative opinion.

Furthermore, the works council must be represented at all the meetings of the company’s Board of Directors or Supervisory Board (Conseil de surveillance) (or Executive Board (Directoire)).

Restructuring and consultation of the staff representatives

As mentioned above, the Works Council must be consulted if the employer wishes to modify the economic or legal organisation of the company, including, without limitation, in the event of a merger, demerger, assignment, partial asset contribution etc. Such obligation stems from Articles L. 2323-31 and 2323-31 of the French Labour Code. The hygiene, safety and working conditions committee must also be consulted when the company is being restructured. The works council cannot issue its opinion if the hygiene, safety and working conditions committee has not been previously consulted.

Employers must be very careful during such consultation procedure. If there is no consultation or if the consultation of the staff representatives is insufficient, employers can be convicted on the grounds of “hindrance”.

Hindrance means an act or omission that provides obstruction to a staff representative. It is punishable by law by a a fine of €7,500.

Dismissals for economic reasons

Dismissals for economic reasons can take place following a job cut or transformation, or the amendment of an essential element of the employment contract that was refused by the employee following:
► economic difficulties

► technological changes

► a reorganisation in order to safeguard the company’s competitiveness and/or

► cessation of activity.

Economic difficulties can be characterised either by “significant alteration of at least one economic indicator such as a decline in orders or in turnover, operating losses, a deterioration of cash flow or EBITDA” or by “any other element which can justify these difficulties”.

The duration of the decline in orders or in turnover that characterizes the economic difficulties should reportedly be set by way of comparison with the same period of the preceding year, and such duration should be at least equal to:

► a quarter for a company with less than eleven employees

► two consecutive quarters for a company with at least eleven but less than fifty employees

► three consecutive quarters for a company with at least fifty but less than three hundred employees

► four consecutive quarters for a company with three hundred employees or more.

Economic difficulties are assessed at international group level sector.

Dismissal for economic reasons can be an individual or a collective dismissal.

When a dismissal is an individual dismissal (two to nine employees), the employees must be convened to attend a pre-dismissal meeting. An individual dismissal may take place after a period of seven days following the date of the disciplinary meeting (such period is increased to 15 days if the employee is an executive).

Collective dismissals concern at least 10 employees over a period of 30 days. In companies of over 50 employees, an employment protection plan (plan de sauvegarde de l’emploi) must be implemented (hereinafter referred to as a PSE).

The Employment Securitisation Act introduces the possibility of concluding an agreement on the content of the PSE, the negotiation of which must concern the redeployment plan, the measures in favour of employment and the terms and conditions relating to the monitoring of the redeployment plan implementation. The companies concerned by such agreement are those which have at least 50 employees, staff representatives and the legal obligation to implement a PSE. The negotiation takes place at company level with the trade unions representing the employees and the company manager.

Employers are required to draw up a unilateral document if no agreement has been reached on the content of the PSE or if certain aspects in the concluded agreement are missing. The drawing up of the unilateral document takes place throughout the information-consultation of the works council and only becomes final at the end of the information-consultation procedure. Such unilateral document must contain the same information as the agreement on the content of the PSE, such as the terms and conditions of information-consultation; the number of job cuts and professional categories concerned; and, lastly, the terms and conditions relating to the implementation of the training, adaptation and individual redeployment measures.

The work council must be informed and consulted on the restructuring plan and staff reduction as well as on the collective dismissal plan. It must therefore, issue two separate opinions. Furthermore, it is up to the works council to decide whether it will call upon the services of an expert or not during the first meeting. All this information must be put on the agenda of the meeting. At the first meeting, the administration must have knowledge of the dismissal plan and more generally of all the information concerning it, and may propose modifications. The information-consultation procedure ends when both opinions have been issued or when the deadlines expire. The unilateral document is drawn up after the works council’s last meeting and must be validated by the administration.

The procedure differs when a negotiation regarding the employment protection plan takes place. The opening of the negotiations prior to the first information-consultation meeting is possible and must be directly notified to the administration. At
the end of the negotiation, several outcomes are possible. Indeed, if an agreement is reached before the end of the information-consultation procedure, the opinion of the works council on the economic dismissal plan is no longer required (as long as the agreement complies with Article L. 1233-24-1 of the French Labour Code and that it is presented to the administration for approval at the end of the information-consultation procedure on the restructuring and staff reduction plan). In addition, if the agreement only concerns part of the social measures, the information-consultation procedure must be fully completed regarding the motive, the dismissal plan and the unilateral document.

Lastly, in the total absence of an agreement, the information-consultation procedure must be fully completed regarding the restructuring and staff reduction plan and the dismissal plan. A unilateral document can only be drawn up and approved once the minutes recording the disagreement have been drawn up.

In each of the aforementioned situations, the employer shall submit an employment protection plan to the competent labour administration. Since the Employment Securitisation Act entered into force, employers are required to inform the administration of their intention to open negotiations in order to conclude a majority agreement and to inform the administration of the works council’s decision to resort to an expert.

Employers must send a grounded response to the proposals put forward by the administration aiming to complete or modify the plan. The administration must also validate the majority agreement by ensuring the regularity of the content thereof and of the procedure. The labour administration must approve the plan and notify the employees of its decision. Its decision will be posted on a bulletin board in the workplace. If the Labour Administration does not approve the plan, the employer must present another plan after having made the necessary modifications thereto.

Regarding the indemnities paid for more than one year’s service, an employee dismissed for economic reasons legally benefits from a dismissal indemnity equal to minimum 1/5 of one month’s salary per year of service, increased by 2/15 if the length of service is more than 10 years. However, branch collective bargaining agreements often make provision for a dismissal indemnity higher than the statutory indemnity.

Regarding the tax and social security scheme, dismissal indemnities are treated favourably as they are exempt from part of the social contributions and from income tax.

**Dismissals for personal reasons and other employment contract terminations**

The procedure for dismissals for personal reasons may be instigated only if an employee has breached the interests of the company. Disciplinary sanctions in the form of a warning are common before the implementation of the procedure.

As it is the case for individual dismissals for economic reasons, employees must be invited to a prior disciplinary meeting in order to explain their actions. A notice period must also be complied with: such period can be statutory or contractual and is, in principle, two months’ long for employees with more than two years’ service.

The level of indemnities received for a dismissal for personal reasons is currently the same as that received for a dismissal for economic reasons. However, in the event of gross misconduct or negligence by the employee, the employee receives no such indemnity.

Under French Labour law, there are other modes of contract termination including, without limitation, constructive dismissal (prise d’acte). When an employer breaches its contractual obligations, an employee can claim for constructive dismissal (prendre acte). The employee will then have to refer the matter to the courts in order to know which system applies to such contract termination:

- If the employer has committed a fault, the legal system specific to dismissals without real and serious cause shall apply to the contract termination. Therefore, the employer may have to pay the employee several sums such as dismissal indemnity, pay in lieu of notice and damages

- If the judges deem that a breach by the employer does not justify a claim for constructive dismissal (prise d’acte), the legal system specific to voluntary resignation shall apply to the employment contract termination. The employee will not receive any indemnity in these circumstances

An employee and an employer may, by mutual agreement (rupture conventionnelle), decide to terminate an indefinite-term employment contract. To this end, it is necessary for both parties to meet and negotiate the terms of their agreement (date
and condition of the termination as well as the amount of the indemnity). During such meeting, the employee may choose to be represented by a company employee. Once the agreement has been signed by the employer and the employee, they both have 15 days to retract. Once this period has elapsed, the parties’ agreement must be approved (verification of the procedural and substantive conditions, and the consent) by the competent labour administration within 15 business days. It should be noted that the indemnity allocated to the employee for termination cannot be less than the statutory or contractual dismissal indemnity (application of the indemnity that is most favourable to the employee). As from the date of the approval, the parties have twelve months to dispute the agreement before the Labour Court.

Profit-sharing and employee savings plans

The remuneration of employees can be, under the certain conditions, individualised (target bonuses, commissions etc.). French law also makes it possible for employees to collectively take interest and be motivated. Thus, many instruments enable companies to motivate their employees and improve collective and individual performance.

Employee profit sharing (participation), whereby a profit-sharing right is granted to employees, is mandatory in companies with 50 employees or more. The purpose of such mechanisms are to re-allocate a portion of a company’s profit to its employees. All the employees of a company must be able to benefit from such profit sharing subject to a possible length of service condition which cannot exceed three months. The terms and conditions of such mechanisms are set by an agreement entered into between the employer and the staff representatives. Every year, employees choose the immediate payment of the sum they are entitled to or may opt to tie up the sum concerned for five years, except in the event of an early termination of employment. The payment of the profit sharing is accompanied by certain social or tax benefits for the company and for the employee.

Voluntary profit-sharing (intéressement) is an optional profit-sharing scheme, the purpose of which is to enable a company to further involve employees, collectively, in the general running of the company, by means of a calculation formula, and, more particularly, in the results and performance by the payment of immediately available bonuses. Such mechanism can be implemented by any company as long as it complies with its obligations relating to staff representation. All employees must be able to benefit, subject to a possible length of service condition which cannot exceed three months. As this is the case with the employee profit sharing (participation), voluntary profit sharing provides social security and tax benefits to companies and employees.

In addition to these mechanisms, the company can set up save-as-you-earn schemes such as PERCO, a collective retirement savings plan, and the PEE, for the constitution of a portfolio of securities. Bonuses resulting from employee profit sharing (participation) and voluntary profit-sharing (intéressement), can fund the PEE and PERCO, thus providing social security and tax benefits to companies and employees.

French law and foreign employees

Foreign employees must be authorised to work in France. It is up to employers to make sure that their employees are in possession of valid papers, failing which, criminal and/or civil sanctions may be handed down (a person, whether directly or via another person, who hires or continues to employ for whatever period of time a foreigner who is not in possession of the valid papers allowing him/her to work in France as an employee, is punishable by civil and/or criminal sanctions). Only EU citizens, EEA or Swiss nationals fall under specific exemptions.

A work permit can take the form of many documents: a resident card, a temporary residence permit bearing the words “European blue card”, a temporary residence permit, a provisional work permit.

In order to verify the existence and validity of the foreign employee’s permit, employers must send the préfet a copy of such document. Such request must be made at least two days prior to the effective hiring date. The préfet must send back its reply within two business days. Failing which, the employer’s obligation is deemed performed.

If an employer wishes to hire a foreigner who is not an EU citizen, such employer must comply with a certain number of formalities. The latter cannot hire the foreigner directly. A procedure referred to as an “introduction procedure” must be complied with. During such procedure, the labour administration will verify, inter alia, a certain number of criteria: location of the position, consistency of the foreigner’s qualification, experience, and diplomas with the job the latter is applying for.

Non-compliance with such rules can result in a civil sanction of up to €15,000 as well as a criminal sanction of up to five years’ imprisonment. Such prison sentence can be increased to 10 years and such fine can be increased to €100,000 when the
offence is an organised offence. Fines can also be multiplied according to the number of employees hired without a work permit.

Taxation

Income tax and social security contributions

Individual taxation overview

Income tax is a comprehensive tax levied on an individual’s worldwide income. Unless otherwise provided, the overall net income is subject to a single tax scale with progressive income band.

As from 2012, the rate applying to the highest tax band of the progressive income tax scale, which applies to taxable income (after application of the family coefficient) exceeding €152,260, has been raised to 45%.

Although capital gains on the sale of shares are subject to income tax at the progressive rates (except for capital gains on the sale of BSPCE which is subject to income tax on progressive rates (either 19% or 30%), taxpayers may benefit, under certain circumstances, from rebates on the taxable capital gains on the sale of shares. In such circumstances, individuals may benefit:

► either from an “ordinary law” rebate amounting to 50% provided that shares being sold have been held for at least two years but less than eight years or to 65% if held for at least eight years or

► from an increased rebate (applicable to investments in startups, small and medium-sized enterprises (SMEs) (i.e. enterprises which (i) employ fewer than 250 persons and (ii) which have an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million) less than ten years old when the sold shares were subscribed for or acquired) amounting to 50% provided that shares being sold have been held from one to four years, 65% from four to eight years and 85% as from eight years.

Before application of this proportional allowance, capital gains made by SME managers when they retire are subject to a special fixed rebate of €500,000.

However, certain types of income are subject to social contributions equal to 15.5% (dividends, interests, capital gains).

Furthermore, an exceptional contribution on high incomes applies to individuals with an annual reference income exceeding €250,000 (€500,000 for couples) as follows:

► 3% on the portion of the annual reference income comprised for singles (including widows/widowers and divorced individuals) between €250,001 and €500,000 (€500,001 and €1,000,000 for couples)

► 4% on the portion of the annual reference income exceeding €500,000 for singles (including widows/widowers and divorced individuals) (€1,000,000 for couples)

Local taxes (i.e. property tax and housing tax) also apply.

Tax residence

Under French domestic tax law (i.e. subject to applicable double tax treaties), an individual is deemed to be a French resident for tax purposes if at least one of the following criteria is met:

► The individual has his household (“foyer”) or his principal abode in France. As a general rule, the term “household” refers to the place where an individual or his family (spouse and/or children) usually lives, and where he maintains his family’s interests. The principal abode relates to the place where the individual usually stays. Please note that the French Supreme Administrative Court decided that the principal abode criterion would only be used when the individual does not have his “household” in France

► The individual carries on a professional activity in France. This criterion applies to individuals performing, whether or not as an employee, a professional activity in France which is not considered as being ancillary (i.e. the individual’s main professional activity must be performed in France)
The individual has the centre of his economic interests in France, defined as the place where the individual has made his major investments, where he has his place of business and/or where he manages his assets. This may also be the place where he has his business base or from where he derives most of his income.

Tax resident employees

French tax residents (regardless of their nationality) are liable to pay income tax at a progressive tax rate (from 14% to 45%) on their worldwide income as follows:

<table>
<thead>
<tr>
<th>PORTION OF TAXABLE INCOME</th>
<th>RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>For the portion under €9,710</td>
<td>0%</td>
</tr>
<tr>
<td>For the portion over €9,710 and less than or equal to €26,818</td>
<td>14%</td>
</tr>
<tr>
<td>For the portion over €26,818 and less than or equal to €71,898</td>
<td>30%</td>
</tr>
<tr>
<td>For the portion over €71,898 and less than or equal to €152,260</td>
<td>41%</td>
</tr>
<tr>
<td>For the portion over €152,260</td>
<td>45%</td>
</tr>
</tbody>
</table>

However, the family coefficient system results in an effective limitation of the progression of income tax.

Gross aggregate income is determined by adding up the net results of all categories of income after applying specific relief measures, and then by subtracting from the total permitted losses, expenses and allowances.

Non-tax resident employees

Subject to the provisions of the relevant double tax treaty, non-tax resident employees performing their activity in France are subject to a progressive withholding tax (from 0 to 20%) on their net salary received from activity in France (i.e. after a 10% deduction for professional expenses).

Employers, in relation to their employees

An employer is liable for the payment of both the employer’s and the employee’s social security charges. Employees’ social security charges are directly withheld from the employees’ gross salary by the employer.

Social security charges include:

- social security contributions (sickness, age, retirement)
- the Contribution Sociale Généralisée (CSG – widespread social security contribution) and
- the Contribution au Remboursement de la Dette Sociale (CRDS) which contributes to the reimbursement of the social security debt

Corporate income tax

Overview

As regards corporate income tax, companies may benefit from various tax incentives in favour of investors, including R&D tax credit; cinema, TV and media tax credit to encourage creativity; tax advantages for businesses contributing to sustainability and preservation of the environment, tax credit for encouraging competitiveness and employment (CICE).

Participation exemption regime: A French or foreign company whose profits are taxable, in whole or in part, in France, owning a minimum of 5% of the share capital (or less in specific circumstances) of a French or foreign company is exempt.
from corporate income tax on 95% of the gross amount of dividends received. The remaining 5% is taxable. The shares must have been held, or an undertaking must have been given to hold the shares, for at least two years.

**The tax consolidation regime** allows a French parent company to pay corporate tax on behalf of other members of its consolidated tax group. It must be mentioned that the Second Amended Finance Bill for 2014 implemented horizontal tax consolidation into French law, allowing a French company to form a French tax consolidated group with other French companies provided that all of them of at least held at 95% by a foreign parent company which is established in a Member State of the European Union or of the European Economic Area and subject there to a tax similar to French corporate income tax.

The consolidated tax liability of a group is calculated on the basis of the algebraic sum of the taxable income (profits or losses) of each member. All taxable income is aggregated and adjusted to eliminate intra-group impacts and form the group’s taxable income. Please note that, regarding fiscal years opened as from 1 January 2016, intra-group dividends are not fully neutralised for the computation of the group’s taxable result as said dividend distributions are solely 99% exempt from corporate income tax, the remaining 1% being subject to corporate income tax.

**Tax residency of business vehicles**

Unlike most other European countries, only profits made by enterprises operated in France are liable to French corporate income tax. Thus, any other criterion such as the nationality of the company, the location of its registered office or place of employment profits is irrelevant when determining the territorial scope of French corporate income tax.

Thus, any foreign entity earning profit in France is liable to pay French tax on its French earnings. The rule applies to all types of entities: subsidiaries; branches; permanent establishments. In the latter case, earnings from activities in France carried out through a branch or a permanent establishment that is not a separate legal entity with its own financial statements are reconstituted using the financial statements of the foreign company. Conversely, the profits earned by businesses operated outside France are exempt from French tax.

The courts and administrative doctrine have identified three criteria for linking a profit made by a company to a given state:

- if the profits are earned through an establishment located in that state
- if the profits are earned through a qualified representative accredited in that state and
- if the profits are earned as a result of normal operations in that state forming a complete business cycle

**Main taxes potentially applying to tax resident business vehicles**

The standard rate of corporate income tax is 3.1/3%. It must be noted that Finance Law for 2017 introduced a gradual decrease of the corporate income tax rate aimed at fixing the CIT rate to 28% for all companies in 2020. In this respect, the standard CIT rate is fixed at 28%:

- for fiscal years opening as from January 1, 2017, for all SMEs, as defined by Appendix I of the EU regulation n°651/2014, up to €75,000 profits, being mentioned that if the current reduced CIT rate applies (i.e. 15% up to €38,120 profits) the 28% rate applies on the portion of profits between €38,120 and €75,000
- for fiscal years opening as from January 1st, 2018, for all enterprises up to €500,000 profits
- for fiscal years opening as from January 1st, 2019, (i) on all the profits realised by enterprises with a turnover lower than a billion euro and (ii) up to €500,000 profits for enterprises with a turnover exceeding a billion euro (being mentioned that, within tax consolidated group, the turnover to be taken into account equals the sum of the turnovers of the companies members of the tax consolidated group at stake)
- for fiscal years opening as from 1 January 2020, for all companies irrespective of the amount of their turnover or profits.

SMEs (owned at least for 75% by individuals or by other SMEs and with a turnover of €7,630,000 or less) are taxed at a reduced rate of 15% on the first €38,120 of profits and at the standard rate on any excess. Pursuant to Finance Law for 2017,
for FYs opening as from 1 January 2019, the reduced CIT rate (i.e. 15%) is extended to companies whose turnover does not exceed €50m.

Large companies whose corporate income tax liability (standard rate and the reduced rate) exceeds €763,000 are subject to a social surcharge of 3.3% levied on the part of the corporate income tax which exceeds €763,000.

In addition, value added tax (VAT) applies to tax resident business vehicles. The scope of VAT comprises all economic activities and transactions within the scope of the law. In 2017, the main VAT rates were 20% and 10%.

Transactions on assets in France give rise to registration duties which can be either fixed, proportional or calculated on a progressive scale.

Subject to certain conditions, a corporate income tax of 3% applies on distributed income (SMEs and distribution between tax consolidated companies excluded). Please note that in order to comply with a recent case-law of the French Constitutional Court, the French Amended Finance Act for 2016 extended the application of the 3% tax exemption to dividends distributed by a French company to:

► French companies which, while not being part of a tax consolidated group, satisfy at the date of payment of dividends, with the distributing company, the shareholding conditions to be part of a tax consolidated group

► a non-resident company which is subject to CIT (or a similar tax) in an EU Member State or a State with which France has signed an administrative assistance agreement against tax evasion and fraud and if it had been established in France, would satisfy, at the date of payment of dividends, with the distributing company, the shareholding conditions to be part of a tax consolidated group.

Taxation of non-tax resident business vehicles

A non-resident company is subject to corporate income tax when it carries out a business in France through a fixed place of business, a dependent agent or within a complete commercial cycle. A complete commercial cycle means that there must be a series of commercial, industrial or handcrafted transactions, for a specific purpose and which together form a consistent whole.

As regards VAT, it should be noted that a non-resident (non-EU) entity carrying out transactions subject to VAT in France must appoint a tax representative in France.

Capital gains

Capital gains are generally subject to corporate income tax at the standard rate. However, capital gains on the sale of shares that form part of a substantive participation and held for at least 2 years can benefit from a tax exemption. However, 12% of the gross amount of the capital gain realised, deemed to represent the expenses incurred on such a transaction, remains taxable.

Capital gains on the sale of Real estate companies are subject to corporate income tax at the standard rate, regardless of the holding period, being mentioned that capital gains on the sale of listed real estate companies are subject to corporate income tax at a 19% rate. However, in order to assess whether a company must be regarded as a Real estate company for capital gains purposes, Real estate used by the company for the purpose of its business are not to be taken into account.

Taxation of dividends and interest

Dividends paid to foreign corporate shareholders

Unless the relevant double tax treaty provides for a lower rate, a 30% withholding tax is payable. Furthermore, dividends paid to foreign corporate shareholders established or domiciled in a non-cooperative state or territory or paid in such a non-cooperative state or territory (within the meaning as set forth in the French tax Code) are subject to a withholding tax at a rate of 75%.

However, provided that certain circumstances are met, dividends paid to a parent company located in the European Union or the European Economic Area may be exempt from withholding tax.
Dividends received from foreign companies
As a general rule, dividends received from foreign companies are included in the taxable income for corporate income tax purposes.

Companies may also opt for the Parent-subsidiary regime (régime mères-filles) under which parent companies are exempt from corporate income tax on dividends received from subsidiaries in which they hold at least 5% of the shares under certain circumstances. However, this is not a full exemption because 5% of the net dividends, deemed to represent non-deductible expenses, are added back to taxable income and taxed at the standard rate of corporate income tax.

Interests paid to foreign corporate shareholders
In general, no withholding tax is levied on interest paid to non-resident companies. However, interest paid to foreign corporate shareholders established or domiciled in a non-cooperative state or territory or paid in such a non-cooperative state or territory (within the meaning as set forth in the French tax Code) may be subject to a withholding tax at a rate of 75% (subject to exceptions).

Royalties paid to foreign corporate shareholders
Gross royalties are subject to 33.1/3% withholding tax unless a treaty provides for a lower rate.

Under the French law which implements the provisions of the EU Interest and Royalties Directive, outbound royalty payments are exempt from withholding tax, provided that the beneficial owner is an associated company of the paying company and is resident in another EU Member State or such a company’s permanent establishment situated in another EU Member State.

By virtue of the EU-Switzerland Savings Agreement, France is obliged to exempt (interest and royalty) payments to Swiss companies under essentially the same conditions as those of the Interest and Royalties Directive.

However, royalties paid to foreign corporate shareholders established or domiciled in a non-cooperative state or territory or paid into such a non-cooperative state or territory may be subject to a withholding tax at a rate of 75%.

Thin capitalisation rules
The thin capitalisation rules allow the current deduction of interest accrued by a French company on indebtedness owed to “related parties” up to highest of the three following limits, if those limits are cumulatively exceeded:

► The debt / equity ratio: interest accruing on an amount equal to 1.5 times the company’s shareholders’ equity

► The interest coverage ratio: 25% of the taxpayer’s adjusted ordinary income

► The interest received test: interest received from related parties

Please note that two companies are treated as related where (i) one of them has a direct or indirect minimum holding of 50% in the capital of the other or exercises a de facto control over the other company or (ii) a third company has a direct or indirect minimum holding of 50% in the capital of the two companies or exercises a de facto control over the two companies. The de facto control is notably characterised where a company owns 50% or more of the voting rights in another company.

Please note that debt owed to an unrelated party (such as a bank) which is secured by a related party is also covered by the thin-capitalisation rules.

General limitation of the deduction of the “net financial expenses”
Since 2014, companies may only deduct up to 75% of their “net financial expenses”. However, this general limitation only applies to companies with net financial expenses exceeding €3m. It should be noted that this amount is a triggering threshold, which means that once the threshold is reached, the portion of non-deductible interest is calculated on the full amount of net financial charges (net of interest which is non-deductible by virtue of other provisions) and not just on the amount in excess of the threshold.
The amount of “net financial expense” consists of the total amount of financial expenses that are paid in consideration for any amounts made available to the taxpayer; reduced by the total amount of financial income received by the taxpayer in consideration for having made amounts available to another company.

Limitation of the deduction of interest relating to the acquisition of qualifying participations

The deductibility of interest paid in consideration of qualifying participations (“titres de participation”) acquired by a French company is limited where the French company is not in a position to demonstrate that:

► the decisions relating to these participations are effectively made by the acquiring company itself, or by a company established in France which controls the acquiring company or is directly controlled by the parent company of the acquiring company within the meaning of Article L.233-3, I of the French Commercial Code and

► where “control or influence” is actually exercised over the acquired company, such control or influence is effectively exercised by the acquiring company itself, or by a company established in France which controls the acquiring company or is directly controlled by the parent company of the acquiring company within the meaning of Article L.233-3, I of the French Commercial Code.

Such limitation does not apply if (i) the total value of the qualifying participations held by the entity does not exceed €1m, or if (ii) the entity demonstrates that those participations have not been financed by borrowing or if (iii) the indebtedness ratio of the group to which the entity belongs is higher than the entity's ratio.

Anti-abuse rule of hybrid instrument and artificial debt

The 2014 Finance Bill introduced a new provision aimed at combating hybrid debt instruments and applicable to the financial year ended on September 25, 2013.

This new provision provides that interest payments made by a French borrower to a related entity are tax deductible only if the borrower is able to demonstrate that the lender (be it French or foreign) is subject to income tax on the corresponding interest income which is at least equal to 25% of the French corporate income tax (corporate income tax at the standard rate increased, if applicable, by the additional corporate income tax contributions mentioned above) that would have been due on such income (25% test).

Transfer pricing legislation

French transfer pricing rules prevent indirect transfers of profits to foreign countries by companies which control, or are controlled by, foreign companies. In particular, the rules scrutinise any potential over-estimating or under-estimating of the price of goods or services charged between group companies. French rules provide for a wide definition of the “transfer of profits” which can include increasing or decreasing selling prices or granting a license for a patent or technical or commercial assistance.

Profits deemed to be indirectly transferred to companies within the same group in a foreign country are added back to earnings and thus subject to tax. In addition, penalties may also be levied.

Under French anti-avoidance rules, any payment made to a company located in a tax haven is not deductible unless proof of the arm’s-length character of the payment and of the reality of the operations carried out by the beneficiary company is provided.

Large companies are subject to a transfer pricing requirement (mostly companies with a turnover or total assets exceeding €400,000,000). If a company does not comply with the transfer pricing requirement, the company will be liable to a tax penalty for each fiscal year audited, amounting to €10,000 or, where the corresponding amount is higher than the latter amount and depending on the seriousness of the breach, up to 5% of the amount of the transferred profits.

However, a new transfer pricing requirement introduced by the Law against tax fraud and economic and financial crime in 2013 applies to companies which already fall within the scope of the aforementioned transfer pricing requirement. Relevant documentation must be sent spontaneously and on an annual basis to the French tax authorities but it must be mentioned that the information that must be sent is not as extensive as that contained in the complete transfer pricing documentation.
Furthermore, the French Finance bill for 2016 has implemented into French law the Country-by-Country reporting developed under OECD’s BEPS action 13. Thus, companies must, regarding fiscal years opening as from 1 January 2016, file a declaration with the tax authorities, each tax year, detailing specific information on a country-by-country basis. This new reporting obligation applies to two types of entities which are either (i) held by entities located in another country which does not participate in the automatic exchange of the country-by-country declarations or (ii) which meet the following cumulative criteria:

- publishing consolidated accounts
- booking an annual consolidated turnover of at least €750m
- owning or directly/indirectly controlling one or several entities or branches located outside of France
- not being themselves controlled by an entity subject in France or in another country to a similar Country-by-Country reporting obligation.

Transfer taxes
Transfer taxes exist on transfers of buildings, businesses or shares. Business transfers consisting of the transfer of goodwill, trademarks, commercial leasehold rights and related assets (except inventories, receivables and cash) are subject to a transfer tax that is assessed on the total price or value, whichever is higher, of the fixed tangible or intangible assets transferred (not inventories) at the following progressive rates:

- portion of the price from €0 to €23,000: 0% (fixed duty of €25)
- portion of the price from €23,000 to €200,000: 3%
- portion of the price over €200,000: 5%

Transfer of buildings are normally subject to a 5.80% transfer tax (reduced rates of 0.715% and €125 may apply in certain circumstances).

Transfer of shares in a SARL (société à responsabilité limitée), a SNC (société en nom collectif) and a SC (sociétés civiles) are subject to a 3% transfer tax. The taxable basis is reduced by a tax allowance amounting, for each share transferred, to the following ratio: €23,000 / total number of shares.

Transfers of shares in Real estate companies are subject to a 5% tax (the above-mentioned deduction is not applicable to Real estate companies) even if the corresponding contract is entered into outside of France.

Unless the company is considered as a Real estate company, transfers of shares in an SAS (société par actions simplifiée) or unlisted SA (société anonyme) are always subject to a single rate registration tax of 0.1%. However, sale of shares of listed companies are only subject to transfer tax when the sale is evidenced in a sales contract or other document.

Concerning intra-group transfers of shares, the rules provide for an exemption for transfers of shares between companies of the same group as defined by Article L.233-3 of the French Commercial Code and within the same tax consolidated group.

Financial transaction tax
As from 1 August 2012, a financial transaction tax is applicable to transactions on equity securities issued by French companies whose market capitalisation exceeds €1 billion. The transaction tax rate is 0.3%. A tax on high frequency trading (0.01%), and a tax on the acquisition of a credit default – CDS of an EU State member (0.01%) is applicable since 1 August 2012.

Taxation of imports and exports
As regards customs duties, imports and exports carried out within the territory of the EU are free from duties.
As regards VAT, it usually is applied in the destination country. Imports from third countries located outside the EU are subject to VAT which is payable in accordance with relevant EU VAT rate.

Exports outside the EU are generally not subject to EU VAT.

**Double tax treaties**

French tax treaties reduce or eliminate double taxation through the application of foreign tax credits and tax sparing. These rules apply both to corporate and individual income tax.

A taxpayer domiciled in France and subject to corporate income tax in France is eligible for a foreign tax credit. Tax applies on a gross-up and deduct basis to foreign income received by companies and on which a withholding tax has been levied in the country of source. The withholding tax is added to the net income and then deducted as a tax credit from income tax due. Excess tax credits on dividends, royalties and interest cannot be carried forward.

**Dispute resolution**

Disputes arising in France can be settled by French Courts or through alternative dispute resolution processes.

**Judicial Courts**

The French judicial system is divided into two branches. The ordinary courts supervise criminal and civil litigation and the administrative courts handle complaints against governmental and administrative bodies.

**The ordinary courts**

**Ordinary courts in France are structured around three levels of jurisdiction**

Ordinary courts are composed of first instance courts, courts of appeal and a supreme court called Cour de cassation. The Cour de cassation is, however, not a third instance Court as it does not re-asses the case on the merits and only hears appeals from courts of appeal on the sole interpretation of law.

The role of the Cour de cassation is to ensure the consistent application of the law among the lower courts. In cases where the decision is quashed by the Cour de cassation, the case can be referred back to a court of appeal to be heard again on the merits.

**Ordinary courts are divided into civil and criminal courts**

Criminal courts are structured according to the seriousness of the offence.

At the level of first instance, the Tribunal de Police hears minor criminal offences and violations. The Tribunal Correctionnel hears criminal offences and misdemeanours punishable up to 10 years of imprisonment. Finally, the Cour d'Assises, composed of three judges and six jurors, hears the most serious felonies.

At the level of second instance, the criminal division of the court of appeal handles appeals from the Tribunal Correctionnel. The appeals from the Cour d'Assises are handled by another Cour d'Assises, composed of three judges and nine jurors.

Civil courts are also structured according to the total amount of the claim.

At the level of first instance, the Tribunal d'instance and the Tribunal de grande instance have general jurisdiction over disputes involving private interests. The Tribunal d'instance handles minor civil cases (below €10,000) and is also competent for specific issues such as election matters and disputes between landlords and tenants. The Tribunal de grande instance hears major civil cases (over €10,000) and has exclusive jurisdiction on matters such as personal status and parental authority, citizenship, divorce, Real estate disputes, successions, Intellectual property and patent issues, commercial lease issues and exequatur.

France also has specialised first instance courts in specific matters such as labour and trade disputes. The Conseil des Prud’hommes handles most disputes between employers and employees and is composed of an equal number of non-professional judges elected by both employers and employees. The Tribunal de Commerce has jurisdiction over commercial
matters, which notably include litigation between shareholders of a commercial company and insolvency proceedings. Judges at the Tribunal de Commerce are elected among the local business community.

At the level of second instance, the courts of appeal hear any appeal lodged against a first instance decision.

**The main stages of civil proceedings**

Civil proceedings are generally commenced by the service of summons on the defendant by a bailiff and the subsequent filing of the summons with the tribunal. The court then investigates its jurisdiction and ensures that the principle of an adversarial process is duly enforced by the parties when exchanging submissions and exhibits. Once the case is ready for trial, a pleading hearing is scheduled. Civil proceedings end with the rendering of a judgment.

Summary proceedings are also available to claimants in order to obtain interim measures before or as a result of a trial on the merits.

**Administrative courts**

While ordinary courts protect individuals from other individuals, administrative courts protect individuals from abuses and errors committed by public authorities or state-owned companies. Public authorities include the State, Regions, Departments, Cities and administrative agencies.

The administrative courts are first-instance administrative jurisdictions and the administrative courts of appeals are the second-instance administrative jurisdictions.

There are also several specialised administrative jurisdictions (i.e. the Cour nationale du droit d’asile – Refugees Appeal Board, the Conseil supérieur de la magistrature – Supreme Judicial Council, the Cour des Comptes – Court of Auditors).

The Conseil d’État (State Council) is the supreme administrative court. It presides over claims against national-level administrative decisions (i.e. administrative orders, regulatory decisions by ministers, etc.) and hears appeals from lower administrative courts. The Conseil d’État’s decisions are final and unappealable. Another department of the Conseil d’État also acts as a legal adviser to the French Government.

Specific rules of procedure apply to administrative justice, such as, for example, the inquisitorial principle allowing the administrative judges to lead the hearing.

Administrative justice is exercised in the main through the procedure of judicial review (i.e. ultra vires claim) or other specific proceeding such as interim injunction proceedings (allowing decisions in certain cases to be made in a very short timeframe).

Basically, in administrative justice, a balance is to be found between individual rights and the public interest. The protection of fundamental liberties and human rights is also to be ensured.

It covers various trials such as, for instance:

► refusal to give a building permit

► claims for compensation for damages caused by public authorities

► denial of administrative agencies’ authorisations (i.e. foreign investment in defence and sensitive industries) and

► claim relating to public procurement issues (i.e. granting or performance of public contracts).

Because of the existence of the dual-court system, certain difficulties may arise in deciding to which jurisdiction a case belongs to.

Conflicts of jurisdiction between judicial and administrative courts are settled by the Tribunal des Conflits (Jurisdiction Court). The Tribunal des Conflits is composed of an equal number of members from the Cour de Cassation and from the Conseil d’État. This ensures legal certainty for the parties, as it avoids any denial of justice caused by conflicts of jurisdiction.
It should be noted that a draft law is likely to be adopted such that the presiding judge will no longer be the Minister of Justice, but one of the eight judges sitting on the panel of the Tribunal des Conflicts.

Recent Civil Litigation developments

Class action procedures

The Consumer Law of 17 March 2014 introduced class actions into the French legal system. Initially restrained to consumer and antitrust practice fields, then extended to health products (January 2016), the French Act on ‘the modernisation of 21st century justice’ of November 19, 2016 eventually created a general framework for class actions in France and allowed for collective actions in the following matters: discrimination, environment and data protection. Class actions may be initiated in these new fields since 11 May 2016.

The French class action mechanism only permits a limited number of claimants (associations and trade-unions) to bring an action on behalf of individuals before courts. All the types of class actions open rights to damages (i.e. in consumer, antitrust, health, discrimination and environment class actions), excluding data protection’s one. Class actions may be launched against French or foreign companies. In the latter case, the Civil Court of Paris has exclusive jurisdiction.

Under the class action procedure, the relevant civil court adjudicates, in one ruling, on the admissibility of the class action initiated by the claimant association or trade-union, on the professional’s liability and on the rules applicable to the compensation, including publicity measures. Once informed of the judge’s decision, the injured individuals can choose to join the group. This is a late opt-in system. Then, after the constitution of the group of individuals (class), the principle is that the professional shall compensate each member of the class according to the conditions and within the limits set by the judgment, under penalty of compulsory enforcement measures.

Several features of the French class action procedure could explain the relatively low number of class actions introduced thus far, in particular the limited standing to act in this matter and the opt-in system.

However, class actions are likely to increase in number in the coming years with the entry into force of the rules governing class actions relating to discrimination, environment and data protection.

French Contract Law Reform

The Ordinance no. 2016-131 dated 10 February 2016 on the reform of contractual law and the general regime and proof of obligations entered into force on 1 October 2016. It applies only to contracts concluded or renewed after this date whereas previous contracts remain governed by the previous law. The Ordinance codifies principles that have emerged in case law, thus enshrining these solutions and improving legal certainty. The reform also introduces new concepts borrowed from other legal systems, such as hardship, or from other areas of law with, for instance, the regulation of ‘imbalanced clauses’ in standard-form contracts, which recalls the existing provisions in the Consumer Code and the Commercial Code.

Pre-contractual relations

New article 1104 of the French Civil Code extends the obligation of good faith to the negotiation and contract formation phases whereas this formerly implied principle was applied only to performance. Failure to comply with such an obligation is now a ground for nullification of the contract, in addition to the payment of damages. However, it should be noted that compensation cannot cover the loss of the advantages expected from the contract that has not been concluded.

Moreover, a new ‘duty to inform’ is to be found in article 1112-1 of the new French Civil Code and arises where one party has information that is “decisive” to the other party’s consent, and where the other party is legitimately ignorant or places its trust in that party. It is however specified that this duty does not apply to the estimation of the value of the subject matter of the contract. The breach of the information duty, that cannot be excluded or limited, may trigger the nullity of the contract and the liability of the breaching party.

The content of the contract

The Ordinance no. 2016-131 dated 10 February 2016 enshrines two major case law principles in prohibiting in the one hand, any provision that deprives one’s essential obligation from its substance and, in the other hand, any provision that creates a ‘significant imbalance’ between the rights and obligations of the parties in standard-form contracts. Such a clause may be deemed void by the courts and withdrawn from the contract. However, it should be note that, again, this does not apply to the subject matter of the contract or the adequacy of the price.
Another key feature of the reform is the introduction of the theory of hardship in the French Civil Code. Under the French approach, if circumstances that were unforeseeable at the time of the contract, make its performance excessively onerous for one party, and provided that such party has not accepted to bear that risk, new article 1195 of the French Civil Code provides a right to renegotiate the contract. If the other party refuses the renegotiation or in the case where such renegotiations fail, the parties may agree on the conditions under which the contract shall terminate or the judge may revise or terminate the contract at the request of one or both parties. Please note that this revision mechanism is not mandatory and left to the parties’ discretion.

**Performance of the contract**

Specific performance of a contract can now be sought by a party pursuant to article 1221 of the French Civil Code, but subject to prior notice. The non-defaulting party is entitled to either ensure performance itself or by a third party, at the costs of the breaching party, or accept incomplete performance in exchange for price reduction. Eventually, it is entitled to unilaterally terminate the contract without resorting to a judge. It should be noted that these remedies are without prejudice to the right to seek damages for breach of contract before a judge. Eventually, the latter can also intervene in case of judicial control of the termination of the contract.

**Procedural innovations**

The reforms also adds three interrogatory actions to be used by a party to put an end to a situation which may be ambiguous and leads to legal uncertainty. The first one allows one to ask in writing to the beneficiary of a pre-emption agreement to confirm the existence of such an agreement and, if any, its intent to take advantage of it (new article 1123 § 3 and 4 of the French Civil Code). The second one allows one to eliminate the doubts that may exist on the powers of the representative authorised to enter into an agreement, by asking the same to confirm in writing its due authorisation (new article 1158 of the French Civil Code). The third interrogatory action aims at allowing one party, facing a potential nullity of an agreement (provided the ground of nullity has ended), to ask that the other party confirms the contract or proceeds with an action for nullity. These actions can be used for contracts concluded before or after 1 October 2016.

**French Civil liability Reform**

The contract law reform is to be followed by a civil liability one, whose consolidated draft should be submitted to the Council of Ministers and then be discussed in Parliament in the course of 2017 or 2018. This reform, rather consensual, may nevertheless introduce two changes of interest to companies that do business in France.

First, the proposed new article 1266 of the French Civil Code provides for a civil fine that is similar, in its effect, to punitive damages. The only difference is that the fine is not allocated to the plaintiff (but to a special compensation fund or, absent such fund, to the French Treasury) contrary to the US well-known mechanism. However, it equally aims at preventing and redressing ‘lucrative wrongdoing’, i.e. misconduct which generates a profit or saving for its author. The fine, of up to 10% of the highest gross amount of worldwide turnover achieved during any of the past financial years may be ordered by the civil judge.

Moreover, the new article 1240 of the French Civil Code may raise collective causation as a general principle of French civil law whereas case law has thus far limited its application to accident caused by collective sports, leisure activities and in a very specific case to pharmaceutical liability. Depending on the strict or broad construction of article 1240 by case law, it could lead to horizontal collective liability (e.g. joint and several liability of competing companies marketing similar expendable goods, such as medicine, groceries, etc.) as well as a vertical collective liability (e.g. joint and several liability of the companies belonging to a same group towards third parties).

**Some specificities of the French criminal proceedings**

Once the Public Prosecutor is seized with facts potentially constituting an offense, he initiates a preliminary investigation (e.g. searches, judicial requisitions, hearings, etc.). Such investigation is confidential, i.e. the parties do not have access to it - except if the Public Prosecutor decides to communicate some elements, at his sole discretion. At the end of his investigations, he can decide (i) to close the case, (ii) to initiate proceedings by referring the defendant before the criminal Courts or referring the case to an investigating judge to further the investigations (this hypothesis is reserved for very complex or sensitive cases), or (iii) to implement alternatives measures.
Please note that a new law No. 2016-731 dated 3 June 2016 was adopted to strengthen the fight against organised crime, terrorism and their financing, and to improve the effectiveness and guarantees of the criminal procedure. According to this law, it is now possible for any person against whom there is one or several plausible reasons to suspect that he/she committed or attempted to commit an offence punished by imprisonment and whom has been heard in custody (in French: “garde à vue”) or free hearing (in French: “audition libre”) to request to the Public Prosecutor, one year after the performance of the first of such acts, to have access to the file of the proceedings to make observations (article 77-2, I, of the French Code of Criminal Procedure). In addition, at any time of the proceedings, the Public Prosecutor, even in the absence of a request as mentioned in article 77-2, I, of the French Code of Criminal Procedure, can communicate all or part of the proceedings to the person accused or to the victim in order to collect their observations or the observations of their lawyers (article 77-2, II, of the French Code of Criminal Procedure).

Arbitration / Alternative Dispute Resolution (ADR)

In January 2011, France has adopted an updated legal framework for both French domestic and international arbitration (articles 1442 to 1527 of the French Code of Civil Procedure) and has, therefore, strengthened its strong reputation as an arbitration-friendly forum.

Historically, France has always been favourable to arbitration and the 2011 Decree reinforces this. This is underlined by: (i) the application of the principle of “competence competence” by French courts, which, accordingly, will systematically decline jurisdiction where an arbitration clause may apply unless such clause is manifestly null or void; and (ii) the role and powers of the French “juge d’appui”, a specialised judge (the President of the Tribunal de grande instance of Paris for international arbitration cases) whose role is to provide assistance to ensure that an arbitration agreement is complied with by the parties. In the recourse phase, as per the New York Convention, French courts will not review the case on the merits and will restrict their review to five grounds essentially relating to the validity of the arbitration agreement and principles of due process (there are six grounds for the review of domestic awards).

A point of interest is the new regime applicable to the arbitration clause in domestic arbitrations which was recently modified by the Act on ‘the modernisation of 21st century justice’ (new Article 2061 of the French civil Code). French law already provided that recourse to domestic arbitration was valid in the context of business relationships between professionals. The new provision extends this principle to relationships between private individuals (for example in real estate, in relation with joint-ownership rules or statutes of property investment companies…) which will therefore become arbitrable.

Uncertainties remained under the former wording of Article 2061 of the French civil Code, as to validity of the arbitration clause stipulated in consumer and employment contracts. In the context of business relationships between professionals and consumers, and if the contract provides for recourse to arbitration, the consumer will now be allowed to opt either for arbitration, or for litigation. The same solution should be adopted in favour of the employee whose employment contract includes an arbitration clause.

As regards arbitration institutions, the Court of International Arbitration of the International Chamber of Commerce (ICC), one of the leading institutions in the world, is headquartered in Paris. A network of other institutions are also based in Paris (amongst which are the Centre de Médiation et d’Arbitrage de Paris, the Association Française d’Arbitrage, Paris Place d’Arbitrage, CEFAREA for insurance related cases, the Chambre Arbitrale Internationale de Paris (CAIP)) and contribute to the reputation of Paris and France as an arbitration-friendly forum.

It should be noted that the ICC has recently amended its rules of arbitration to introduce an expedited procedure allowing for the parties to resolve their claims under US$ 2 million in a speedy and cost-effective manner. The new provisions allow the ICC to order that the case be decided by a sole arbitrator and reduce procedural time-limits (it is provided for example that the tribunal shall render its final award within six months from the date of the case management conference). Moreover, the Tribunal has full discretion to adopt any procedural measure that it considers necessary to guarantee the efficiency of the procedure. As such, it is allowed to limit the length and scope of parties’ written submissions or to refuse their requests for document production. The Tribunal may, after consulting the parties, decide the dispute solely on the basis of the documents transmitted by the parties, without holding a hearing and examining witnesses.

Other commonly used alternative dispute resolution processes include mediation, where a professional third party assists the parties to negotiate a settlement, and conciliation under the supervision of a representative appointed by French courts. Decree no.2012-66 of 20 January 2012 has brought a legal framework to these alternative dispute resolution processes and...
introduced the possibility of having an agreement reached by the parties homologated by the Court. More recently Decree no. 2015-282 of 11 March 2015 imposed the obligation to state in any writ of summons which alternative dispute resolution processes were attempted by the parties to resolve their dispute before submitting it to a judge. Although there are no sanctions accompanying this new obligation in the law, it is anticipated that the claims could be considered inadmissible by the French courts following a failure to comply with such obligation. This mechanism is accordingly having a strong impact on the rise of mediation and other alternative dispute resolution processes in France.

The Ordinance no. 2015-1033 of 20 August 2015, implementing the Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes, establishes the principle of a “right to mediation” for consumers and the resulting obligation for traders to ensure an effective access to such right. This mediation process is intended to all domestic and cross-border disputes between consumers and traders and, with some few exception, applies to all sectors. Since 1 January 2016, all traders must fully comply with this new alternative dispute resolution mechanism.

**Competition**

In France, the French Competition Authority (FCA) is responsible for upholding fair competition in markets, an essential prerequisite if consumers are to benefit from the best prices and broadest choice of products and services.

Anticompetitive practices are detrimental to the consumer in that they deprive them of the freedom to make their choice at the best price. But they are also an impediment to their well-being in more indirect ways, in that they are prejudicial to innovation, economic efficiency and, ultimately, growth. The law has therefore given the FCA the mission of upholding or restoring healthy competition.

Anticompetitive practices can take a variety of forms. They are generally divided into two broad categories: anticompetitive agreements and abuses of a dominant position.

Restrictive agreements and practices are regulated by articles L 420-1 and L 420-2 of the French Commercial Code (CC).

Article L. 420-1 CC prohibits anticompetitive agreements and concerted practices or behaviour. An anticompetitive agreement is characterised by a collusion between several economic players deciding to act together to adjust their behavior, rather than defining their commercial strategy independently as required by the law. Such practices are prohibited when they hinder, restrain or distort fair competition in a market.

A distinction is made between “horizontal” agreements (cartels) involving several companies which are competitors on the same kind of product or service and “vertical” agreements elaborated between operators at different levels in the economic chain, such as between suppliers and distributors.

The following practices are typically prohibited:

- limiting access to the market or the free exercise of competition by other undertakings (limiting the access of products and services to the market and / or of competitors to the market)
- preventing prices from being set by the free workings of the market, by artificially encouraging price increases or reductions
- limiting or controlling production, opportunities, investments or technical progress
- allocating markets or sources of supply (allocating customers and / or markets, bid-rigging)
- exchanging sensitive information between competitors
- maintaining resale price

Unlike agreements, which are bilateral or multilateral practices, abuses of a dominant position are generally unilateral practices by an economic player using its strong position in a market to lock it up, drive its competitors out or prevent the entry of new players. Article L. 420-2 CC applies to those behaviors from dominant firm.
French law explicitly takes into account individual and collective dominance, as Article L. 420-2 CC refers to “an undertaking or a group of undertakings”. The FCA uses approximately the same definition of dominance as that used by the European Court of Justice; an undertaking is considered to have a dominant position when it is in a position to “effectively hinder competition” in the market because no competitor is able to offer a significant alternative to its clients or suppliers which, as a consequence, gives the undertaking concerned the freedom to determine market conditions. Typically, the kinds of abuses prohibited by article L 420-2 are the following:

- refusal to sell
- linked sales or discriminatory conditions of sale
- termination of established commercial relations, solely because the partner refuses to submit to unjustified commercial conditions and
- predatory pricing

Article L.420-2 CC also prohibits the abuse of economic dependence.

The law distinguishes between two types of investigation: simple investigations governed by Article L. 450-3 of the Commercial Code and “heavy investigations” (dawn raids governed by Article L. 450-4 of the French Commercial Code.

- “Simple” investigations – governed by article L. 450-3 CC. The terms of this provision are very restrictive, as the investigators only have a right of access limited to professional premises, lands and means of transport and professional documents.

- “Dawn raids”. In this case, the investigators can carry out searches subject to an authorisation by the Judge of Liberties and Custody (Juge des Libertés et de la Détention) of the relevant Civil Courts of First Instance (Tribunal de Grande Instance). They may also interview the occupant of the premises or the representative of the company in order to gather information or explanations. After the inspections, two actions are open to the targeted company before the First President of the Court of Appeals within the jurisdiction of the Civil Courts of First Instance which rendered the authorisation:
  - an action against the search warrant that authorised the inspections (article L. 450-4 of the Commercial Code; § 6) or
  - an action against the conduct of the raid (article L 450-4 of the Commercial Code; § 12)

The FCA has the authority to impose different type of sanctions:

- Interim Measures: when faced with an emergency situation requiring a rapid response, the FCA may issue interim measures pending a decision on the merits of the case. This decision is made within an extremely short period of time, generally three to four months as of referral. This type of measure can only be justified in the event of a serious and immediate impediment to an economic sector or a company.

- Financial Penalties: the maximum amount of the financial penalty for a company is 10% of the company’s worldwide turnover (or €3 million if the offender is not a company). The fine is proportionate, in each case, to the seriousness of the practice and to the prejudice caused to the sector, to the situation of the company and to the potential reiteration of the infringement. If the company accepts not to challenge the grievances and to change its behavior in the future, it may obtain a reduction of the incurred fine.

- Injunctions: the FCA may also order offenders who have implemented anticompetitive practices to cease the practice concerned or, in a positive way, to modify their behavior in order to comply with competition law.

- Publishing injunction: to ensure that decisions are properly publicized, the FCA may order publication in the press.

Companies and individuals also face criminal sanctions under article L. 420-6 CC (“a prison sentence of four years and a fine of 75,000 Euros”), although criminal enforcement is rarely applied in practice.
Intellectual property

French intellectual property law provides protection for both intellectual and industrial property rights.

Whereas intellectual property rights (author's rights, neighbouring rights) are protected per se without any registration requirement, industrial property rights need to be registered, such registration being with the French Institute of Industrial Property (Institut National de la Propriété Industrielle - INPI). In case of concurrent applications with respect to the same right, priority is given to the first applicant to file.

Patents

Scope

Patents can be granted for any inventions that are novel, inventive and susceptible to industrial application, subject to certain exceptions such as therapeutic treatments or scientific theories.

Protecting patents

In France, patent applications, with or without claiming of foreign priority, must be filed at the French patent office, the INPI. They are subject to examination and search of prior art by the patent office which then issues a search report. Patents are granted for 20 years from the date of application, entitling their holders to prevent anyone from using the patented invention, following which the patented invention itself is in the public domain. From the 3rd year to the lapse, the patent has to be maintained in force by the payment of annual fees to the Patent office. Patents can be assigned and licensed. Applications derived from a registered patent can also be filed (divisional applications).

Enforcing patents

Action for infringement of a granted patent may be brought by the patent owners before the courts on both civil and criminal grounds. Enforcement proceedings result in monetary remedies and/or an injunction from the relevant court prohibiting the continuation of the infringement. Corrective remedies are available through the destruction or seizure of goods which contain the patented product.

Trademarks

Scope

Names, letters, colours, figurative signs and sounds represented graphically are all included in the potential ambit of a trademark.

Protecting trademarks

A trademark can be protected only if the following conditions are met: it must not be a word or image which is immoral or contrary to public order; nor likely to confuse or deceive third parties. Moreover, a trademark must be clearly distinctive and enable the identification of a particular product or service and must not be a word or image already protected by others.

Furthermore, there are requirements for the fulfilment of formalities as a condition of trademarks protection. A trademark application in one or more classes of products and/or services must be filed with the INPI. Within two months from the publication of the trademark application, a third party can file an opposition to prevent the registration of the mark. The applicant must also pay application fees (€250 for three classes paper filing, €210 for three classes online filing and €40 per additional class).

If a trademark is registered in accordance to these rules, it confers on the proprietor of the mark exclusive rights in relation to the mark, but only in the country of registration (i.e. only in France).

The effect of the registration is to confer these exclusive rights for a period of ten years, which is renewable for further periods of ten years.

Trademarks can also be assigned and licensed.
Enforcing trademarks

If a mark is registered, it is a trademark infringement to use the same or similar mark for the same or similar goods or services. The most common form of trademark infringement is the risk of public confusion.

The trademark owner can bring a legal action before the civil or criminal court in case of infringement of its trademark which can lead to different consequences:

► Monetary remedies may be granted, and/or an injunction from the court prohibiting the continuation of the infringement
► Corrective remedies are available through the destruction or seizure of goods which contain in order to maintain reliable evidence about the infringement

Copyright

Scope

French copyright protects the work of creators, with a non-exhaustive list of protected subject matter including literary, musical, software and audiovisual works. Thus, the author's right is founded on the link between the author and the work emanating from his mind.

However, the intellectual work must fulfil two conditions to be protected: originality and creativity.

The author is the first owner of the copyright, which gives him an exclusive right to make copies and to reproduce his work.

Exercise of Rights

French law allows the author to assign his rights, which can be transferred to another person. The assignment must be in writing and needs to comply with several requirements to be valid. The assignment contract must specify any rights assigned, as well as the field of exploitation, the scope and purpose, the duration and the territory covered by the assignment (FIPC, art. L.131-3, al. 1).

Protecting copyright

There are no formalities required to obtain copyright protection. Only the intellectual creation itself can attract copyright.

The copyright holder benefits from a number of economic and moral rights to develop and exploit his work for a period of time:

► Economic rights concern control over the commercial or industrial exploitation of works, it is comprised under the two headings of “performance”- communication of the work to the public, and “reproduction” – material fixation of the work by any process (Article L.122-1 et seq. of the French Code). These latter rights have an extremely wide scope and cover all forms of electronic communication to the public, as well as adaptation, etc
► Moral rights are related to the protection of the paternity and integrity of the work

Moral rights of the author are perpetual and non-assignable, whereas economic rights have the protection term of the author’s life plus 70 years and are freely transferable.

Infringement

Anyone who performs an act that has been reserved exclusively for the copyright-owner will infringe the copyright in the work if he or she has not in advance obtained the permission of the copyright owner to perform that act.

The author may then bring an infringement action before civil or criminal courts. French law provides for civil remedies (damages, account of profits, seizure of infringing material, etc.) and criminal penalties are also applicable in this area (fines and possible terms of imprisonment).
Designs and models

Scope

Designs and models law protects the appearance of whole or part of industrial or commercial products. Products are functional goods with aesthetic shape. Thus, products which are exclusively functional are not protected by design law.

Any design must be new and have an individual character to be protected. If these two conditions are not met, designs and models can still be protected by copyright if they are original and creative.

Protecting designs and models

Unlike copyright law, formalities are required for designs and models to be eligible for protection.

The designer has to file a design application in the INPI and has to pay application fees.

There are three levels of protection concerning Designs and Models:

► National design and model in France, registered by the INPI
► Community design and model, registered or not by the OHMI
► International design and model registered by theOMPI

The registration of a design and/or a model takes effect for 5 years which may be extended for no more than 25 years in France.

Design or model protection is enforceable only within the country in which it is registered.

Designs and models rights

Designs and models law gives the holder the exclusive right to use and sell the design or model, in particular the making, exporting, importing, placing on the market, etc.

The owner of design and model can also grant a license or assign his rights to third parties.

Enforcing designs and models

The owner of designs and models can bring an action before civil or criminal courts.

However, the holder of the right has to wait for the final registration of his work/design to initiate an action based upon design law, and an action can only be brought in relation to an infringement committed after the publication date of the design, except if it can be demonstrated that the defendant/infringer was aware of the registration before its publication.

Nevertheless, it is still possible to pursue an infringement, before publication, based on copyright law.

Marketing agreements

Several types of marketing agreements are regulated by French law.

Agency

Agency agreements are strictly regulated under French law (Articles L.134-1 and seq. of the French Commercial Code).

A “commercial agent” or “sales agent” within the meaning of Article L.134-1 of the French Commercial Code is an agent who, as an independent professional, negotiates (and possibly concludes) contracts with prospects in the name and on behalf of the principle.

If the intermediary indeed qualifies as a “sales agent” under French law, then a strictly regulated status applies in particular with respect to termination. Indeed, in the event the agency agreement is terminated in accordance with this principle, the agent is entitled to compensation (Article L.134-12 of the French Commercial Code), generally equal to two years’ of
commission, based on the average commission received over the past three years. Such right is mandatory and cannot be contractually excluded. The agent must request such indemnity within one year of the termination date. Compensation may not be due in some very limited cases listed under Article L.134-13 of the French Commercial Code, in particular in case of material breach (meaning that compensation will be due even in case of termination for “normal” breach). French judges determine, on a case-by-case and sovereign basis, if a given breach qualifies as a “material breach”. The parties cannot therefore validly provide contractually and in advance how a particular breach is to be classified.

Commercial agents should be distinguished from mere “business getters” (apporteurs d’affaires) whose principal task is to introduce the beneficiary to business contacts (in order for the beneficiary to enter into business relationships with them) but do not negotiate the contract(s) in the name and on behalf of the beneficiary. Agreements entered into with such “agents” are not subject to the strict rules of commercial agency under French law but to general provisions of French contract legislation (Articles 1101 and seq. of the French Civil Code).

Finally, if the “agent” is a mere representative (mandant), then all rules applicable to mandate (Articles 1984 and seq. of the Civil Code) will apply.

Distribution

Formal requirements apply to contracts entered into by suppliers and distributors (wholesalers and retailers). Articles L. 441-7 and L. 441-7-1 of the French Commercial Code provide for the conclusion of a “written convention” which must include all the obligations to which the parties have committed in order to determine pricing as a result of negotiations (including immediate discounts granted to the distributor and other discounts resulting from commercial cooperation or other services). This written agreement can either take the form of a single agreement or a framework agreement followed by application agreements, and must be concluded before 1 March of a given year and for a duration of one, two or three years. Such formal requirements would not, however, apply to one-off contracts which can be simply governed by general terms and conditions.

Discounts granted to distributors in consideration of services performed by the same are strictly regulated. In particular, commercial cooperation services must give rise to a separate invoice issued by the distributor and cannot be simply deducted from the supplier’s invoice. Any service provided by the distributor must be expressly described in the abovementioned convention, specifying the type and purpose of services, the conditions, date of implementation and applicable remuneration (Articles L. 441-7 and L. 441-7-1 of the French Commercial Code).

Distribution agreements, in particular exclusive or selective, agreements are also governed by competition law. Indeed, distribution agreements must not impede competition and as such are governed by:

► French competition law, which prohibits anti-competitive practices (abuse of a dominant position - Article L. 420-1 – and/or anticompetitive agreement (entente) prohibition – Article L.420-2 of the French Commercial Code) for distribution agreements which may affect competition in France and

► European competition law, especially EU Regulation 330/2010 of April 20, 2010 on the application of Article 101(1) TFEU – which prohibits anticompetitive agreements and/or practices, for distribution agreements which may also affect competition in the EU market

Please note that French law also prohibits “restrictive practices” (Articles L. 442-1 to L. 442-10 of the French commercial Code). In this respect, French law notably prohibits:

► resale at a loss (i.e. selling at a price below the initial purchase price)

► price fixing (i.e. imposing a minimum resale price or a commercial margin to the distributor)

► “significant imbalance” between the rights and obligations of the parties

► abrupt termination of an established business relationship (i.e. without a sufficient priori notice taking into account in particular the duration of the relationship, irrespective of the terms of the contract)

► “most favoured nation” clauses which are null and void under French law
Finally, payment terms are also regulated under French law and cannot exceed in principle 60 days from the date of invoice or 45 days from the date of the invoice.

Franchising

The basic requirement regarding franchising under French law concerns the franchisor’s obligation to inform the franchisee before the agreement is entered into. Indeed, pursuant to Articles L. 330-3 and R. 330-1 of the French Commercial code (formerly Article 1 of Law no 89-1008 of December 31, 1989 (known as Loi Doubin) and its application Decree no. 91-337, of April, 4 1991), the franchisor (and more precisely “any person who provides to another person a corporate name, trademark or trade name in exchange of exclusivity or quasi exclusivity”) must disclose a set of pre-contractual information, at least 20 days before the execution of the franchising agreement or before the payment of any amount (for example to reserve a specific area), whichever occurs first.

Breach of this obligation by the franchisor can lead to annulment of the agreement.

Like other vertical agreements, franchising agreements are also subject to French and/or European competition law.

E-commerce

E-commerce itself has grown rapidly in France as in many other jurisdictions and yet business on the internet is not governed by a single set of rules. In particular, e-commerce is governed under French law inter alia by:

- The law of 21 June 2004 For Trust in the Digital Economy (LCEN) which implements the EU Directive 2000/31.EC of 8 June 2000 on e-commerce;

- The French Loi relative à la Consommation, known as Loi Hamon dated March 17, 2014 which has considerably reformed regulations applicable to distance selling and implements under French law the EU Directive 2011/83/EU on Consumers rights dated 25 October 2011.

E-commerce is regulated at each stage of the order process:

Before an order is placed

Prescribed information must be provided by the professional to consumers (“consumer” being defined under French law as any natural personal who is acting for purposes which are outside his/her trade, business, craft or profession) before the order is placed (identity of the seller, essential characteristics of the goods, prices, delivery date, information regarding legal warranties and, if applicable commercial warranty, availability period of spare parts that are essential for the use of the goods, right of withdrawal (including standard withdrawal form to exercise such right), specifying that return costs shall be borne by consumers and applicable exceptions to such rights, available means of payment, delivery restrictions, etc.).

During the order process

Contracts entered into electronically are valid provided that their formation has been made in compliance with the so called “double click” system laid down by LCEN. Indeed under French law, subject to certain exceptions in contracts between professionals, the recipient of the offer (buyer) must be offered the possibility of checking his/her order and correcting possible errors. Besides, essential mandatory information such as the essential characteristics of the goods, prices, delivery date, and availability period of spare parts must be confirmed before confirming acceptance.

In addition, since the new Loi Hamon, the seller must ensure that the consumer, when placing his order, explicitly acknowledges that the order implies an obligation to pay by stating that in an obvious place and in an understandable way. If the seller does not comply with this requirement the consumer will not be bound by the contract or order.

Finally, costs incurred by opt-out systems, such as pre-ticked boxes, are not enforceable against consumers.

After the order is placed

The author of the offer (seller) must acknowledge on a durable medium (for instance by email) within a reasonable time after the contract is concluded, and at the latest upon delivery of the product or service, the receipt of the order and remind to consumer all the above information.
Consumers generally benefit from a discretionary right of withdrawal for a period of 14 days (except in some limited cases listed under Article 121-21-8 of the Consumer Code). A withdrawal form must be provided by the seller to the consumer so as to facilitate the exercise of this right. Should it be exercised, the seller must reimburse the consumer within 14 days. Return costs are borne by the consumer, provided the seller has clearly informed the consumer (before the sale) of such costs.

There are other more general rules under French law that would also apply i.e. mandatory disclosures laid down by the LCEN (e.g. identity of the editor of the website, publication director and hosting services provider) which must appear on any websites, rules regarding spamming which prohibit direct marketing using contact details of an individual who has not given prior consent to being approached, rules regarding cookies posted on the website which must be accepted expressly and in advance by the users of the website and data protection rules as long as buyers’ data is collected and processed to deliver the good or the service (see below).

In addition, in e-commerce contracts, as in other consumer contracts not concluded online, the professional must offer to the consumer the possibility to resort to a free out-of-court consumer mediation procedure, and indicate the contact details of the mediation entity in its terms and conditions. The list of duly authorised mediation entities is determined by a special commission and is available online to professionals, who have to choose and enter into a contract with such a mediation entity.

Finally, France recently adopted a set of regulations (amongst which the French Digital Bill of 7 October 2016) aiming at increasing the regulation of the activities of many categories of online platforms (including online intermediaries or platforms referencing, classifying or comparing goods or services such as marketplaces). Such operators now have extended information duties for example.

Data protection

Collection and processing of personal data (i.e. any information that may be used to identify, directly or indirectly, an individual -including for instance photographs, IP address, social security number, ID number) are strictly regulated under French law in particular by the French Data Protection Act (Loi Informatique et Libertés) of 6 January 1978. French Data Protection rules implement the EU Directive on Data Protection no. 95/46/EC of 24 October 1995, although there are several French specificities.

Specifically, it should be noted that:

- subject to few exceptions, any processing of personal data must in principle be notified to the French Data Protection Authority (CNIL) - each purpose of processing must in principle give rise to one specific notification to the CNIL. For some processing of sensitive information as well as for some specific data processing purposes (including automatic processing which may, due to its nature, importance or purposes exclude persons from the benefit of a right, a service or a contract), an authorisation from the CNIL may be needed. Specific formalities also apply to data transfers outside the European Union, where a specific authorisation is also needed if such transfers are based on Standard Contractual Clauses or Binding Corporate Rules.

- data controllers must provide clear information to data subjects as regards inter alia the existence and purpose of the data processing, the data recipients, data retention periods, whether the data is to be transferred outside the EU or not, and if so, the mandatory means implemented to ensure the validity of such transfer under French law (transfer of data is strictly regulated), the existence of a right for data subjects to access, modify or delete their data and the new right to send specific instructions to the data controller regarding the use of data subject’s data after his death, etc.

- personal data must be obtained lawfully, processed for a legitimate purpose and not excessive in relation to that purpose. It must be accurate and be kept for a limited period, no longer than what is necessary in view of the purpose of the processing.

- the collection and processing of sensitive data (i.e. racial and ethnic origins, political, philosophical, religious opinions or trade union affiliation, health data or data related to sexual orientation) is prohibited, except in some limited cases such as, for instance, where the express consent of the data subject has been obtained. The processing of some other data is strictly prohibited. For instance, the processing by private companies of data regarding a data subject’s convictions or criminal offences is not allowed i.e. an employer cannot, for example, process data regarding his employees’ criminal record.
the CNIL has undertaken 430 inspections in France in 2016 in order to ensure compliance of companies with French Data Protection rules. CNIL’s investigations are thus quite frequent and can lead to public warnings and financial sanctions. In 2016, CNIL has issued 93 formal notices (to request data controllers to comply with the French Data Protection Act) among which 4 of them were made public. These formal notices led to 13 sanctions, among which 4 of them were public fines and 9 of them were warning.

the CNIL have recently been granted, by the French Act for a Digital Republic dated 7 October 2016, with new sanction powers. Indeed, the maximum amount of fine that can be pronounced by CNIL is now of €3 million (the maximum previously being of EUR 150 000 pronounced once against Google Inc).

the French Act for the modernisation of the XXI century justice dated 18 November 2016 has created a new class action dedicated to data protection matters. As of now, some consumer associations, as well as some trade unions can introduce a class action where several persons placed in a similar situation suffer damage due to the same breach of the French Data Protection Act caused by a data controller or a data processor. Said class action can only lead to the termination of the breach but cannot in any case lead to the compensation of the damages suffered.

finally, due to the implementation of the General Data Protection Regulation dated 27 April 2016, the French Data Protection Act is currently under review by the French parliament. An update of the French rules to comply with the GDPR - including to implement national rules where such references are made in the GDPR - is expected by the end of 2017 to beginning of 2018.

Product liability

Under French law, legal actions on product liability are generally based on the specific provisions regarding the liability for defective products, which in principle excludes all other liability regimes. Alternative civil liability regimes may, however, apply. Criminal liability can eventually be sought in case of hazardous products.

Liability for defective products

The European Directive no. 85/74/EEC on product liability was transposed into French law by Decree no. 98-389 of 19 May 1998 under articles 1 to 1245-17 of the New French Civil Code.

Under these provisions, the producer has a liability without fault for the damages caused by a defective product, defined as a product which does not conform to the safety standards which a person is entitled to expect. The producer, who can be either the manufacturer of the finished product or the importer of the product into the EU, is held liable for any damage caused by a defective product even when the victim and the producer have not entered into a contract.

The victim has to prove the existence of damage, the product’s defect and the link between the damage and the defect. Legal action must be commenced within 10 years after the product has been released and within 3 years after the damage has occurred.

Compensatory damages cover bodily injuries and damages to property exceeding €500, excluding the damage caused to the defective product as well as its replacement.

Alternative applicable civil liability regimes

Legal liability for latent defects

Articles 1641 and seq. of the French Civil Code provide that the buyer of a product who has personally suffered loss has a legal claim based on the legal warranty against latent defects.

Under these provisions, sellers who were aware of the defects in the products they sold must compensate the buyer for the damage incurred. Professional sellers are irrefutably presumed to be aware of the defects of the products. In addition, a buyer may directly sue any of the preceding professional sellers, up to the producer.

In matters arising between consumers and professionals and relating to non-conformity defects, French law also provides a specific set of rules, set forth in article L.221-1 of the French Consumer Code.
General civil liability whether tortious or contractual

Contractual liability under articles 1231 and seq. of the New French Civil Code may be incurred by any supplier of a defective product who has caused a loss to the co-contracting party.

When a loss has been suffered by a third party, the general rules of civil liability under the provisions of article 1240 of the New French Civil Code may apply. The claimant has to prove that the supplier or producer was negligent or is at fault.

Criminal liability for hazardous products

The criminal offences related to a hazardous product notably include deceit (article L213-1, paragraph 3, of the French Consumer Code), involuntary bodily harm (article 222-19 of the French Criminal Code), endangering the lives of others (article 223-1 of the French Criminal Code), failure to help someone in danger (article 223-6, paragraph 2, of the French Criminal Code) or misleading commercial practice (article L121-1 of the French Consumer Code).

Bribery and corporate crime

France has an extensive set of rules on bribery and corruption related offences, all set out in the Criminal Code

Articles 432-11 and 433-1 of the French Criminal Code proscribe offences of corruption and influence peddling in relation to public officials. Both passive and active corruption/influence peddling falls within the scope of the legislation and carry a potential penalty of up to 10 years imprisonment and a fine of up to €1,000,000 or twice the proceeds derived from the offence. Additional penalties notably include exclusion from government contracts, prohibition from offering shares to the public or closing of an establishment for legal entities and deprivation of rights or professional restrictions for individuals.

The act of offering a bribe agreement to a private individual or consenting to the individual solicitation is also punishable, under the provisions of article 445-1 of the French Criminal Code. The penalties are up to 5 years imprisonment and a fine of up to €500,000 or twice the proceeds derived from the offence.

France has ratified the main European and International treaties on bribery and corruption (EU Convention against corruption involving officials in 1997; OECD Anti-Bribery Convention in 2000; UN Convention against Corruption in 2005) and has therefore extended the legal prohibitions on corruption to foreign public agents and members of public international organisations, under articles 435-1 and seq. of the French Criminal Code.

The Sapin 2 Law (see below) has established an offence of influence peddling on foreign public officials (articles 435-2 and 435-4 of the French Criminal Code), and aims at encouraging the prosecution of offences of influence peddling and corruption committed abroad, by removing certain preconditions: (i) the need for the offences to be punished in the country where the facts were committed and (ii) the need for a prior complaint from the prosecution.

In the fight against corruption, article L.112-6 of the French Monetary and Financial Code prohibits cash payments above €1,000 and requires the involvement of French financial institutions. Suspicious transactions must be reported to the French Financial Intelligence Unit (TRACFIN).

Law no.2013-1117 of 6 December 2013 has not only increased the fines for bribery-related offences, but has also (i) enabled anti-corruption associations to join criminal proceedings as a civil party claiming damages and (ii) created a “Financial Public Prosecutor”, who detains a concurrent jurisdiction with the “traditional prosecutors” regarding (among others) offences against probity.

Decree no. 2013-960 of 25 October 2013 also established a new central authority within the criminal police, tasked with investigating corruption and financial offences. The Decree grants the central anti-corruption authority wide jurisdiction over different offences (white collar crime generally, tax fraud, offences against probity, offences defined by articles L. 106 to L. 109 of the Electoral Code, which include influencing votes by financial offerings, provided that they are significant and money laundering and related offences).

A new law on transparency, fight against corruption and modernisation of the economy (Sapin 2 Law) was adopted on 9 December 2016. The implementing decree on the functioning of the new French Anti-Corruption Agency (invested with many missions and having broad powers to fight corruption) was published on March 14, 2017. Inspired by international standards (the UKBA and the FCPA), the Sapin 2 Law includes, in particular, new obligations to detect and prevent corruption/influence
peddling for companies employing at least 500 employees or belonging to a group of companies with a French parent company employing at least 500 employees and with a turnover or consolidated turnover amounting to over €100,000,000 (Art. 17, I).

On 1 June 2017, such companies will have to implement the following measures:

► a code of conduct defining and describing the prohibited behaviors likely to be qualified as acts of corruption/influence peddling
► an internal whistleblowing mechanism and appropriate measures for accepting reports
► a risk mapping regularly updated to identify, analyse and prioritise the risks of external requests depending on the industries and geographical areas
► a procedure to assess the situation of the clients, first-tier suppliers and intermediaries in consideration of the risk mapping above mentioned
► internal or external accounting controls to make sure that the accounting records/accounts are not used to hide acts of corruption/influence peddling
► training for the companies’ executives and staff most exposed to the risks of corruption/influence peddling
► a policy of disciplinary sanctions to sanction any violation of the company’s code of conduct and
► an internal system to control and assess the implementation of the measures above mentioned (Art. 17, II).

In case of violation of this obligation, the companies and their executives incur in particular an administrative sanction amounting to a maximum of €200,000 for individuals and €1,000,000 for legal entities (Art. 17, V). In addition, the Sapin 2 Law creates for companies which do not fall within the scope above mentioned (i.e. 500 employees) but employ at least 50 employees an obligation to implement appropriate measures for accepting reports (Art. 8).

Also pursuant to the Sapin 2 Law, a kind of “Deferred prosecution agreement” was introduced into French law: as long as prosecution has not been set in motion (i.e. until the end of the preliminary investigation) the Prosecutor may offer legal entities accused of offenses of corruption or influence peddling, a Settlement imposing some obligations: the payment of an amount proportionate to the profits arising out of the offense (within the limit of 30% of the company’s average annual turnover of the last three years), and the implementation, under the supervision of the Agency, of a compliance program to ensure the existence and the implementation of the eight requirements listed above in relation to the duty to prevent corruption/influence peddling (code of conduct, whistleblowing mechanism etc.).

A plethora of other implementing texts are expected for the application of the Sapin 2 Law, including final texts regarding a public register of interest representatives and rules of ethics imposed on them.

French law on the prohibition of bribery applies beyond French boundaries

Under French territorial competence rules, a criminal offence is deemed to have been committed in France as long as part of the offence was carried out on French territory (Article 113-2 §2 of the French Criminal Code).

The law also applies beyond national boundaries as article 113-6 of the French Criminal Code provides that French criminal law is applicable to offences committed by French nationals outside the territory of the Republic if the facts are punishable under the law of the country in which they were committed.

Irrespective of their nationality, individuals committing offences punishable by imprisonment committed outside French territory against a French victim, can also be prosecuted by French Courts, under article 113-7 of the French Criminal Code.

Finally, please note that articles 435-1 and seq. of the French Criminal Code prohibit the corruption/influence peddling of foreign/international public officials.
Real estate

Ownership restrictions on foreign companies

Under French law, foreign companies are entitled to acquire and own Real estate in France without any restriction. Foreign investments are subject to various declarations if they exceed certain thresholds as for any transaction.

However, as transactions involving Real estate are, in principle, governed by the law of the place where the property is located, all asset transactions involving a property located in France are governed by French law.

For tax purposes, the acquisition and ownership of Real estate assets are frequently achieved through a Real estate partnership Société civile immobilière (SCI) consisting of a single-purpose tax-transparent structure.

Types of interest in land

Property interests in land exist in several types of possessory, enjoyment, and use rights.

Ownership of the land exists in: (i) the right of usufruit which is the right to use and receive the proceeds of Real estate assets; and (ii) the right to dispose of said assets, which is called nue propriété. Usufruit and nue propriété may be gathered in one party or split between different holders. For instance usufruit may be granted by a landlord to a third party.

The right to use and enjoy (droit de jouissance) may be transferred pursuant to a civil or commercial lease. Civil leases are not heavily regulated and are mostly governed by the parties. Commercial lease agreements are regulated by mandatory provisions of the French Commercial Code and its main interest is to give the tenant security of tenure pursuant to which the landlord has either to renew the lease or to indemnify the tenant. The Law no.2014-626 dated June 18, 2014 (Loi Pinel), and its implementation order (décret d’application), have given additional protection to tenants under a commercial lease, notably by detailing several charges which cannot be borne by the tenant.

Finally, the construction lease (bail à construction) is a useful mechanism consisting of a right in immovable property (droit réel) over the land through a lease granted with the purpose of constructing a building. The lessee pays a rent to the landlord for a minimum duration of 18 years and up to 99 years. Upon expiration of such duration, the buildings are usually vested in the landlord unless otherwise agreed upon.

Registration requirements upon acquisition of real estate property

In order to be enforceable vis-à-vis third parties, the acquisition of Real estate property has to be registered with the land register (fichiers immobiliers). Such registration is also necessary should a lease be granted for a period exceeding 12 years.

Tax payments upon acquisition of real property

The purchase of immovable property located in France is subject to registration duties at a rate ranging from 5.09% to 5.81% based on the sale price or fair market value if higher. Furthermore, the land registration of the transfer of an immovable property triggers a 0.1% land registration right calculated on the sale price (contribution de sécurité immobilière) and public officer’s fees calculated according to a specific formula depending on the deed’s characteristics. The application of exemptions or reduced registration duties (in case of application of the 0.715% specific reduced rate plus 0.1% land registration fee) are complex and should be analysed on a case by case basis.

Real estate and environment

The focus on environmental issues has grown recently in the context of Real estate transactions. Since the Grenelle 1 law dated 3 August 2009 and Grenelle 2 law dated 12 July 2010, Real estate transactions must disclose information regarding energy consumption diagnosis, risks of ground pollution, and a natural and technological risk statement. The decree dated 30 December 2011 also requires environmental information for any lease of offices or commercial spaces exceeding 2,000 m², including water and energy consumption and quantity of waste generated.

The law “transition énergétique pour la croissance verte” dated 17 of August 2015, which aims at reducing carbon emissions by 50% between 2012 and 2050, created new obligations concerning energy efficiency in new constructions as well as in existing ones that undergo large renovation works.
Furthermore, under French law, any industrial facility likely to create a risk or to cause pollution or a nuisance, notably in terms of local residents’ health and safety, is considered as a classified installation under the Installations Classées Pour la Protection de l’Environnement legal framework (ICPE Legislation). Activities regulated under the ICPE Legislation are listed in a nomenclature imposing an authorisation (permit) or declaration system depending on the significance of the risks or inconvenience which may be caused.

The known as the ALUR law dated 24 of March 2014 brought novelties regarding to the liability for the rehabilitation of the contaminated lands where a classified installation had been in activity. The principle remains the same: the last operator of the site is in principle liable after its closure, regardless of a land sale (i.e. polluter pays principles). Before 2014, contractual agreements with interested third parties modifying this allocation of responsibilities were not enforceable towards authorities. But the ALUR law introduced the possibility to make this transfer official under certain conditions, notably the agreement of certain parties, including the last operator of the site.

Finally, a new procedure for environmental authorizations came into force in March 2017. ICPE installations and installations regulated under the law on water are now subject to a single unified environmental authorisation. This new procedure will serve as a substitute for all the procedures those installations previously had to go through individually (for example, the authorisation to use Genetically Modified Organisms (GMO), specific authorisations for natural reserves or waste processing agreements).

**Existing law is stated as it applied in May 2017.**

**Useful contacts**

<table>
<thead>
<tr>
<th>USEFUL CONTACTS</th>
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<tbody>
<tr>
<td>French Chambers of Commerce (Chambres de commerce et d'industrie francaises), which site provides useful information</td>
<td><a href="http://www.cci.fr">www.cci.fr</a></td>
</tr>
<tr>
<td>Chambre de commerce et d'industrie de Paris</td>
<td><a href="http://www.cci-paris-idf.fr">www.cci-paris-idf.fr</a></td>
</tr>
<tr>
<td>The web site of the Paris commercial court</td>
<td><a href="http://www.greffe-tc-paris.fr/en/">www.greffe-tc-paris.fr/en/</a></td>
</tr>
<tr>
<td>Invest in France Agency (promotion of international investments in France):</td>
<td><a href="http://www.en.businessfrance.fr/invest">www.en.businessfrance.fr/invest</a></td>
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<tr>
<td>Banque de France</td>
<td><a href="http://www.banque-france.fr/en">www.banque-france.fr/en</a></td>
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<tr>
<td>Authority for prudential supervision and resolution (banking authority)</td>
<td><a href="http://www.acpr.banque-france.fr/en">www.acpr.banque-france.fr/en</a></td>
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<tr>
<td>Authority for the financial markets (AMF)</td>
<td><a href="http://www.amf-france.org">www.amf-france.org</a></td>
</tr>
<tr>
<td>Euronext-NYSE Paris (French stock exchange operator)</td>
<td><a href="http://www.euronext.com">www.euronext.com</a></td>
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**Further information**

August Debouzy Avocats

6-8 avenue de Messine - 75008 Paris

+33(0)1 45 61 51 80

+33(0)1 45 61 51 99

www.augdeb.com
Created in 1995, August Debouzy avocats is one of the first full-service law firms offering legal advisory and litigation services. AD staff are lawyers of various nationalities from the best French and foreign professional backgrounds, members of international bars, known for their high level of legal expertise. The firm has a clientele made up of major economic actors (national and international companies, SMEs, public authorities and institutions) in all business sectors. AD is the member of an international network of independent business law firms of more than 9,000 lawyers from 45 law firms spread across the world’s major economic centres. AD was the first French law firm to develop a lobbying function.

For any information please contact Kami Haeri, (khaeri@august-debouzy.com)

August Debouzy’s main fields of expertise are:

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► Public M&A and capital markets
► Real estate
► Labour law
► Tax law
► IP, IT & media
► Commercial and distribution law
► Litigation, arbitration & white collar crime
► Competition, Distribution & Consumer
► Public, Regulatory, Environment & Lobbying

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► Construction, Building, Infrastructure
► Communication, Media, Press
► Energy, Environment, Extraction/Mining
► IT, Internet, Electronics
► Luxury goods, Fashion
► Manufacturing
► Pharmaceuticals, Chemicals, Biotechnology
► Public authorities, Charity sector
► Real estate
► Retail, Distribution, Consumer products
► Telecommunications
► Tourism, Leisure
► Transport and Logistics

Key contacts at AUGUST & DEBOUZY by field of expertise

<table>
<thead>
<tr>
<th>MERGERS &amp; ACQUISITIONS – PRIVATE EQUITY</th>
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<tbody>
<tr>
<td>Gilles August</td>
</tr>
<tr>
<td>Partner</td>
</tr>
<tr>
<td>+33 1 45 61 51 87</td>
</tr>
<tr>
<td><a href="mailto:gaugust@august-debouzy.com">gaugust@august-debouzy.com</a></td>
</tr>
<tr>
<td>Valery Denoix de Saint Marc</td>
</tr>
<tr>
<td>Partner</td>
</tr>
<tr>
<td>+33 1 45 61 79 97</td>
</tr>
<tr>
<td><a href="mailto:vdenoixdesaintmarc@august-debouzy.com">vdenoixdesaintmarc@august-debouzy.com</a></td>
</tr>
<tr>
<td>Pierre Descheemaeker</td>
</tr>
<tr>
<td>Partner</td>
</tr>
<tr>
<td>+33 1 45 61 88 56</td>
</tr>
<tr>
<td><a href="mailto:pdescheemaeker@august-debouzy.com">pdescheemaeker@august-debouzy.com</a></td>
</tr>
<tr>
<td>Julien Aucomte</td>
</tr>
<tr>
<td>Partner</td>
</tr>
<tr>
<td>+33 1 45 61 83 12</td>
</tr>
<tr>
<td><a href="mailto:jaucomte@august-debouzy.com">jaucomte@august-debouzy.com</a></td>
</tr>
<tr>
<td>Julien Wagmann</td>
</tr>
<tr>
<td>Partner</td>
</tr>
<tr>
<td>+33 1 45 61 83 12</td>
</tr>
<tr>
<td><a href="mailto:jwagmann@august-debouzy.com">jwagmann@august-debouzy.com</a></td>
</tr>
<tr>
<td>Jérôme Brosset</td>
</tr>
<tr>
<td>Partner</td>
</tr>
<tr>
<td>+33 1 45 61 83 12</td>
</tr>
<tr>
<td><a href="mailto:jbrosset@august-debouzy.com">jbrosset@august-debouzy.com</a></td>
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# Banking & Finance – Financial Regulations

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<tr>
<td>Valery Denoix de Saint Marc</td>
<td>+33 1 45 61 79 97 <a href="mailto:vdenoixdesaintmarc@august-debouzy.com">vdenoixdesaintmarc@august-debouzy.com</a></td>
</tr>
<tr>
<td>Olivier Moriceau</td>
<td>+33 1 45 61 88 56 <a href="mailto:omoriceau@august-debouzy.com">omoriceau@august-debouzy.com</a></td>
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# Capital Markets

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<td>Valery Denoix de Saint Marc</td>
<td>+33 1 45 61 79 97 <a href="mailto:vdenoixdesaintmarc@august-debouzy.com">vdenoixdesaintmarc@august-debouzy.com</a></td>
</tr>
<tr>
<td>Laurent Cotret</td>
<td>+33 1 45 61 59 22 <a href="mailto:lcotret@august-debouzy.com">lcotret@august-debouzy.com</a></td>
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# Real Estate

<table>
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<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Pierre Descheemaeker</td>
<td>+33 1 45 61 88 56 <a href="mailto:pdescheemaeker@august-debouzy.com">pdescheemaeker@august-debouzy.com</a></td>
</tr>
<tr>
<td>Laurent Cotret</td>
<td>+33 1 45 61 59 22 <a href="mailto:lcotret@august-debouzy.com">lcotret@august-debouzy.com</a></td>
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# Employment

<table>
<thead>
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<th>Name</th>
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<tr>
<td>Emmanuelle Barbara</td>
<td>+33 1 45 61 59 73 <a href="mailto:ebarbara@august-debouzy.com">ebarbara@august-debouzy.com</a></td>
</tr>
<tr>
<td>Fabienne Haas</td>
<td>+33 1 45 61 80 91 <a href="mailto:fhaas@august-debouzy.com">fhaas@august-debouzy.com</a></td>
</tr>
<tr>
<td>Philippe Durand</td>
<td>+3 1 45 61 83 16 <a href="mailto:pdurand@august-debouzy.com">pdurand@august-debouzy.com</a></td>
</tr>
<tr>
<td>Marie-Hélène Bensadoun</td>
<td>+33 1 45 61 83 16 <a href="mailto:mbensadoun@august-debouzy.com">mbensadoun@august-debouzy.com</a></td>
</tr>
<tr>
<td>Virginie Devos</td>
<td>+33 1 45 61 83 30 <a href="mailto:vdevos@august-debouzy.com">vdevos@august-debouzy.com</a></td>
</tr>
<tr>
<td>Eric Manca</td>
<td>+33 1 45 61 80 90 <a href="mailto:emanca@august-debouzy.com">emanca@august-debouzy.com</a></td>
</tr>
<tr>
<td>Catherine Le Manchec</td>
<td>+33 1 45 61 59 73 <a href="mailto:clemanchec@august-debouzy.com">clemanchec@august-debouzy.com</a></td>
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<td>EMPLOYMENT</td>
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<tr>
<td><strong>Partner</strong></td>
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<tr>
<td>Anaïs Qureshi</td>
<td>+33 1 45 61 83 30</td>
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## PUBLIC LAW, REGULATORY, ENVIRONMENT & LOBBYING

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<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Christian Pierret</td>
<td>+33 1 45 61 83 24</td>
<td><a href="mailto:cpierrret@august-debouzy.com">cpierrret@august-debouzy.com</a></td>
</tr>
<tr>
<td>Vincent Brenot</td>
<td>+33 1 45 61 79 73</td>
<td><a href="mailto:vbrenot@august-debouzy.com">vbrenot@august-debouzy.com</a></td>
</tr>
<tr>
<td>Emmanuelle Mignon</td>
<td>+33 1 45 61 79 73</td>
<td><a href="mailto:vbrenot@august-debouzy.com">vbrenot@august-debouzy.com</a></td>
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## COMPETITION, DISTRIBUTION & CONSUMER

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<tr>
<td>Mahasti Razavi</td>
<td>+33 1 45 61 59 11</td>
<td><a href="mailto:mrazavi@august-debouzy.com">mrazavi@august-debouzy.com</a></td>
</tr>
<tr>
<td>Renaud Christol</td>
<td>+33 1 45 61 79 73</td>
<td><a href="mailto:rchristol@august-debouzy.com">rchristol@august-debouzy.com</a></td>
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Overview

Germany’s legal system is based on civil law. It consists of a legislature and an independent judiciary. Legislative power resides at both federal (Bund) and state level (Land). The constitution presumes that all legislative power remains at the state level unless otherwise provided. Many fundamental matters of administrative law fall within the jurisdiction of the individual federal states.

A new German government was formed in December 2013. The elected Cabinet of the so-called grand coalition consists of the two major contemporary parties in Germany. Nine ministers come from the ranks of the conservative parties CDU and CSU. Six ministers come from the social-democratic party SPD. Angela Merkel (CDU) was re-elected as Chancellor and after her previous elections in 2005 and 2009, this is her third consecutive term in office.

Foreign investment

In principle, the German market is open for investments of any kind. However, the Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie, BMWi) has certain powers to review and prohibit or restrict a transaction for reasons of public order or security.

Investors from outside the EU who acquire 25% or more of the shares in a German enterprise can be subject to an examination by the BMWi. Acquisitions by investors from within the EU may likewise be reviewed if one of their shareholders comes from a third country and holds 25% or more of the shares. If the BMWi concludes that the acquisition constitutes a sufficiently serious threat to public order or security, it can either prohibit or restrict the investment, provided it has informed the investor of the review within three months after conclusion of the acquisition contract. In order to obtain prior legal certainty, an investor can apply for a clearance certificate with the BMWi.

Special rules apply in the defence and cryptology sectors. Foreign investors must notify to the BMWi acquisitions of 25% or more of the shares of enterprises that produce or develop:

► Goods subject to the German war weapons control laws
► Certain IT-security products
► Specially designed motors or gears for combat tanks and other armoured military vehicles

The validity of the purchase contract depends on the approval of the BMWi, which can prohibit the acquisition to protect vital national security interests.

Under the antitrust laws of Germany and the EU, the acquisition of shares in a German enterprise may require clearance from the Federal Cartel Office (Bundeskartellamt) and/or the European Commission.

Restrictions on doing business with certain countries or jurisdictions

The EU has enacted a number of sanctions or restrictive measures within the framework of its Common Foreign and Security Policy, both against third countries (for example, Iraq, Iran, North Korea, Sudan or Syria) and/or non-state entities and individuals (such as terrorist groups and terrorists). As in all other EU member states, these EU regulations are directly applicable in Germany. These sanctions or restrictive measures (the two terms are used interchangeably) have frequently been imposed by the EU in recent years, either on an autonomous EU basis or by implementing binding resolutions of the Security Council of the United Nations. They can comprise:

► Arms embargoes
► Other specific or general trade restrictions (import and export bans)
► Financial restrictions
► Restrictions on admission (visa or travel bans)
► Other measures
The most comprehensive sanctions are currently imposed on Iran.


A consolidated list of persons, groups or entities targeted by EU financial sanctions is available at http://eeas.europa.eu/cfsp/sanctions/consol-list/_en.htm

Exchange control and currency regulations

Germany does not restrict the export or import of capital, except for restrictions on transactions based on sanctions or restrictive measures or national legislation. For statistical purposes only, every individual or corporation residing in Germany must report to the German Federal Bank (Deutsche Bundesbank), subject only to certain exceptions, any payment received from or made to an individual or a corporation resident outside Germany, if the payment exceeds EUR 12,500 (or the corresponding amount in other currencies).

In addition, residents must submit reports on claims against or liabilities to non-resident individuals or corporations amounting to more than EUR 5 million per month. Further, there is a reporting obligation for claims against or liabilities to non-residents arising under derivative financial instruments and exceeding EUR 500 million per quarter. Further reports have to be made with regard to the value of assets of non-resident companies in which a certain proportion of shares or voting rights are attributed to the resident (10% or more) or to one or more non-resident companies controlled by the resident (more than 50%).

Moreover, a resident has to report the value of its non-resident branch offices and permanent establishments. Likewise, residents must report the value of the assets of resident companies in which a certain proportion of shares or voting rights is held by a non-resident (10% or more) or by one or more resident companies controlled by a non-resident (more than 50%). This reporting obligation also applies to the value of the non-resident's resident branch offices and permanent establishments.

Incentives available to investors

Investment incentives are provided by the German federal government, the German federal states and the EU. The incentives include, for example, cash incentives, interest-reduced loans, public guarantees, labour-related incentives and R&D incentives. While some programmes specifically target small and medium sized enterprises (SMEs), investment incentives are, in general, available to all investors if the investment is beneficial for the German economy. However, the programmes may require companies to have a registered seat or management in Germany.

The most important German institution for financing investments is the KfW Banking Group (Kreditanstalt für Wiederaufbau, KfW) (www.kfw.de), the nationally operating development bank of Germany owned by the Federal Republic and the federal states. It makes available a number of different financing tools such as promotional loan programmes, mezzanine financing and private equity. In addition to the KfW, the German federal states have their own development banks that finance projects within their respective state boundaries.

More information on incentive programmes in Germany is available at Germany Trade and Invest (www.gtai.de/GTAI/Navigation/EN/Invest/Investment-guide/incentive-programs.html). This is an official and up to date site promoted by the BMWI, providing information about investment opportunities in Germany and general investment conditions.

The BMWI website (www.bmi.de/English/Navigation/root.html) provides information about the German economy in general, as well as about key issues such as energy, foreign trade and technology.

Business vehicles

In Germany, two types of corporations are commonly used: the stock corporation (Aktiengesellschaft, AG), comparable to the English public limited company (Plc) and the the limited liability company (Gesellschaft mit beschränkter Haftung, GmbH), comparable to the English private limited company (Ltd)

They both have the benefit of limited liability for their shareholders. The GmbH is the legal form most commonly used in Germany, including by foreign investors. This is mainly because the corporate governance of a GmbH is significantly easier to handle and the capital maintenance rules are less strict compared to an AG.
In addition, several forms of partnerships exist and it is possible to set up a trust (Stiftung). Such business vehicles have, however, a rather complex corporate governance structure and some of them expose their members to unlimited liability.

Registration and formation

► A GmbH can be set up by at least one shareholder by notarising its articles of association. It comes into force on its registration with the competent Commercial Register (Handelsregister) that is kept at the competent local court. The Commercial Register contains information on the company's key details, for example:

► Company name
► Share capital
► Object of the company
► Information about managing directors
► Existence of domination agreements and profit and loss transfer agreements
► The articles of association
► Shareholders' list

Commercial Registers are centrally accessible through the common register portal of the German federal states (www.handelsregister.de). Information is available on payment of a fee.

Reporting requirements

A GmbH is obliged to file its financial statements with the German Federal Gazette (Bundesanzeiger, BAnz), which will publish them. Depending on the size of the GmbH (determined based on its total assets, sales revenues and number of employees), reporting requirements vary significantly. A small GmbH does not have to have its accounts audited. If an audit is mandatory, the auditor is appointed by the general meeting for one business year.

Share capital

A GmbH must have a minimum registered share capital of EUR 25,000. There is no maximum share capital.

Non-cash consideration

Shares in a GmbH can be issued for consideration in cash or in kind.

Rights attaching to shares

Restrictions on rights attaching to shares. The corporate governance regime of a GmbH is more flexible than that of an AG. Therefore, the articles of association of a GmbH can attach special rights to certain shares or restrict rights attached to other shares within a certain legal frame. Restrictions on shareholder rights can also result from a violation of mandatory obligations. An AG is, for example, obliged to report the reaching of certain shareholding thresholds in a GmbH. Violation of this obligation has, in particular, the effect that the AG cannot exercise its shareholder rights in the GmbH.

Rights attaching to shares. Certain fundamental rights are attached to shares of a GmbH by statutory law, for example the right to dividends and proceeds of liquidation, the right to vote on shareholders' resolutions and certain control and management rights.

Management structure

Management structure

In principle, two decision-making bodies exist in a GmbH: the managing director(s) as the executive management, and the general meeting as the shareholders' forum. The general meeting decides all essential issues regarding the GmbH by law, whereby certain decisions require a qualified majority of votes representing three quarters of the company's share capital.
This is, for example, the case for resolutions amending the articles of association and changing the registered share capital. In such cases, 25% of the share capital plus one share constitute a blocking minority.

Further, the shareholders can decide on a catalogue of business measures which require their prior consent. They can also issue binding instructions to the managing directors by way of a shareholders’ resolution. The general meeting of the GmbH is in principle also responsible for the appointment, revocation and replacement of its managing directors.

Management restrictions
Managing directors have to be individuals. The appointment of a legal entity as a managing director is not possible. They do not need to be German or European citizens as long as they are generally able to enter German territory. There are no legal restraints on the managing directors’ term of office.

Directors’ and officers’ liability
The managing directors of a GmbH are bound by duties of care to the company. Formal approval of the actions of the managing directors by shareholders' resolution generally relieves the managing director from known liability. To protect managing directors against personal liability, directors and officers (D&O) insurance can be taken out.

Parent company liability
As a general rule, a parent company is not liable for the obligations of a GmbH. However, there is some case law on the piercing of the corporate veil of a GmbH, resulting in the liability of the parent company. The requirements governing the liability of the parent company in such cases are rather high. The parent company may also be liable to its subsidiary on the basis of tort law. The most common event triggering liability of the parent company under tort law is the destruction of the existence of the GmbH.

Employment

Laws, contracts and permits
German labour and employment relations are regulated by statutory legislation, case law, collective bargaining agreements and individual employment contracts. There is no single unified labour and employment code. Instead statutory regulations are spread over numerous statutes, including the:

► German Civil Code (Bürgerliches Gesetzbuch, BGB) regulating among other things the general principles of employment contracts
► Act on Protection Against Dismissal (Kündigungsschutzgesetz, KSchG)
► Federal Vacation Act (Bundesurlaubsgesetz, BUrlG)
► Act on Working Hours (Arbeitszeitgesetz, ArbZG)
► Act on Continued Remuneration (Entgeltfortzahlungsgesetz, EFZG), regulating sick pay
► Works Constitution Act (Betriebsverfassungsgesetz, BetrVG), regulating co-determination of works councils
► Act on Collective Bargaining Agreements (Tarifvertragsgesetz, TVG)
► Minimum Wage Act (Mindestlohngesetz, MiLoG)

The Minimum Wage Act came into effect on 1 January 2015 and provides for a cross-sectoral minimum wage (which is currently EUR 8.50 per hour). Until 31 December 2017, transitional arrangements exist for collective labour agreements which have been declared generally binding for all employers and employees of a specific branch.

Apart from written codes and statutes, labour and employment law has strongly been influenced by case law, in particular of the Federal Labour Court (Bundesarbeitsgericht, BAG).

In principle, these laws also apply to foreign employees working permanently in Germany. Even though it is possible to choose the application of foreign laws, such choice of law cannot deprive the employee of the protection given to him by such
provisions of German labour law that cannot be derogated, even by mutual agreement. Most of the regulations in the statutes mentioned above are mandatory and apply regardless of any choice of law.

For several industries (for example, the construction, electrical and personal care industries) these or at least some of these mandatory laws also apply to:

- Foreign employees who are employed by a foreign employer but are temporarily working in Germany (see the German Act on Posting of Workers, Arbeitnehmer-Entsendegesetz, AEntG)
- Employees of a German employer that are appointed in a foreign country for a limited period of time only

While not required, employment agreements are usually in written form. If no written contract is concluded, the employer is required to provide the employee with a summary of the key terms and conditions of employment in text form.

If both the employer and the employee are bound by collective bargaining agreements, the terms and conditions of such agreements apply as a minimum standard. The parties may agree on more beneficial terms of employment at any time. For employees who are not members of a trade union but whose employer is a member of the employers’ association, the employment contracts regularly contain reference clauses to the relevant collective bargaining agreements.

Similar to collective bargaining agreements, works agreements entered into by the employer with the local, company, or group works councils which establish minimum standards also apply to all employees, except for certain managerial employees.

**Foreign employees**

In principle, foreign employees require a residency permit, including a work permit. It takes between four and eight weeks to obtain a residency permit. A small fee of EUR 100 is payable, and lawyers’ fees may be incurred for legal advice. The following employees do not require a work permit:

- EU/EEA citizens
- In general, citizens of Switzerland
- Foreign persons with an unrestricted residency permit
- North Atlantic Treaty Organisation (NATO) troops and their immediate family members

A residency permit is not required for certain types of work if the work lasts for less than 90 days within any 180-day period, for example:

- Key/senior management employees to whom a registered commercial power of attorney (Prokura) has been granted, or who work in the German division of international companies at board level (Vorstandsebene) or on the executive board (Geschäftsleitung)
- Managing directors of a GmbH or board members of an AG

**Termination and redundancy**

In business units (Betriebe) with five or more employees, a works council can be elected. The works council has significant rights to information, supervision, and consultation, as well as co-determination in relation to financial, personnel and social matters. Further, a general (at company level) or group works council (at group level) can be established. In stock corporations and limited liability companies with at least 500 employees, employees can also be entitled to elect representatives to the employer’s supervisory board. In cases of mass redundancy and other material changes of business (for example, restructurings, changes of work methods, and relocations) the works council of an employer with more than 20 employees has a co-determination right if, in principle, at least 10% of the staff are affected. In such cases the works council has consultation rights and the employer must try to reach an agreement on a reconciliation of interests before implementing the measures. Further, the works council has a co-determination right with regard to compensation for the adverse economic effects the measures could have on employees, which would be set out in a social plan. Usually, the mere disposal of assets or business units as well as shares of the employer results in information rights only. Any related restructuring may, however, be subject to co-determination as outlined above.
In general, in business units with more than ten employees, a valid notice of termination requires a justification on social grounds once the employment in question has lasted more than six months. This means that one of the following must apply in the meaning of the Act on Protection Against Dismissal:

► Certain personal reasons (such as permanent inability to work)

► A certain kind of misconduct

► Operational grounds (such as redundancies)

Further, if there is a works council, it must be heard in good time before notice of termination is issued. Any notice of termination must be in written form.

In general, notice periods must be observed for dismissals. The statutory minimum notice period after a probationary period, if any, is four weeks, effective on the 15th or at the end of a calendar month. It increases along with the length of service of the employee (up to seven months to the end of a calendar month after a seniority of 20 years).

For notices of termination issued by the employee, the notice period is four weeks effective as of the 15th or the end of the month, unless otherwise agreed (which is regularly the case). Only in very limited cases can an employer dismiss an employee with immediate effect for good cause.

The employee can, within three weeks after receiving notice of dismissal, file a claim for invalid dismissal, for which the only remedy is reinstatement (other than in limited circumstances where the employment may be dissolved). This means that dismissal without legally accepted reasons as stated above is not effective, so that the employment continues if the employee wins his case. If, instead, the termination is justified on social grounds and formally correct, the employment ends without any severance payment claim (except for cases of mass redundancy with a social plan). In practice, however, the parties regularly conclude a settlement agreement during the court proceedings, whereby the employment is terminated against payment of a negotiated severance.

**Regulations on redundancies and mass layoffs**

If an employment relationship is terminated owing to redundancy and the employees are protected under the Act on Protection Against Dismissal, the employees affected must be selected on the basis of:

► Duration of service

► Age

► Maintenance obligations to immediate family members

► Disability

In general, employees with weaker claims to protection under these social criteria have to be dismissed first. In case of mass redundancy of a certain dimension (depending on the staff numbers), the works council has certain co-determination and consultation rights and can also demand that a social plan be set up, providing for severance payments. Further, if a certain number of employees are made redundant, the employer must notify the labour agency before issuing notices of dismissal, otherwise the dismissals are invalid.

**Tax**

**Taxes on employment**

Employees having residence or usual place of abode in Germany are considered tax residents.

All other employees are only taxed on income arising from their employment in Germany. However, most German double tax treaties provide that the employee’s home jurisdiction can tax the employee if all of the following apply:

► Presence in Germany does not exceed 183 days in any 12 month period
Remuneration is paid by or on behalf of an employer who is not resident in Germany

The remuneration is not borne by a German permanent establishment of the employer (foreign company)

Income tax and social security contributions to be paid by the employee and the employer

Tax resident employees

Individuals resident in Germany are taxed on their worldwide income. The income tax rate ranges from 14 to 45% (for 2015). There is an initial general tax-free amount of EUR 8,354 for single people and EUR 16,708 for married couples (for 2015). There is an additional tax-free amount of EUR 1,000 (for 2015) for all employees.

In addition to wage taxes, there is a so-called solidarity surcharge of 5.5% on the tax levied. Members of certain religious organisations must also pay an additional church tax.

In general, all employees must pay social security contributions for the following schemes in total:

- Unemployment insurance
- Pension insurance
- Health insurance
- Long-term nursing care insurance

An employee must pay about 21% of his gross annual salary into these social security schemes. For the following schemes, this amount is capped (in 2015) at:

- Unemployment insurance and pension schemes: EUR 72,600 in the western federal states, and EUR 62,400 in the eastern federal states
- Health insurance and long-term nursing care insurance: EUR 49,500

Non-tax resident employees

Non-tax residents are taxed on their German source income only. The tax rate for non-tax resident employees is the same as for tax resident employees, but there are special provisions for non-tax resident employees, including:

- Expenses can only be deducted if they are related to German source income
- Special expenses, such as certain insurance payments, cannot be deducted from the taxable income

There is, in principle, no difference between non-tax resident and tax resident employees as regards social security contributions (see above, Tax resident employees).

Employers

Employers have to withhold tax (income tax, solidarity surcharge and church tax) and social security contributions on behalf of their employees. In addition to the employee’s contributions, the employer must pay social security contributions of about another 19% (in 2015) of the employee’s gross salary (capped at the same thresholds as the employee’s contributions) (see above, Tax resident employees). The employer must also pay for statutory work-related accident insurance.

Business vehicles

**Tax-resident business.** A corporation is tax resident if it has a registered seat or place of management in Germany. Special provisions apply to business partnerships which are treated as tax transparent for German tax purposes.

**Non-tax-resident business.** Non-tax-resident corporations are subject to limited tax liability on their German source income (for example, income received from a German permanent establishment).
Corporate income tax. Corporations are subject to corporate income tax at 15% plus a solidarity surcharge of 5.5% on this.

Income tax. The income tax rate for individuals conducting business (including through a partnership) in Germany varies between 15% and 45% plus a solidarity surcharge of 5.5% on this.

Trade tax. Trade tax rates regularly vary between 7% and 17.15%.

Value added tax (VAT). The standard rate of VAT is 19% (reduced rates are 7% and 0%).

Dividends, interest and IP royalties

Dividends paid. Dividends paid to foreign corporate shareholders are subject to 25% withholding tax, plus a 5.5% solidarity surcharge on this. Subject to compliance with the German Anti-Treaty/Directive Shopping Rules, withholding tax can be further reduced by domestic law, Directive 90/435/EEC on the taxation of parent companies and subsidiaries or a tax treaty.

Dividends received. Dividends a corporation receives from foreign companies are regularly 95% tax exempt, in case of a shareholding of at least 10% at the beginning of the assessment period.

For trade tax purposes, the 95% tax exemption only applies in case of a shareholding of at least 10% in an EU corporation at the beginning of the calendar year or, subject to further conditions, at least 15% in a non-EU company (from the beginning of the calendar year). Individuals receiving dividends as business income benefit from the partial-income privilege, that is, only 60% of the dividends are taxed. For trade purposes, dividends are tax exempt if the above conditions are met.

Interest paid. Generally, there is no withholding tax on interest payments on plain vanilla loans to non-residents. However, there are some exceptions, one being if the debtor is a German branch of a bank or financial services institution, and another interest which is profit-related.

IP royalties paid. Subject to an applicable treaty or Directive 2003/49/EC on interest and royalty payments, IP royalties paid to non-resident corporate shareholders are subject to withholding tax at a rate of 15%, plus a solidarity surcharge of 5.5% on this.

Groups, affiliates and related parties

Under the interest barrier rules, the deduction of net interest expenses is limited to 30% of the relevant taxable earnings before interest, taxes, depreciation and amortisation (EBITDA). This 30% limitation on tax EBITDA does not apply under the following conditions:

► Net interest expenses are less than EUR 3 million

► The company does not belong to a group. The equity ratio of the company is no lower than 2% compared to the overall ratio for the whole group

► In case of corporations further conditions are to be fulfilled (no detrimental shareholder financing)

Controlled foreign company rules

Controlled foreign company rules apply if both:

► More than 50% of the capital of the foreign company is held by German residents (in the case of portfolio income, 1% held by a German resident)

► The income of the foreign company is regarded as passive income and is low taxed (that is, effectively taxed at a rate less than 25%)

The controlled foreign company rules do not apply if the taxpayer can prove that the controlled foreign company is resident in an EU or EEA member state and fulfills certain substance requirements.

The transfer price must be determined on an arm’s-length basis. The standard transfer pricing methods are the comparable uncontrolled price method, the resale price method and the cost-plus method.
Customs duties

Goods which are in free circulation within the EU are not subject to customs duties. Imports from outside the EU are subject to customs duties almost exclusively on an ad valorem basis.

Double tax treaties

Germany has double tax treaties with about 100 countries including the US and all European countries.

Dispute resolution

Court process

The German general courts have jurisdiction over criminal and civil matters, including commercial cases. Besides the general courts, specialised courts exist in four areas of the law: administrative law, labour law, tax and social matters. Furthermore, constitutional courts operate at a federal and state level.

The main statute governing civil litigation in Germany is the German Code of Civil Procedure (Zivilprozessordnung, ZPO), which contains detailed provisions on all aspects of the court process. In civil litigation, the parties typically file detailed briefs in preparation for the oral arguments presented at the hearing, which specify the documents, witnesses and other means of proof on which a party relies. There is no pre-trial discovery or disclosure under German law. Moreover, requests for the production of documents by the opponent or a third party depend on narrowly-defined prerequisites.

When filing a lawsuit, the plaintiff has to advance court fees which are calculated based on the amount in dispute and set forth by statute. In civil litigation, the unsuccessful party generally has to pay the court fees plus the opponent’s legal fees. The latter are limited to the fees set forth in specific legislation governing lawyers’ fees and likewise depend on the amount in dispute.

Arbitration/Alternative Dispute Resolution (ADR)

In 1998, the German Code of Civil Procedure was amended, inter alia, with respect to the provisions on arbitration. Modern German arbitration law is modelled on the UNCITRAL Model Law, with only few deviations, and applies to both domestic and international arbitration proceedings. Supported by this reform, the acceptance and use of arbitration in Germany has grown significantly. The German courts constantly demonstrate an arbitration-friendly position, for example, when interpreting arbitration agreements or recognising awards of arbitral tribunals. With respect to the enforcement of international awards, the German Code of Civil Procedure incorporates the provisions of the New York Convention to which Germany is a signatory.

The principal German arbitration institution is the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V., DIS) which administers domestic and international arbitration proceedings. In addition to its Arbitration Rules, the DIS provides rules for various alternative dispute resolution methods. In 2010, separate rules for mediation were introduced. Besides the DIS, several other institutions provide arbitration services in Germany, however, often with a specific industry or regional focus. During the past years an increasing number of providers of mediation services has emerged but, nevertheless, mediation does not yet play a major role in the conflict resolution culture, especially not for commercial disputes.

Competition

As in many jurisdictions, competition law in Germany can be divided into three main branches governed by specific legal regimes according to the Act Against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB):

- The prohibition of anti-competitive agreements (cartels)
- The prohibition of abuse of a dominant position
- Merger control

Therefore, under certain conditions the GWB outlaws concerted practices as well as unilateral conduct. The Federal Cartel Office (FCO) (Bundeskartellamt) is the German competition authority that deals with such behaviour.
The FCO prosecutes anti-competitive market behaviour (there are also regional antitrust authorities for purely regional cases). The FCO can impose significant fines for breaches of the cartel prohibition. From a procedural and enforcement perspective, the growing importance of private (in contrast to administrative) enforcement of German competition law is noteworthy, in particular in the context of cartel damage claims.

The GWB contains specific provisions which aim to facilitate such claims, for example, even decisions of the European Commission and those of competition authorities of other EU member states have binding effect on cartel damage claims in Germany.

Initial information on competition law rules and the FCO's practice is available at www.bundeskartellamt.de.

Restrictive agreements and practices

Section 1 of the GWB contains a prohibition of cartel agreements (cartel ban). As the GWB was fully harmonised with Article 101 of the Treaty on the Functioning of the European Union (TFEU) in 2005, agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition, are prohibited. The GWB does not differentiate between horizontal and vertical agreements. According to the GWB, the European block exemption regulations also apply. In case of breaches of the cartel ban, the GWB provides for fines of up to 10% of the entire group turnover of the undertakings concerned.

Unilateral conduct

German competition law aims to outlaw anti-competitive market behaviour in the form of abuse of a dominant market position. According to the GWB there is a (rebuttable) presumption of market dominance if an undertaking has a market share of at least 40%.

Further, the GWB also provides for a dominance test for oligopolies. Certain forms of discriminatory behaviour are prohibited for dominant enterprises. The GWB sets out a non-exhaustive list of prohibited behaviour, including:

- Directly or indirectly impairing other undertakings in an unfair manner, or treating equal undertakings unequally without any objective justification
- Demanding payment or other business terms which differ from those which would very likely arise if effective competition existed
- Demanding less favourable payment or other business terms than the dominant undertaking itself demands from similar buyers in comparable markets, unless there is an objective justification for such differentiation
- Refusing access to essential facilities (infrastructures) in return for reasonable fees
- Asking for unjustified advantages without objective justification
- Mergers & acquisitions as subject to merger control

There are also provisions which outlaw the abuse of so-called relative market power in relation to small and medium sized enterprises.

The GWB regulates merger control including jurisdictional and procedural aspects. However, the European Commission has jurisdiction if the proposed transaction has a Community dimension, as set out in Regulation (EC) 139/2004 on the control of concentrations between undertakings (Merger Regulation).

The GWB prescribes a mandatory filing of transactions before their implementation depending, among other things, on the parties' turnover and whether the merger has domestic effect in Germany. In particular, to fall within the scope of German merger control, a concentration must meet all of the following thresholds in the financial year preceding the concentration:

- The combined worldwide turnover of all undertakings concerned exceeds EUR 500 million
- One participating undertaking had turnover exceeding EUR 25 million in Germany and
At least one other undertaking had turnover in Germany exceeding EUR 5 million

Possible exemptions can apply, for example, a de minimis clause for the sale of undertakings with a small group turnover.

Foreign-to-foreign acquisitions are subject to the merger control laws if the thresholds set out above are met. In this case, it is hardly possible to argue that the transaction has no domestic effect, at least if the target company is active in Germany to a certain extent or the participating undertakings are competitors in the German domestic market. In late 2013, the FCO issued a draft guidance document on the domestic effect test which had been under public consultation, and is still not finalised.

Being harmonised with EU competition law, the substantial test during merger control proceedings is whether the transaction will significantly impede effective competition, in particular if it creates or strengthens a dominant market position.

Infringing the prohibition on the implementation of transactions before clearance by the FCO (prohibition on gun-jumping) is subject to fines of up to 10% of the total worldwide group turnover, and can lead to nullity of the transaction (civil law related risk). Various cases in the past have shown that the FCO vigorously enforces the gun-jumping prohibition.

**Intellectual property**

**Patents**

**Definition and legal requirements.** To merit protection under the Patent Act (*Patentgesetz, PatG*) or the European Patent Convention (EPC), an invention must be:

▶ Novel

▶ Involve inventive step

▶ Susceptible of industrial application

The right holder is entitled to use, license or prevent others from using the patent.

**Registration.** An application must be submitted to the German Patent and Trade mark Office (*Deutsches Patent- und Markenamt, DPMA*) or the European Patent Office (*EPO*). It is strongly recommended to instruct a patent attorney to draft the patent application in order to obtain proper protection. Further detailed information on the procedure can be obtained at the DPMA (www.dpma.de) or the EPO (www.epo.org).

**Enforcement and remedies.** The patent right can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

▶ Injunctive relief (permanent or preliminary)

▶ Rendering of accounts

▶ Damages

▶ Destruction of infringing items

▶ Recall of products

Patents enjoy a presumption of validity in enforcement proceedings (no invalidity defence available). The validity must be challenged in separate nullity proceedings before the German Federal Patent Court (*Bundespatentgericht, BPatG*).

**Term of protection.** Patent protection is granted for 20 years from the date of filing, provided that an annual patent renewal fee is paid. The term of protection is not renewable (except for cases where there is a supplementary protection certificate).
Utility models

**Definition and legal requirements.** In addition to a patent, an invention can be protected as a utility model under the Utility Model Act (Gebrauchsmustergesetz, GebrMG). The requirements for protection are basically the same as for patents. The annual fees are lower than those for patents.

**Registration.** Protection can be obtained by mere registration (no examination by the DPMA).

**Enforcement and remedies.** Enforcement and remedies of a utility model are similar to those for a patent (see above, Patents). However, utility models do not enjoy a presumption of validity in enforcement proceedings, that is, the defendant may raise an invalidity defence.

**Term of protection.** Utility model protection is granted for ten years from the date of filing, provided that a renewal fee is paid (after three, six and eight years).

Trade marks

**Definition and legal requirements.** The German Trade Mark Act (Markengesetz, MarkenG) protects words, pictures, letters, numbers, acoustic signs, three-dimensional designs, colours and combinations of colours. To be registered as a trademark, a mark must:

► Be sufficiently distinctive
► Not exclusively describe a product
► Not mislead the consumer
► Not be a public sign

The right holder is entitled to use, license or prevent others from using the trademark.

**Registration.** An application, together with the prescribed fee, must be submitted to the DPMA.

**Enforcement and remedies.** Trademarks can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

► Injunctive relief (permanent or preliminary)
► Rendering of accounts
► Damages
► Destruction of infringing items
► Recall of products

**Term of protection and renewability.** A trade mark is protected for ten years from the date of the application, with unlimited extensions of ten years.

Community trade marks. In addition to national trademarks, Community trademarks (CTM) can also be enforced in Germany. A CTM is a trademark that is valid across the EU, registered with the Office for Harmonisation in the Internal Market, OHIM (www.ohim.eu) in accordance with the provisions of the CTM Regulations. The term of protection and renewability are similar to those for German trademarks.
Registered designs

**Definition.** Two-dimensional patterns and three-dimensional designs are aesthetic creations and can be protected under the Design Act (*Designgesetz, DesignG*) provided:

- They have individual character
- The design is new

The right holder is entitled to use, license or prevent others from using the registered design.

**Registration.** A design must be registered at the DPMA.

**Enforcement and remedies.** Design rights can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

- Injunctive relief (permanent or preliminary)
- Rendering of accounts
- Damages
- Destruction of infringing items
- Recall of products

**Term of protection and renewability.** Protection can be extended for up to a maximum of 25 years as of the date of application.

Registered Community Designs (RCD)

**Definition and legal requirements.** A RCD is the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation. A RCD is valid across the EU. RCDs are protected, provided:

- The design is new
- The design has individual character

**Registration.** A RCD must be registered with the OHIM.

**Enforcement and remedies.** RCD are protected against similar designs even when the infringing design has been developed in good faith, that is, without knowledge of the existence of the earlier design. A RCD can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

- Injunctive relief (permanent or preliminary)
- Rendering of accounts
- Damages
- Destruction of infringing items
- Recall of products

**Term of protection and renewability.** A RCD is initially valid for five years from the date of filing and can be renewed for consecutive terms of five years up to a maximum of 25 years.
Unregistered Community Designs (UCD)

**Definition and legal requirements.** Under the Community Design Regulation of 2002, registered and unregistered designs are protected, provided:

► They have individual character
► The design is new
► The design has been made publicly available

**Enforcement and remedies.** UCD grant the right to prevent commercial use of a design only if that design is an intentional copy of the protected one, made in bad faith, that is, with knowledge of the existence of the earlier design. UCD can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

► Injunctive relief (permanent or preliminary)
► Rendering of accounts
► Damages
► Destruction of infringing items
► Recall of products

**Term of protection.** Protection is granted for three years as of the date on which the design is first made publicly available. This period is not renewable.

Copyright

**Definition and legal requirements.** The German Copyright Act (Urheberrechtsgesetz, UrhG) protects a creative work as an immaterial asset, independent of its embodiment. The work must be a personal, intellectual creation by the author and can be literary, scientific, artistic, and so on. The right holder is entitled to use, license or prevent others from using the copyrighted work.

**Protection.** Copyright protection subsists automatically, without any registration requirements.

**Enforcement and remedies.** Copyrights can be enforced by the right holder or an exclusive licensee. Depending on the circumstances, the remedies available are:

► Injunctive relief (permanent or preliminary)
► Rendering of accounts
► Damages
► Destruction of infringing items
► Recall of products

**Term of protection and renewability.** Copyright lasts for 70 years after the death of the creator.

Confidential information

**Definition, legal requirements and protection.** Industrial espionage and breach of confidentiality obligations by an employee can be punished by measures of civil and criminal law under the Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG). However, there is no protection for confidential information as such, even if the respective document is labelled confidential. Confidentiality must be ensured by contractual means (non-disclosure agreements).
Term of protection. Protection of confidential information ends in any of the following circumstances:

► Termination of the agreed contractual provision
► When protected information is disclosed by another source
► When the need of, or interest in, maintaining confidentiality no longer exists for other reasons

Marketing agreements

Agency

Agency arrangements are governed by the Commercial Code (*Handelsgesetzbuch, HGB*), which implements Directive 86/653/EEC on self-employed commercial agents. The Code contains a number of mandatory provisions to protect commercial agents.

These mandatory provisions cover minimum notice periods for indefinite-term agency contracts. The minimum notice periods may vary from one to a maximum of six months depending on the duration of the agency contract.

Further, the commercial agent is entitled to commission as soon and so far as the customer of the commercial agent's principal has completed the transaction.

Mandatory provisions also exist on the validity of post-termination restrictions and an indemnity claim accruing to the agent. The latter is limited to the average of the annual commission payments received by the commercial agent during the last five years of the agreement. If the commercial agent is acting in the European Economic Area (*EEA*), the indemnity claim cannot be excluded, not even through choice of law or jurisdiction or a combination of both.

Distribution

Under German law there are no provisions specifically regulating distribution agreements. The distributor is usually integrated into the supplier's sales organisation and is therefore to a certain extent comparable to a commercial agent. According to case law, some of the provisions in the Commercial Code for commercial agents apply analogously to distribution agreements. This applies especially to any indemnity claim after termination of the distribution agreement, if the distributor is integrated into the sales organisation of the supplier in a manner comparable to a commercial agent, and if the distributor is under the (also indirect) contractual obligation to provide customer data to the supplier to such an extent that the supplier may immediately and automatically use the advantages of the customer data obligation to provide customer data to the supplier on termination of the distribution agreement.

Distribution agreements are further subject to the Act Against Restraints on Competition, which has been largely harmonised with EU competition law, and which for example, restricts arrangements regarding fixed sale prices or arrangements restraining the sale to customer groups or into territories.

Further, German law on standard business terms and agreements is more strictly regulated than is often required by EU law and also applies, in principle, to business relationships between professionals. Therefore, irrespective of a distributor's integration into a supplier's sales organisation, there are restrictions on contractual freedom which can be surprising from the perspective of other jurisdictions. Detailed legal advice is usually necessary where form agreements are used that are intended to govern, for example, the long-term supply of goods. This is the case even if the agreement is intended to be negotiated in detail by the parties, since the requirements set by German case law with regard to such negotiations are onerous and, arguably, unclear.

Franchising

There is no specific legislation governing franchising in Germany. However, depending on the design of the franchise, some provisions of the Commercial Code for commercial agents (for example, termination and indemnity claims) may also apply analogously to franchise agreements. A large number of court rulings provide information on contractual practices. Before the conclusion of a franchise agreement, the franchisor is especially obligated to give the potential franchisee accurate information, including experiences learned from its existing franchise system, enabling the franchisee to analyse the risks and potential rewards of entering into the franchise. Failure to provide correct information may result in a claim for damages accruing to the franchisee.
The existing court rulings also show that the requirements for valid termination of a franchise for good cause are extremely onerous, especially if the franchise agreement involved considerable investments. Like distribution agreements, franchise agreements are governed by the Act Against Restraints on Competition and EU competition law, with the exceptions resulting from the Pronuptia ruling of the European Court of Justice (ECJ).

E-commerce

While various EU directives and regulations have resulted in a degree of harmonisation of e-commerce law at European level, German legislators have taken further steps to strengthen the position of consumers and to protect their interests. The three most relevant statutes on e-commerce are as follows:

► The Civil Code contains provisions on distance selling. Enterprises using the internet to sell goods or services online have special information duties, and goods purchased electronically can be returned within 14 days without cause by private customers. There are detailed rules on whether the use of e-mail or electronic signature is sufficient to satisfy certain formalities. Although the legal framework exists, electronic signatures are not widely accepted in Germany

► The Telemedia Act (Telemediengesetz, TMG) covers the main legal aspects of information services, in particular electronic commerce. Among others, it regulates e-commerce and other online service providers’ information duties. There are also rules for limiting provider liability, for example for user-generated content. Further, the Act contains the most relevant regulations regarding data protection on websites, including online stores and social media platforms

► The Electronic Signature Act (Signaturgesetz, SigG) regulates all the technical and legal aspects of electronic signatures as well as the relevant certification of services and procedures

Advertising

There is no single unified regulation on advertising in Germany. Instead, regulations are spread over numerous statutes.

Regulations governing advertising activities are set out in the Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) that prohibits unfair business practices which are likely to have a noticeable adverse effect on the interests of competitors, consumers or other market participants. The UWG contains a catalogue of examples of unfair business practices (paragraph 4(1) to (11)) such as:

► Encroaching on the consumer's freedom of choice through undue influence

► Surreptitious advertisement

► Discrediting goods and services provided by competitors

Paragraph 6 provides for certain restrictions on comparative advertising, and paragraph 7 provides for restrictions on unsolicited advertising. Further, paragraph 3(3) refers to a blacklist of 30 business practices which are per se considered unfair and detrimental.

In addition, advertising is regulated in sector-specific statutes. The most important regulations governing advertising activities are the:

► Healthcare Sector Advertising Act (Gesetz über die Werbung auf dem Gebiet des Heilwesens, HWG) and the Advertising Guidelines enacted by the respective State Pharmacy Chamber

► Food and Feed Code (Lebensmittel-, Bedarfsgegenstände- und Futtermittelgesetzbuch, LFBG) which prohibits disease-related advertising claims

► Price Indication Act (Preisangabenverordnung, PAngV) which sets out transparency requirements regarding price indications

► Broadcasting and Telemedia Treaty (Rundfunkstaatsvertrag, RStV) entered into between the federal states, which among others sets out regulations on advertisements for public and commercial broadcasting
Advertising Guidelines of the State Media Authorities, which further specify the provisions of the Broadcasting and Telemedia Treaty governing sponsorship and advertising opportunities for commercial broadcasters

State Treaty on Gambling (Glücksspielstaatsvertrag, GlüStV) which sets out regulations on advertisements for public gambling

Youth Protection in the Media Treaty (Jugendmedienschutzstaatsvertrag, JMSIV)

Advertising is also indirectly regulated by data protection regulations, if personal data is used for advertising purposes.

Data protection

Although at EU level data protection law is largely harmonised, Germany has taken a leading role in data protection, and has partly extended its data protection laws beyond the EU requirements. As data protection law is relevant whenever personal data is concerned, it has to be observed throughout all industries and in various contexts, and plays a major role in legal compliance. Therefore, it includes but is not limited to IT-outsourcing, e-commerce, online social communities and direct marketing. Further, the transfer of personal data within international groups of companies has become a major challenge for corporate compliance.

Data protection in Germany is subject to the jurisdiction of both the federal union and the individual federal states.

The main statutes are the:

- Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG) and several other federal Acts, including the Social Security Code (Sozialgesetzbuch, SGB)
- Various general state acts (Landesdatenschutzgesetze) and state-level privacy laws for certain industries, such as hospitals
- Telemedia Act (Telemediengesetz, TMG)
- Telecommunications Act (Telekommunikationsgesetz, TKG)

The use of personal data is permitted if either a statutory justification exists, or the consent of the data subject has been granted. The grant of consent must be clear and fairly detailed and based on the free decision of the data subject.

Product liability

Civil liability for defective products in Germany is in principle fault based and can result from a breach of contract, a tort, or a breach of statutory safety provisions. However, fault is generally presumed if a defect is proven and the burden of proof lies with the manufacturer to rebut this presumption. As an exception, strict liability is provided for in the Product Liability Act (Produkthaftungsgesetz, ProdHaftG), which implements Directive 85/374/EEC on liability for defective products.

A seller (who is not necessarily the manufacturer) will be liable to the buyer for subsequent performance (remediation or subsequent delivery) independent of fault if the product is defective, lacks the agreed qualities, or does not display the qualities usually expected of such a product. However as a matter of principle, a seller who is not the manufacturer will not be liable for damages caused by a product defect since the element of fault is missing.

Non-contractual liability of the manufacturer of a product may arise out of the improper design or manufacture of the product, the provision of incomplete or incorrect instructions as to use and insufficient product monitoring.

A party that purports to be the manufacturer of a product, in particular by using its brand on the product, is also deemed to be the manufacturer under the Product Liability Act. The same applies to an importer to the European Economic Area. Compensation for personal injury and material damage caused by a defective product, but not the cost of repair to the product itself, can be claimed in tort. If safety risks are discovered, there is an obligation on the manufacturer to at least warn the product user of such risks. A warning is deemed to be sufficient if it can be expected that the product user will observe it. This is particularly assumed in the case of non-consumers. As a matter of principle the manufacturer does not have to bear any costs of remedial measures. If issuing such a warning is deemed to be insufficient (which is particularly likely in the case of dangerous consumer products), an obligation to recall the product may arise.
Individuals (for example, members of a board of directors or responsible quality engineers) can be personally liable under both tort and criminal law if their individual responsibility for the defect and damage can be established, particularly in circumstances where personal injury or death have occurred as a result of improper product manufacturing or insufficient monitoring of product safety. Public authorities of the German federal states are responsible for the surveillance of the safety of products and equipment and can check their safety and compliance with harmonised product standards by obtaining samples of them as provided for under the Product Safety Act (Produktsicherheitsgesetz, ProdSG). The market surveillance authorities are entitled, inter alia, to order the stop of the sale of defective products or equipment or even to order a recall if it is deemed that the products pose a serious risk to the health of consumers.

**Bribery and corporate crime**

**Anti-bribery provisions**

German law has strict provisions on bribery in the public and in the private sector as well as with respect to politicians. Although different in detail, the thing that all bribery provisions have in common is that it is punishable to offer, promise or grant a benefit to the bribed person or to any other third person in return for an activity or omission by the bribed person. A benefit is anything of material or immaterial value. German law does not acknowledge any monetary thresholds below which contributions are admissible.

Bribery of German public officials is fulfilled if a benefit is offered, promised or granted to a public official for the discharge of his/her duty. It is irrelevant whether the public official finally performs any act or omission or whether such performance will violate the public officials' duties. Contributions for the mere purpose of keeping up relations are also prohibited. However, gifts and hospitality which is neither intended nor appears to influence the discharge of a public official's duty are permitted. Most public authorities have enacted internal guidelines which define details. Benefits are legitimate if the superior authority of the public official has granted its consent. Sponsoring of public authorities is permitted only if the relevant sponsoring guidelines are observed. In an upcoming bill officials of European institutions will be treated equal to German public officials.

German law also punishes the bribing of public officials of foreign states or foreign public companies, even if the act of bribery is committed abroad. However, this requires that bribery is intended to solicit or retain business in international business transactions. Moreover, only benefits made in consideration for the discharge of duties by which the public officials will violate their obligations are punishable.

In most cases, politicians are not regarded as public officials. However, bribing members of domestic or foreign legislative assemblies and of the European Parliament is also punishable under German law if any benefit is offered, promised or granted in consideration for any activity in relation to the mandate of the respective member of a legislative assembly.

Also the bribery of employees or agents of a business in the private sector, if its aim is to obtain preferential treatment in an unfair manner in the competitive purchase of goods and services, is prohibited. This is designed to ensure free and fair trade practices. The offence does neither require that the employer or principal suffers any damage nor does their consent exclude criminal liability. In contrast to public officials, the granting of gifts and hospitality as well as other benefits for the mere purpose of maintaining business relations is permitted.

Bribes or expenses related to bribes are not tax deductible. Breaches will be punished as tax evasion (Steuerhinterziehung). Most cases of corruption can also be punished as a breach of trust (Untreue).

**Laws against money laundering**

Germany has implemented all the requirements of the EU Money Laundering Directives in the Act on Money Laundering (Geldwäschegesetz, GwG). As such, all companies and persons have to refrain from any activities which might assist money laundering and terrorist financing and report suspicious transactions. Further, companies in almost all sectors, in particular the financial sector and related industries as well as lawyers, tax advisors, accountants and others have to identify their customers and run an anti-money-laundering monitoring system.

It is a criminal offence to assist or participate in any way in transactions relating to proceeds of crime irrespective of whether the offence was committed in Germany or abroad.
Prevention of corporate crime

German law does not acknowledge the concept of criminal liability of corporations. However, an administrative fine can be imposed on a corporation if its representatives, directors and officers, members of supervisory bodies or persons entrusted with power of attorney or with managing a part of the business commit a crime or an administrative offence. The maximum fine is EUR 10 million; this amount can be exceeded if this is necessary to confiscate profits obtained by the corporation.

A manager who intentionally fails to prevent employees from committing crimes can be held criminally liable for aiding and abetting. If the manager fails to exercise reasonable care in the organisation of a company or department, or in the supervision of employees and subordinates so as to avoid or impede the commission of crimes or administrative offences, he himself commits an administrative offence for lack of supervision and can be fined with up to EUR 1 million.

Real estate

Ownership restrictions on foreign companies

There are no special regulations applicable to foreign buyers as compared to German buyers. In particular, there are no public law restrictions on real estate investments by foreign individuals or legal entities.

Types of interest in land

German law distinguishes between “in rem” and contractual rights to land. While rights in rem are effective against everyone, contractual rights only affect the actual parties to a contract. Rights in rem alone, in particular ownership rights, are entered in the land register (Grundbuch).

Ownership is, in principle, all-encompassing. It can only be restricted with the consent of the owner in the form of subordinate rights to use the land or security rights (e.g. usufructs, easements or land charges, also entered in the land register).

Furthermore, there is a special right of use of land, the hereditary building right (Erb-baurecht), a form of leasehold which grants the beneficiary a long-term right of use subject to the conditions agreed in a hereditary building right agreement (e.g. periodic payments of ground rent). The hereditary building right is transferable, inheritable and can be encumbered in the same way as freehold, all subject to registration in the land register. Any building erected on the basis of hereditary building rights remains in the ownership of the beneficiary of the right.

According to the principle of the numerus clausus (“closed number”) of rights in rem, only the rights and ownership forms statutorily recognised at the place where the land is situated can be entered in the land register. For this reason, it is not possible to have common law ownership structures such as leasehold interests or trusts entered in the German land register because these rights are not recognised by German law.

Registration requirements upon acquisition of real property

In principle, the question of the requisite legal form is subject to the law of the state in which the legal transaction is concluded (locus regit actum). This depends on where the property purchase agreement is actually concluded. However, the in rem part of the transaction (i.e. the conveyance and the entry of the change of ownership in the land register) is necessarily subject to German law meaning that, in practice, notarisation of the entire agreement and related contracts by a German notary is necessary. The notarial fees are calculated based on the purchase price, although they do not increase proportionally but on a diminishing scale. The same applies to the fees for the registration of ownership in the land register.

If a foreign legal entity is acting as a purchaser, their existence and the authorisation of their representatives must be proven in German in a form required by the land register (e.g. by a certified extract from the relevant state commercial register). In principle, foreign public documents (including notarial documents) are accepted as evidence but must usually be translated and legalised under a special procedure (legalisation or apostille).

Reliance on the land register

German law provides for public reliance in the land register being accurate and complete, i.e. any registered owner or beneficiary of a right is deemed to be legally entitled. Consequently, title to the land or any right can be legally acquired from a registered beneficiary provided that no objections are registered in the land register and the buyer is acting in good faith.

Existing law is stated as it applies in May 2016.
### Useful information

#### Main business organisations & online resources

<table>
<thead>
<tr>
<th>Organisation</th>
<th>Description</th>
<th>Website</th>
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<tr>
<td>German Chambers of Commerce and Industry</td>
<td>The German Chambers of Commerce and Industry (Industrie- und Handelskammern, IHK) act as representatives and advisers of all commercial enterprises in local regions.</td>
<td><a href="http://www.dihk.de/en">www.dihk.de/en</a></td>
</tr>
<tr>
<td>German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungs-aufsicht) BaFin</td>
<td>BaFin is the Federal Financial Supervisory Authority. It supervises banks and financial services providers, insurance undertakings and securities trading.</td>
<td><a href="http://www.bafin.de/EN/Homepage/homepage_node.html">www.bafin.de/EN/Homepage/homepage_node.html</a></td>
</tr>
<tr>
<td>German Land registries</td>
<td>Information relating to real estate is accessible through this portal of the German Land registries (Grundbuchämter) of the justice authorities of the federal and state governments. Issues covered include publishing of ownership, possession and other rights (for example, encumbrances) relating to real estate.</td>
<td><a href="http://en.justiz.de/onlinedienste/internet_grundbucheinsicht/index.php">http://en.justiz.de/onlinedienste/internet_grundbucheinsicht/index.php</a></td>
</tr>
<tr>
<td>German Federal Central Tax Office</td>
<td>This official and up-to-date website of the Federal Central Tax Office (Bundeszentralamt für Steuern, BZSt) provides information and forms relating to the German tax system.</td>
<td><a href="http://www.germantaxes.info">www.germantaxes.info</a></td>
</tr>
<tr>
<td>German Federal Ministry of Justice</td>
<td>This website of the Federal Ministry of Justice (Bundesministerium der Justiz und für Verbraucherschutz, BMJV) provides the texts of almost all current federal law (unofficial versions only). Updates are continuously provided. For certain statutes, a working translation into English can be accessed at</td>
<td><a href="http://www.gesetze-im-internet.de/Teilliste_translations.html">www.gesetze-im-internet.de/Teilliste_translations.html</a></td>
</tr>
<tr>
<td>German Federal Ministry of Finance</td>
<td>The website of the Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) provides several German statutes following their publication (unofficial versions only). No information on the status of information is available. For certain statutes, a working translation into English is provided under:</td>
<td><a href="http://www.bundesfinanzministerium.de/Web/EN/Service/Laws/laws.html">www.bundesfinanzministerium.de/Web/EN/Service/Laws/laws.html</a></td>
</tr>
<tr>
<td>German Federal Constitutional Court</td>
<td>The Federal Constitutional Court's (Bundesverfassungsgericht, BVerfG) task is to ensure that all institutions of the state obey the constitution of the Federal Republic of Germany (Basic Law). Its website provides the full German texts of its decisions that have been issued since 1 January 1998 free for non-commercial use. Several decisions are also available in English.</td>
<td><a href="http://www.bundesverfassungsgericht.de/en/index.html">www.bundesverfassungsgericht.de/en/index.html</a></td>
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### About Noerr

Noerr stands for excellence and entrepreneurial thinking. With well-versed teams of strong characters, Noerr devises and implements solutions for the most complex and sophisticated legal matters. United by a set of shared values, the firm’s 500+ professionals are driven by one goal: the client’s success. Listed groups and multinational companies, large and medium-sized family businesses as well as financial institutions and international investors all rely on the firm.
Entrepreneurial thinking

Noerr’s advisors make their clients’ challenges their own and are always thinking one step ahead. In doing so, they assume responsibility and are at liberty to make their own decisions. The firm is committed to always going the extra mile for its clients and to resolving complex matters with the perfect mix of experience, excellence and sound judgement.

Innovative solutions

In complex and dynamic markets new approaches are regularly required – and delivered by experts who bring both the know-how and the necessary passion. This is precisely what Noerr excels at: implementing integrated and innovative solutions in the most efficient way.

Global reach

As one of the top European law firms, Noerr is also well established internationally. With offices in eleven countries and a global network of top-ranked “best friends” law firms, Noerr is able to offer its clients truly cross-border advice. In addition, Noerr is the exclusive member firm in Germany for Lex Mundi, the world’s leading network of independent law firms with in-depth experience in 100+ countries worldwide.

Capacity in Central and Eastern Europe

Noerr has long had its own offices in all major Central and Eastern European capitals. The firm regularly advises on greenfield investments, joint ventures, acquisitions and divestments in Central and Eastern Europe by investors from all over the world. With around 100 professionals, Noerr is one of the leading law firms in the region.

Noerr Group

Noerr LLP – Noerr Consulting AG – TEAM Treuhand GmbH – NOERR AG Wirtschaftsprüfungsgesellschaft
Steuerberatungsgesellschaft

Offices

<table>
<thead>
<tr>
<th>PRACTICE AREAS</th>
<th>INDUSTRIES &amp; SOLUTIONS</th>
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<tbody>
<tr>
<td><strong>Antitrust &amp; Competition</strong></td>
<td><strong>Automotive &amp; New Mobility</strong></td>
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<tr>
<td>Dr. Alexander Birnstiel, LL.M.</td>
<td>Dr. A. Dominik Wendel</td>
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<tr>
<td>Munich</td>
<td>Brussels</td>
</tr>
<tr>
<td>T +49 89 28628241</td>
<td>T +32 2 27455 80</td>
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<td><a href="mailto:alexander.birnstiel@noerr.com">alexander.birnstiel@noerr.com</a></td>
<td><a href="mailto:dominik.wendel@noerr.com">dominik.wendel@noerr.com</a></td>
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<tr>
<td><strong>Banking &amp; Finance</strong></td>
<td><strong>Commerce &amp; Trade</strong></td>
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<tr>
<td>Andreas Naujoks, LL.M.</td>
<td>Dr. Karl Rauser</td>
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<td>Frankfurt</td>
<td>Munich</td>
</tr>
<tr>
<td>T +49 69 971477380</td>
<td>T +49 89 28628174</td>
</tr>
<tr>
<td><a href="mailto:andreas.naujoks@noerr.com">andreas.naujoks@noerr.com</a></td>
<td><a href="mailto:karl.rauser@noerr.com">karl.rauser@noerr.com</a></td>
</tr>
<tr>
<td><strong>Capital Markets</strong></td>
<td><strong>Compliance &amp; Investigations</strong></td>
</tr>
<tr>
<td>Dr. Holger Alfes, LL.M.</td>
<td>Dr. Torsten Fett</td>
</tr>
<tr>
<td>Frankfurt</td>
<td>Frankfurt</td>
</tr>
<tr>
<td>T +49 69 971477231</td>
<td>T +49 69 971477252</td>
</tr>
<tr>
<td><a href="mailto:holger.alfes@noerr.com">holger.alfes@noerr.com</a></td>
<td><a href="mailto:torsten.fett@noerr.com">torsten.fett@noerr.com</a></td>
</tr>
<tr>
<td>Dr. Gerald Reger</td>
<td></td>
</tr>
<tr>
<td>Munich</td>
<td></td>
</tr>
<tr>
<td>T +49 89 28628155</td>
<td></td>
</tr>
<tr>
<td><a href="mailto:gerald.reger@noerr.com">gerald.reger@noerr.com</a></td>
<td></td>
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<tr>
<td><strong>Corporate/M&amp;A</strong></td>
<td><strong>Energy</strong></td>
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<td>Dr. Christof Federwisch</td>
</tr>
<tr>
<td>Munich</td>
<td></td>
</tr>
<tr>
<td>T +49 89 28628414</td>
<td>T +49 69 971477446</td>
</tr>
<tr>
<td><a href="mailto:florian.becker@noerr.com">florian.becker@noerr.com</a></td>
<td><a href="mailto:christof.federwisch@noerr.com">christof.federwisch@noerr.com</a></td>
</tr>
<tr>
<td>Dr. Alexander Hirsch</td>
<td></td>
</tr>
<tr>
<td>Düsseldorf</td>
<td></td>
</tr>
<tr>
<td>T +49 211 49986225</td>
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</tr>
<tr>
<td><a href="mailto:alexander.hirsch@noerr.com">alexander.hirsch@noerr.com</a></td>
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<td>Dr. Michael Reiling, Maître en droit</td>
</tr>
<tr>
<td>Düsseldorf</td>
<td>Munich</td>
</tr>
<tr>
<td>T +49 211 49986254</td>
<td>T +49 89 28628464</td>
</tr>
<tr>
<td><a href="mailto:andreas.butz@noerr.com">andreas.butz@noerr.com</a></td>
<td><a href="mailto:michael.reiling@noerr.com">michael.reiling@noerr.com</a></td>
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## PRACTICE AREAS

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<th>Industry &amp; Solutions</th>
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<td>Insurance &amp; Reinsurance</td>
<td>Dr. Christiane Zedelius</td>
</tr>
<tr>
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<td></td>
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</tr>
<tr>
<td>T +49 89 28628225</td>
<td>Dr. Thomas Heitzer</td>
<td>Düsseldorf</td>
</tr>
<tr>
<td><a href="mailto:christiane.zedelius@noerr.com">christiane.zedelius@noerr.com</a></td>
<td>T +49 211 49986170</td>
<td><a href="mailto:thomas.heitzer@noerr.com">thomas.heitzer@noerr.com</a></td>
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</tr>
<tr>
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<td></td>
<td>Munich</td>
</tr>
<tr>
<td>T +49 89 28628225</td>
<td>Dr. Georg Christoph Schneider</td>
<td>Munich</td>
</tr>
<tr>
<td><a href="mailto:christiane.zedelius@noerr.com">christiane.zedelius@noerr.com</a></td>
<td>T +49 89 28628238</td>
<td><a href="mailto:thomas.thalhofer@noerr.com">thomas.thalhofer@noerr.com</a></td>
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<tr>
<td>T +49 89 28628146</td>
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<td><a href="mailto:georg.schneider@noerr.com">georg.schneider@noerr.com</a></td>
</tr>
<tr>
<td><a href="mailto:michael.molitoris@noerr.com">michael.molitoris@noerr.com</a></td>
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</tr>
<tr>
<td>Berlin</td>
<td>Düsseldorf</td>
<td>T + 49 30 20942030</td>
</tr>
<tr>
<td>T+49 30 20942160</td>
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<td><a href="mailto:holger.schmitz@noerr.com">holger.schmitz@noerr.com</a></td>
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<tr>
<td>Dr. Thomas Hoffmann</td>
<td></td>
<td>Prof. Dr. Alexander Goepfert</td>
</tr>
<tr>
<td>T+49 69 971477161</td>
<td>T+49 30 20942002</td>
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</tr>
<tr>
<td>Frankfurt</td>
<td>Berlin</td>
<td>T +49 211 49986282</td>
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<td><a href="mailto:thomas.hoffmann@noerr.com">thomas.hoffmann@noerr.com</a></td>
<td></td>
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<tr>
<td>T +49 30 20942200</td>
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<tr>
<td><a href="mailto:martin.kleinschmitt@noerr.com">martin.kleinschmitt@noerr.com</a></td>
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### Noerr Offices

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<td>Noerr &amp; Partners Law Office</td>
<td>Noerr OOO</td>
</tr>
<tr>
<td>Avenida México 20</td>
<td>Fő utca 14-18</td>
<td>1-ya Brestskaya ul. 29</td>
</tr>
<tr>
<td>03008 Alicante</td>
<td>1011 Budapest</td>
<td>P.O.B. 247, 125047 Moscow</td>
</tr>
<tr>
<td>Spain</td>
<td>Hungary</td>
<td>Russian Federation</td>
</tr>
<tr>
<td>T +34 96 5980480</td>
<td>T +36 1 2240900</td>
<td>T +7 495 7995696</td>
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<tr>
<td>Charlottenstraße 57</td>
<td>Paul-Schwarze-Straße 2</td>
<td>Briener Straße 28</td>
</tr>
<tr>
<td>10117 Berlin</td>
<td>01097 Dresden</td>
<td>80333 Munich</td>
</tr>
<tr>
<td>Germany</td>
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</tr>
<tr>
<td>T +49 30 20942000</td>
<td>T +49 351 816600</td>
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<td>Noerr LLP</td>
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</tr>
<tr>
<td>AC Diplomat</td>
<td>Speditionstraße 1</td>
<td>Representative Office</td>
</tr>
<tr>
<td>Palisády 29/A</td>
<td>40221 Düsseldorf</td>
<td>885 Third Avenue, Suite 2610</td>
</tr>
<tr>
<td>811 06 Bratislava</td>
<td>Germany</td>
<td>New York, NY 10022</td>
</tr>
<tr>
<td>Slovak Republic</td>
<td>T +49 211 499860</td>
<td>USA</td>
</tr>
<tr>
<td>T +421 2 59101010</td>
<td></td>
<td>T +1 212 4331396</td>
</tr>
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<td>Boulevard du Régent</td>
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<td>Na Poříčí 1079/3a</td>
</tr>
<tr>
<td>1000 Brussels</td>
<td>60313 Frankfurt am Main</td>
<td>110 00 Prague 1</td>
</tr>
<tr>
<td>Belgium</td>
<td>Germany</td>
<td>Czech Republic</td>
</tr>
<tr>
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</tr>
<tr>
<td>Str. General Constantin</td>
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<td>Al. Armii Ludowej 26</td>
</tr>
<tr>
<td>Budișteanu nr. 28 C, Sector 1</td>
<td>25 Old Broad Street</td>
<td>00-609 Warsaw</td>
</tr>
<tr>
<td>010775 Bucharest</td>
<td>London EC2N 1HQ</td>
<td>Poland</td>
</tr>
<tr>
<td>Romania</td>
<td>United Kingdom</td>
<td>T +48 22 5793060</td>
</tr>
<tr>
<td>T +40 21 3125888</td>
<td>T +44 20 75624330</td>
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Introduction and legal system

Legal and court system

Hungary is an independent, democratic, constitutional state. Under its Fundamental Law, Hungary is a parliamentary republic, meaning that its executive, legislative, and judicature branches are separate.

The main and highest law of Hungary is the Fundamental Law. The Fundamental Law of Hungary regulates two classic constitutional areas: state administration (national and local government and organisations for the protection of rights) and citizens’ basic rights.

Hungary has a civil law system. In addition to the Fundamental Law, there are acts of Parliament, governmental and ministerial decrees (which are valid only if published in the Official Gazette), and decrees of local governments (which also need to be published). Hungary became a Member State of the European Union on 1 May 2004.

The Judiciary is independent of the executive and legislative branches. The highest court in the Hungarian court system is the Curia. First instance jurisdiction in most matters rests with local courts, affecting the principle that the majority of cases should be settled at a local level, within the easiest reach of the parties. Operating parallel to the local courts are the courts of public administration and labour, specialised for the revision of decisions of public authorities and for those arising in labour disputes. Appeals against the decisions of local courts may be submitted to higher courts (regional courts and regional courts of appeal) acting as appellate courts. In certain cases specified by law, however, regional courts act as the court of first instance. The territorial competence of the local and regional courts is determined by (and is identical to) the areas of public administration. The right of remedy is ensured in the Hungarian jurisdiction. The regional courts of appeal hear the appeals lodged against decisions of local and regional courts. There are five regional courts of appeal throughout the country - in Budapest, Szeged, Pécs, Debrecen and Győr. Taking over the task of examining appeals, the regional courts of appeal have significantly reduced the backlog of cases in the Curia. As a result, the Curia can now concentrate on its main function of ensuring the uniform application of law and examining applications for the review of final judgments. Extraordinary remedy is also ensured in certain cases, if there is no further right to appeal, the parties have the right for extraordinary remedy such as the review of the judgement of lower level courts by the Curia based on violation of law.

Governmental system

The President holds the highest office in Hungary. He is elected by Parliament every five years. Although he is the Commander-in-Chief of the armed forces, he has a largely ceremonial role.

Legislative power is vested in both the Government and the unicameral Parliament which consists of 199 members elected by a one-round election system, which replaces the previous two-round system. Since the most recent elections (April 2014), Parliament has once again been dominated by the conservative Fidesz party, with a two-thirds’ majority.

As the Hungarian political system is parliamentary the Government is held accountable by the Parliament. Parliament monitors the Government, and if it concludes that the Government is not discharging its responsibilities satisfactorily, it may withdraw its support for it through a constructive vote of no confidence.

The Government is the most important organ of executive power, and the chief controller of public administration. The government has the right through the competent branch ministers to replace any public officer or governmental officer freely. This means that it implements decisions made by the Parliament, as the legislative organ, and it pursues the goals laid out in the Government’s programme (holding the pre-formulated programs of the government).

The Hungarian Government comprises the Prime Minister and government ministers. The Prime Minister is the head of the Government. The Prime Minister is elected by the Parliament following a proposal from the President. At the same time, the Parliament votes on the Government’s programme. The Prime Minister has to determine the general direction of Government policy within the context of the Government’s programme. The President appoints ministers according to the Prime Minister’s recommendations. In addition, the Prime Minister chairs cabinet meetings and ensures the implementation of Government decisions.

The Prime Minister may nominate one or more Deputy Prime Ministers, chosen from ministers. At present there are two Deputy Prime Ministers, who carry out specific tasks in addition to deputising for the Prime Minister in certain situations which he has specified. One of these Deputy Prime Ministers is responsible for the structure of public administration and its efficient operation, while the other coordinates and manages national policy and church affairs on a permanent basis.
A large part of a minister’s work is taken up with the guidance and supervision of a given ministry (being a government department). It is the task of a minister to develop statutory proposals to promote effective operation within the minister’s specialist area of responsibility, and to implement the Government programme. He must also represent the Hungarian Government at the European Council or other international organisations.

Public administration operates efficiently when policy and traditional public administration tasks are separate. This is reflected in the new structure of public administration: where a state secretary acts as a deputy for a minister, with full delegated ministerial powers for a given specialist department. Each minister can be responsible for several departments: for example, one minister is responsible for education, sport and healthcare.

Ministers of state are divided into three categories: state secretaries responsible for special areas (e.g. education); state secretaries responsible for administrative tasks; and parliamentary ministers of state. State secretaries responsible for special areas are political leaders, while the posts of public administration and parliamentary state secretaries are politically neutral, as is the post of Deputy Minister of State. A public administration state secretary is a specialist leader of a ministry’s organisational operations, while the responsibilities of a parliamentary state secretary are to Parliament.

Policy approach

Hungary is the only country in Central and Eastern Europe where all governments have been able to fulfil their four year mandate with no interim elections.

In 1989, Hungary started its reintegration into the world economy. The country opened up to direct foreign investments, and liberalised its trade regime. Privatisation began, and was almost finished by the second half of the 1990s. Hungary joined the OECD in 1996 and NATO in 1999.

In the past 25 years, conservative and social-liberal governments have been alternately in power. At the last parliamentary elections in April 2014, the conservative FIDESZ-Hungarian Civil Alliance (FIDESZ-MPSZ) won with a majority. Besides Fidesz in 2010 no single party since Hungary’s transition to democracy 25 years ago has had two thirds mandate. Fidesz’s central key goals have been to reform the system of local governments, the electoral system and media law, and aims to ease the process for Hungarian nationals in neighbouring countries to obtain dual citizenship.

Hungary offers a number of benefits and incentives for new investors as well as for companies already active in the country. Generally, investors qualify for incentives when they surpass a certain investment value or number of created jobs.

The Hungarian taxation system is now close to the level of complexity found in Western Europe. Tax laws in Hungary are enacted by Parliament and the Tax Authority provides interpretative and administrative guidelines for these laws. Court decisions play an increasing role in interpreting tax laws and, as a result of Hungary’s accession to the EU, European Court of Justice case law is also applicable.

Hungarian tax is paid by self-assessment. All taxpayers have to register, determine their tax obligations, make payments in advance, file tax returns on their own behalf, make corrections to the tax returns as needed, keep records, and supply information as required by law. Authorities randomly examine tax returns to keep track of the self-assessment system. Corporations are subject to continuous assessment throughout the year. The Head of the National Tax and Customs Authority (NAV) determines the target audit areas for the tax authority in the tax year concerned. The tax year is the calendar year for individuals and the calendar year or the financial year for companies (the financial year of companies varies from the calendar year only in limited cases). In general, tax returns must be filed annually. For VAT, payroll and withholding taxes, however, quarterly or monthly filings may be required.

Central taxes:
- Corporate income tax
- VAT
- Personal income tax

Local taxes:
- Building tax
Foreign investment policy

Hungary is one of the most developed countries in Central and Eastern Europe. Many foreign investors have become active in Hungary since the beginning of the 1990s. As a result, modern industrial facilities and moderate incomes have created an attractive economic market with a high export potential. Here the Companies with Western European or overseas residence also profit from Hungary’s strategic location as a “Bridge to Eastern Europe”.

About one third of the country’s foreign investments continue to originate from large and medium sized companies, especially from the automobile and machinery industries in Germany. The Hungarian Government is building on its traditional strengths which include the training of specialists for technical products and IT. A wide range of concepts are being used to encourage foreign companies within these industries to invest in Hungary.

Within the state aid legal framework of the EU, the Hungarian Government supports investment projects with a one-stop shop service including a VIP treatment and comprehensive information about available subsidies for investment projects. The current structure of the governmental bodies coping with the support of foreign investors is coordinated by the Minister of Foreign Affairs and Trade, and include various types of organisations involved in the investment promotion, such as investment banks, trading and investment promotion agencies.

Regarding the available incentives, it has to be noted that Hungary is entitled to approx. €40 billion from EU funds during the period of 2014-2020, 60% of which will be spent for the development of the Hungarian economy and focusing on R&D&I projects and investments of SMEs, according to the plans of the Government. Beside EU funds, there are national funded subsidies as well, aiming to support investment projects creating new workplaces and training projects targeting to assure the availability of well-educated workforce.

Types of business vehicles

Forms of business vehicle

Foreign investors prefer (in the majority of cases) to establish limited liability companies for the purposes of starting their business activities in Hungary. The main characteristics of the relevant limited liability corporate forms are described below.

In Hungary, limited liability companies can either be a Kft. (company limited by quotas; hereinafter Kft.), a public (Nyrt., stock company, not described in this summary) or a private (Zrt.) company limited by shares. For international operations, it is also possible to establish a European Company (Societas Europaea) with its registered seat in Hungary, based on the conditions prescribed by the rules of the relevant regulation of the European Union.

Relevant vehicle

The limited liability company form is preferred, as its members/shareholders, with certain exceptions, are only liable for the company's losses to the extent of their contributions.

From the available corporate forms it is generally easier to establish a Company Limited by Quotas (see description below).

Registration formalities

After signing the necessary documentation, the company must be registered in the trade register by the competent court of registration and this procedure is administered by a lawyer or a notary public.
It is possible to sign the establishment documents outside Hungary, however, all the documents would need to be signed in front of a notary public and, in certain cases, an Apostille also needs to be attached. If the documents are signed in Hungary, the involvement of a notary public is not a requirement; lawyers may countersign documents.

A Kft. or a Zrt. may be incorporated using an ordinary procedure or a simplified procedure, whereas a stock company (Nyrt.) can only be incorporated with admission to the Budapest Stock Exchange via traditional public offering from a Zrt.

The simplified procedure is significantly faster and cheaper but the founders are not free to decide on the content of the articles of association of the company. The founders are free to draft the articles under the ordinary procedure.

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| TIMESCALE | 15 business days after filing the application | 1 working hour (+ 1 day should be taken into account) |

A company is legally established only upon registration in the Hungarian Trade Register, but it may conduct certain activities (as a pre-company) from the date of foundation, i.e. from counter-signing the executed version of the articles of association by the attorney preparing the establishment documents. However, the activities which are subject to prior authorisation (e.g. the commencement of any financial services related activities) cannot be conducted in the pre-company phase.

The Kft. has a smaller capital requirement (min. registered capital: HUF 3,000,000), while the Zrt. may only be established with a minimum capital of HUF 5,000,000, and the Nyrt. with HUF 20,000,000. Registered capitals can freely be increased, i.e. no statutory maximum is applicable in this respect.

Members’ contributions of capital can be provided either in cash or in kind, or as a combination of the two.

The quotas of a Kft. and the shares of a Zrt./Nyrt. may be freely transferred or encumbered unless a shareholders’ agreement or the articles provide otherwise.

A Nyrt. or Zrt. can issue preference shares, which may grant different, preferential rights to the shareholders. The possibility to issue preferential shares may be an advantage for foreign investors planning to acquire shares in a Hungarian entity.

On the other hand, the issue of preferential business quotas is not possible in the case of Kfts. It is, however, theoretically possible to attach different rights to different types of quotas in the Kft.’s articles of association.

With regard to a Kft., if not otherwise stipulated or precluded in the articles of association, the members and the company in this sequence have a pre-emption right (i.e. offers must first be made to existing quotaholders in relation to the quotas being transferred to a third party). It is also possible to set out pre-emption rights in relation to the shares in the case of a Zrt.

Corporate governance and management structure of a Kft. and a Zrt./Nyrt.

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<td>◆ sole shareholder (in the case of a single-shareholder company)</td>
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Members’ (shareholders’) meeting

The members’ / shareholders’ meeting is the highest decision-making body of a Kft. and Zrt./Nyrt., and consists of the company’s members / shareholders. Special rules apply with regard to “single-member / shareholder” companies (see below).

A simple majority vote of the members’ / shareholders’ meeting is sufficient in most cases. For some matters, however, a 75% majority is required by law (e.g. for changing the articles of association). The articles of association may specify certain matters where the members / shareholders may decide without holding a members’ / shareholders’ meeting, as well as the method of decision. The articles may also allow the holding of members’/shareholders’ meetings by means of electronic communications.

The Kft. and Zrt. may also operate as a single-member / shareholder company. In this case, the single member / shareholder exercises the decision-making rights of the members’ / shareholders’ by passing written resolutions. Additionally, the single member / shareholder may directly instruct the management.

There are no restrictions with respect to foreign members / shareholders.

Management

The management of a Kft. is carried out by one or more managing directors (i.e. the single managing directors act on their own).

In the case of an Nyrt., a board of directors consisting of 3 or more members must be set up. A Zrt. must be operated by a single director or by a board of directors (3 or more members).

The appointed directors may be authorised to sign on behalf of the company solely or jointly with other directors.

Directors carry out their duties independently, meaning that their activities are governed only by law, the articles of association and the previous members’ / shareholders’ resolutions. This also means that directors may not be instructed concerning their management activities (with the exception of single member / shareholder companies).

The articles may, however, provide that certain decisions may only be made subject to the prior consent of the members’ / shareholders’ meeting (or the supervisory board). It should be noted that these restrictions on representation incorporated in the articles of association only bind the directors and the members / shareholders, i.e. the restrictions are not effective towards third parties (e.g. prior authorisation of the members’ meeting may be required to conclude agreements above a certain contractual value limit).

Officers of companies may hold any nationality.

Directors’ liability

Directors must carry out their activities with due care and in the interests of the company. Directors are jointly and severally liable to the members / shareholders for their acts and omissions. In certain cases, directors may also have liability towards
the creditors of the company, if, in case of a liquidation procedure, the company does not have sufficient assets for the satisfaction of creditors.

The new Civil Code kept the previously adopted regulations introducing new statutory provisions excluding a person who has been an executive or member of an insolvent or phantom company to be an executive in a new business entity.

Parent company liability

A parent company’s liability is generally limited to its capital contribution, however, there are certain important exceptions such as:

► if a company which is controlled by a dominant member (holding at least 75% of the voting rights in the company) is going into liquidation, the dominant member shall bear unlimited liability for all liabilities of the company that are not covered by its assets (provided that the court has declared the unlimited and full liability of the dominant member responsible due to its history of making unfavourable business decisions in the debtor company) and

► if the company is liquidated, those members / shareholders which have abused their limited liability or the company’s legal personality to the detriment of creditors must bear unlimited, joint and several liability for the unsatisfied obligations of the liquidated company (e.g. where risky, speculative business were conducted through the limited liability company, the members may not in all cases rely on their limited liability).

Effective as of 1 March, 2012 regulations introduced new statutory provisions excluding anybody who has been an executive or member of an insolvent or fantomised company to acquire a majority share (50%+1) in a new company.

Reporting obligation

Companies must file their annual balance sheets with the competent authorities by 31 May of each year. This balance sheet is publicly available.

Companies must fulfil certain disclosure and reporting requirements of the court of registration following any changes in the corporate data included in the trade register, (e.g. any amendments to the articles of association, directors, members of the supervisory board, etc.).

Details for opening a branch office or representative office

A branch office is a business unit (without legal personality) through which the following entities may operate in Hungary: foreign legal persons (i.e. companies), foreign organisations without legal personality, and other foreign-registered businesses.

A branch office comes into existence when the relevant court of registration, registers the branch office in the trade register. Prior to its registration in the trade register, the branch office may not engage in any activities which require official authorisation and / or the conduct of which requires a licence (including activities relating to the purchase and lease of business premises).

The branch office may be represented by persons who (i) are employed by or are assigned to the branch office or (ii) have resident status in Hungary and have concluded a contract for services (i.e. a civil law contract) with the branch office.

The court of registration must process the branch office registration application within 15 working days.

A Hungarian commercial representative office (CRO) is a business unit of a foreign enterprise (founder) without its own legal personality, like a branch.

Business activities may not be conducted through a CRO, therefore, the scope of its activities is significantly limited. A CRO may only act as an intermediary in the negotiation of contracts, participate in the preparation of contracts, and carry out informational, marketing and promotional activities on behalf of its founder and no other activities (i.e. in general, a branch office can be seen as an independent economical unit, whilst a CRO is not).

A CRO comes into existence when the relevant court of registration, registers the CRO in the trade register. The CRO may commence its operations and may engage in legally permitted activities only following its registration in the trade register.
The CRO may be represented by persons who (i) are employed by or are assigned to the CRO or (ii) have resident status in Hungary and have concluded a contract for services (i.e. a civil law contract) with the CRO. The persons employed by the CRO are deemed to be in a legal relationship with the CRO’s founder.

The court of registration must process the CRO registration application within 15 working days.

Information for listing on local stock exchange

The regulation and operation of the capital market in Hungary is supervised by the Hungarian National Bank (HNB) (Magyar Nemzeti Bank). The stock market operator authorised by the HNB is the Budapest Stock Exchange (Budapesti Értéktőzsde).

Listing equity on the Budapest Stock Exchange requires several steps. Its complexity and timeline also depends on the “type” of listing the company requires:

► “Simple” listing on the Budapest Stock Exchange is where there is no capital increase (i.e. issue of new shares) and no public offering of existing shares

► “Traditional public offering” is admission to the Budapest Stock Exchange together with the offer of shares to the public, i.e. either the issue of new shares or sale by owners or a combination of the two

As a general rule, the admission of securities to trading on a regulated market must be made following the preparation of a prospectus. The prospectus must contain all relevant information on the economic, market, financial and legal position of the company, giving investors the widest possible range of information. A prospectus prepared for a listing on the Budapest Stock Exchange must be submitted for prior approval to the Hungarian National Bank. As a consequence of Hungary’s EU membership and on the basis of a “single passport”, the Budapest Stock Exchange also accepts prospectuses approved by a supervisory authority of any other EU member state.

An application for listing must be submitted to the Budapest Stock Exchange, which must review the application and make a decision within 30 calendar days of receipt. Various documents must be published at least two trading days before the listing on the official site for publications of the Budapest Stock Exchange such as the prospectus, constitutional documents, the ownership structure, and the details of the Registrar of Shares etc.

Listing of equity securities will fall under one of three categories “A”, “B” or “T”. A category “B” listing requires the basic legal requirements to be fulfilled, however, a category “A” listing has additional requirements, and while the admission is stricter, category “A” equities have, in general, a better reputation in the market. Category “T” is for technical listings only, the simplest procedure for a company to appear in the regulated market. For companies newly entering category “T”, it will be easier to move to category “A” or “B” once a public offering has been completed.

Businesses with their securities listed on a regulated market must continue to observe certain governance rules and market transparency requirements.

Hungarian Civil Code does not restrict the giving of upstream guarantees, (non-beneficial decisions, or decisions which provide more risks to the company, and may violate the company’s interests) however, in general the acts of shareholders or executive officers which negatively affect creditors and cause the company to become insolvent may lead to full and joint liability for such persons. Such actions may also be considered a criminal offence.

Laws relating to the charging of assets

The charging of corporate assets is permitted, in principle, subject to certain limitations. More precisely, a company may not grant loans, give undertakings or surety or pay financial liabilities in connection with the subscription or acquisition of shares issued by the company prior to the subscription or acquisition of shares. This restriction only applies to joint stock companies (joint stock limited liability companies like Zrt. or Nyrt.). These provisions do not restrict the acquisition of shares by employees of the respective company (i.e. the target company) - or employees of companies under the majority control of the respective company - and transactions carried out by banks and other credit institutions in their ordinary course of business do not fall under the restrictions.

Furthermore, the quotaholders/shareholders and directors of a limited liability company and their close relatives may not enter into transactions for the acquisition, disposal, lease or encumbrance of corporate assets without the prior approval of
shareholders. No such mandatory provision applies to joint stock companies, but the quotaholders/shareholders may include such a provision in the company’s deed of foundation.

**Employment**

**Employee relations**

Hungarian labour relations are regulated by EU and statutory legislation, case law, collective bargaining agreements and individual employment agreements. Although case law has no legally binding force, it plays a significant role when interpreting the statutory provisions, and therefore influences employment relations in a broad sense.

Employment regulations allow efficient contracting between employers and employees, enabling labour market flexibility on the one hand and protecting employees from discriminatory or unfair treatment by employers on the other hand. The protection for employees is also reinforced by the employee-friendly attitude of the Hungarian labour courts.

In general trade unions are not as strong as in some other countries in Western Europe, although in some sectors such as transport, education and public health they play a significant role in labour relations. Strikes are not as common as in some other countries in continental Europe.

The global financial crisis has significantly affected the Hungarian economy and has resulted in an increase of the overall unemployment rate (climbing to a record high of 11.8% in the first quarter of 2010). However, in the fourth quarter of 2015 this rate went down to 6.2% according to the Hungarian Central Statistical Office. National minimum wages still lag behind those of Western Europe: from 1 January 2016, the statutory minimum monthly wage for workers without secondary education is HUF 111,000, and for workers with at least secondary education is HUF 129,000.

Employees in Hungary are generally highly skilled and educated, particularly in IT, engineering, pharmacy, mathematics and physics. The number of employees with foreign language skills also increases year on year.

**Relevant labour and employment laws**

The most important rules on labour relations are incorporated in Act I of 2012 on the Labour Code *(Labour Code)*, which entered into force on 1 July 2012. The rules of the Labour Code are, in many ways, similar to the legislation of other industrialised countries. They comply with EU legislation and are applicable to all employment relations in Hungary.

Hungarian labour law - unless otherwise regulated by international private law, international contracts or agreements (bilateral or multilateral) or ius cogens - applies to (i) all employment relationships where work is performed in Hungary, i.e. this code applies for temporary projects on Hungarian territory and (ii) where the employee of a Hungarian employer works temporarily outside Hungary.

**Contracts, agreements and implied terms governing employment relationships**

Employment may only be established by a written contract, which must contain information detailing the following (at least): personal base salary, scope of work of the employee and the place of work. Oral agreements concluded by the parties are also deemed to be valid unless the employee notifies the employer of a disagreement within 30 days of their first day at work.

As a general rule, the parties may alter the provisions of the Labour Code only if the change is in favour of the employee. In some cases, however, (e.g. termination notices must be in writing), deviation from the provisions of the Labour Code is prohibited.

The employment term may be for an indefinite or a definite period, the latter may generally not exceed five years.

If an employer is bound by a local collective bargaining agreement, the relevant terms must also be applied to the employees of the employer who are not members of the respective trade union.

Again, individual employment contracts may only differ from the rules of the applicable collective agreement to the advantage of the employee. If an issue is regulated in both the applicable collective agreement and the individual employment contract, the regulation that is more advantageous for the employee will be deemed to apply.

The website of the Labour Ministry can be used to check whether there is an effective collective bargaining agreement applicable to a certain employer.
There are also collective bargaining agreements applicable to entire business sectors and employment relationships falling under the scope of the respective sector collective bargaining agreement.

Furthermore, in certain sectors, a sectoral collective agreement applies to all employers active in that sector, whether or not they are members of a union.

**Employees and management representation and corporate transactions**

Works councils may be elected at companies and their individual business units where they each have more than 50 employees. If less than 51 but more than 15 employees are employed at the same company or one of its individual business units, a works representative may be elected, and the representative has the same rights as the works council. Works councils and works representatives are elected for a period of five years.

The works councils have a co-determination right concerning the usage of welfare funds, properties and institutions specified in the applicable collective bargaining agreement. In addition, works councils have a comprehensive right to express their opinion on issues such as plans made by the employer affecting a material amount of the employees (such as any reorganisation, restructuring, privatisation, modernisation of the employer, etc.), proposals on employee training, proposals on the annual vacations and new performance requirements, etc. In such matters, however, no prior consent of the works council is required.

Employers must inform the works councils on certain other issues every half year. For example they must inform works councils of: the basic economic situation of the employer; any plans of changing the business activities, any proposed changes of wages, the available assets and on the number and scope of duties of the employer, etc. Works councils are entitled to request information from the employer relating to the social and economic interests of the employees and to their equal treatment. The employer cannot refuse to provide such information. Any employer actions which breach the co-determination right of the works council and the right to express their opinion are deemed void.

In the case of mass redundancies, the employer must hold consultations with the works council before making its final decision on the redundancies. The employer must provide the works council with the relevant information regarding the planned redundancies during the consultation. The employer and the works council may enter into an agreement regarding the redundancies, but the consent of the works council is not required.

In the case of legal succession of the employer (including a merger or demerger of companies or a transfer of undertaking), the employer must also hold consultations with the works council on the planned consequences of the legal succession that might affect employees. Again, consent of the works council is not required.

If the employer employs more than 200 employees full time, at least one third of the supervisory board members of the employer must be elected from among the employees.

**Termination of the individual employment contract**

In general, an employment contract may be terminated by mutual consent, by termination, or by termination with immediate effect by the employer or the employee. The termination of an employment relationship must be in writing.

Termination with immediate effect can occur only in the case of:

- a serious breach of a material obligation arising from the employment with intent or by gross negligence or
- exhibiting behaviour which makes the continuation of the employment impossible – such as causing injuries to the employer, being absent from work without proper excuse, or endangering the economic interests of the employer

The employee may terminate the indefinite-term employment at any time by prior notice without cause. The employer, however, may only terminate the indefinite-term employment by termination due to the:

- employee’s abilities
- the employee’s conduct in connection with the job
- employer’s operation
Reasons relating to the employee’s abilities include, among others, professional inadequacy, health reasons, but also psychological reasons, e.g. inability to get on with co-workers and superiors. Reasons relating to the conduct of the employee include, among others, the violation of workplace and performance rules or the provisions of the employment contract, refusal to carry out legitimate instructions from superiors and other behaviour violating the employer’s business interests. Reasons relating to the employer’s operation include, for example, the restructuring or closing of the operation.

No justification for termination by the employer needs to be given if the employee is beyond the statutory retirement age.

In the case of termination the employment ends on the last day of the notice period. The statutory notice period is 30 days. Depending on the number of years’ continuous service, the above period increases to a maximum of 60 days after 20 years of employment. The parties may agree on specific notice periods in the employment contract. These, however, may not be less than 30 days or more than 6 months.

In the case of termination by the employer, the employee shall be exempted from their duties at least for the half the notice period.

Employees who have been employed at the same employer for at least three consecutive years are entitled to severance pay upon termination by the employer, unless the employee is a pensioner. The amount of the severance payment depends on the time spent in service (minimum one month, maximum six months’ absentee fee).

Certain groups of employees enjoy special protection from termination (e.g. employees on sick leave, employees on maternity leave, etc.).

In the case of fixed-term contracts, the employer may terminate the employment agreement with immediate effect upon payment of one year’s absentee fee or the remaining period’s absentee fee if less than one year remains of the term of employment. In such cases, no justification need be given for the termination. The employer may terminate the fixed term employment agreement: (i) during the liquidation bankruptcy procedure of the employees; (ii) in relation with the employee’s ability to work or (iii) if maintaining the employment relationship becomes impossible due to a force majeure event.

In the case of an unlawful termination of the employment by the employer, the employee has the right to contest the termination at court within 30 days of receipt of the termination notice. Should the court establish that the termination was unlawful, the court may, upon the employee’s request, reinstate the employee into his former position. In the absence of such a request, the employee may be awarded an amount equal to the absentee fee for the notice period. Furthermore, irrespective of the claim for reinstatement, the employer is obliged to reimburse the employee for his lost wages, any other allotments due and any further proven damages.

**Redundancies and mass lay-offs**

A mass lay-off occurs when an employer having (on average during the previous six months):

- more than twenty but less than one hundred employees, terminates the employment of at least ten employees
- more than one hundred but less than three hundred employees, terminates the employment of at least ten percent of the employees or
- three hundred or more employees, terminates the employment of at least thirty employees within a 30-day period based on grounds connected to its business operation or by mutual consent

In the event of a mass lay-off, a strict procedure must be followed during which consultations must be held with the works council (during which an agreement can be concluded between the employer and the works council on the terms of the redundancy) and the national employment agency must be notified of the relevant information on the planned redundancies.

**Foreign employees: work permits and residency permits**

Generally, foreign citizens require an employment permit and a residence permit in order to work legally in Hungary. The employer is entitled to launch the process for the employment permit on behalf of an employee at the competent employment agency. Obtaining a work permit generally takes one month, depending on the conditions. A permit is valid for a maximum term of two years and can be extended for an extra two years. There is a small fee.
No permits are required for EU / EEA citizens and refugees or persons holding resident status in Hungary.

If no permit is required for employment, the competent national employment agency must be notified of the employment by the production of certain information and the employee must obtain a registration card.

For EU / EEA citizens, no residency permit is required, however, a registration card must be obtained if they spend more than three months in Hungary. For non-EU / EEA citizens, a residency permit is required. Generally, obtaining such a permit takes 30-40 days.

An EU “blue card” is a permit for high-educated employees from third countries, this entitles the employee to reside and be employed inside any member state.

**Economy and government**

Hungary has a medium-sized economy and it is structurally, politically and institutionally open. Hungary is in Central Europe and is part of the European Union’s single market. Like most Eastern European economies, the Hungarian economy experienced market liberalisation in the early 1990s as part of the transition from socialist economy to market economy. Hungary has been a member of the Organisation for Economic Co-operation and Development (OECD) since 1995, a member of the World Trade Organisation (WTO) since 1996, and a member of the European Union (EU) since 2004.

**Restrictions/regulations**

There are no general restrictions on foreign investments. In certain sectors (e.g. real property), however, licenses may be required. In the case of takeovers, mergers or acquisitions, approval of the competition authority may be required under competition law. There are no exchange control or currency regulations in Hungarian law.

Regarding state subsidies, on the one hand Hungary is entitled to approx. €40 billion from EU funds during the period of 2014-2020, 60% of which will be spent for the development of the Hungarian economy and focusing on R&D&I projects and investments of SMEs, according to the plans of the Government. These incentives are offered to foreign investors in form of tenders including the targeted project parameters.

On the other hand, there are the following main national funded incentive programs available for foreign investors:

► VIP cash grant (granted by the individual decision of the Government)
► job creation subsidy (cash grant granted by the individual decision of the Government)
► development tax allowance (exemption from the corporate tax to be paid by a company)
► training subsidy
► subsidy granted to the establishment or the development of vocational training centres

**Taxation**

**Tax residency**

Resident individuals are subject to personal income tax on their worldwide income.

An individual is deemed to be a resident if he is:

► a Hungarian citizen (except where he has another citizenship and has no permanent or temporary residence in Hungary)
► a natural person who is present in Hungary for at least 183 days in the relevant calendar year
► a national of another country or stateless person residing in Hungary if the person is present in Hungary for at least 183 days in the relevant year
► a person whose only permanent residence is in Hungary
► a person whose centre of vital interests is in Hungary (as determined by family ties and business relations), if he has no permanent residence in Hungary or elsewhere

► a person whose temporary residence is in Hungary, if his centre of vital interests is unknown, and if he has no permanent residence in Hungary

Non-resident individuals are subject to personal income tax on Hungarian-source income if the place of gainful activity is in Hungary or if the income is taxable in Hungary pursuant to an international agreement or Treaty. Hungarian-source income includes income from being a senior officer or supervisory board member of a legal entity registered in Hungary, and dividends and interest received from Hungarian-registered businesses.

**Income tax and social security contributions**

Tax resident employees must pay personal income tax at 15%.

The tax rate for healthcare contribution is 7% (in kind at 4%, monetary at 3%), a Labour Fund (the paid amount is used to help the unemployed labour capable part of the country to contribute the possibility of their future employment) contribution at 1.5% and pension contribution at 10%.

Non-tax resident employees pay the same taxes and contributions as tax resident employees but only on Hungarian-source income.

Employers must pay a social contribution at 27%, and a vocational training contribution at 1.5% calculated on the employee’s gross monthly wage.

**Business vehicles**

A business vehicle is tax resident if it is incorporated and registered under Hungarian law. Foreign legal entities are deemed resident if their place of management is located in Hungary.

A business vehicle is non-tax resident if it is not incorporated and registered under Hungarian law but carries out business operations through branches in Hungary.

Tax resident companies generally pay corporate income tax at 19% on their worldwide income. The corporate income tax rate is only 10% up to a positive tax base of HUF 500 million (€1.85 million).

VAT is payable at 27% on supplies of goods and services. Certain goods and services listed in the annexes to the VAT Act are subject to special rates of 5% or 18%, as applicable.

Non-tax resident business vehicles are subject to corporate tax at the same rate as tax resident businesses but only in respect of income from business activities conducted through a permanent establishment located in Hungary.

Corporate shareholders are not subject to tax on dividends declared in favour of them, irrespective of their residency.

Individual shareholders must pay income tax at 15% on dividends received, unless a double tax treaty applies. A corporate shareholder does not have to pay income tax on dividends received, unless a double tax treaty applies.

The same taxes apply to IP royalties paid as for interest.

**Thin capitalisation rules**

Thin capitalisation rules apply if the company subject to corporate income tax has obligations in respect of outstanding loans, outstanding debt securities offered privately or an overdrawn account.

Under Hungarian thin capitalisation rules, pre-tax profits must be adjusted by adding a pro-rata portion of all interest paid on any of the above obligations that exceed three times the company’s equity capital, with the exception of interest paid to financial institutions (which are not affiliates). This means that for example in the event a loan is granted by the parent company to the Hungarian entity, and this loan exceeds the Hungarian Kft’s equity multiplied by three, then the payable interest which falls on the loan exceeding the above limit (i.e. three times the equity of the Hungarian entity) will not be deductible for tax purposes.
Profits of a foreign subsidiary

Companies deemed to be controlled foreign companies are:

(a) foreign-resident entities or

(b) entities deemed as foreign-resident on account of their place of management, and which either:

(i) have a Hungarian resident beneficial owner on at least 183 days of the calendar year or

(ii) which derive more than 50% of their revenues from Hungarian sources in the tax year and

where the effective tax, equivalent to Hungarian corporate income tax, paid by the foreign company is:

(A) below 10% of the company’s taxable profits for that accounting period or

(B) zero, because the company has a zero or negative tax base, despite making profits for that period.

No CFC rules apply to companies with a registered seat or resident status in an EU or OECD Member State or in a treaty country where the company carries out genuine economic activity.

The taxable profits of the Hungarian company must be increased by an amount equal to the controlled foreign company’s after-tax profits as at the last day of the tax year less any dividends paid to its shareholders, provided that the Hungarian shareholder controls at least 25% of the votes or shares or has a controlling interest in the controlled foreign company and no Hungarian resident individual holds any interest in that Hungarian resident shareholder.

Transfer pricing rules

If two or more companies are deemed to be affiliated companies under the Act on Corporate Tax and Dividend Tax, and do not use arm’s length prices in the course of their dealings, the pre-tax profits of the affiliated companies are adjusted to reflect the arm’s length price.

The arm’s length price is generally determined using the comparable price, the resale price, the cost plus, the transactional net margin or the profit split methods.

Companies qualifying as small or medium-sized enterprises (SME) are not required to apply the above transfer pricing rules to long term agreements concluded with an affiliated company, established for the purpose of joint purchases and sales, in which the total voting rights held by such SME exceeds 50%.

Companies not qualifying as SMEs on the last day of the tax year must record the arm’s length price, the method used to determine the arm’s length price and the facts and circumstances supporting such price until the date of filing their corporate tax returns.

Imports and exports

Exports are subject to zero VAT. Imports are subject to VAT at the applicable rates. The relevant EC Directives are implemented.

Double tax treaties

Hungary has double tax treaties with all of the original EU Member States and most of the newly joined EU Member States.

Dispute resolution

Court process

In Hungary, the civil court system has four levels: local courts, regional courts (in Budapest the Budapest Capital Regional Court), regional courts of appeal and the Curia. In civil law cases the local courts or regional courts have jurisdiction at first instance. Regional courts deal with cases where the value of the claim exceeds HUF 30 million (approximately EUR 100,000). Court decisions can in general be appealed and will be heard by the relevant higher court.
In Hungarian civil procedure, legal disputes begin with the filing of a written statement of claim, including supporting facts and evidence. The court hears the statements of the parties and the evidence filed, which can include witness testimonies, expert opinions and other material evidence. In Hungary, civil lawsuits usually last for several months. Representation by an attorney is mandatory if the value of the claim exceeds HUF 30 million (approximately EUR 100,000) and in other cases where the regional courts have jurisdiction in the first instance.

There is no jury trial in Hungary. Judges decide both factual and legal questions and are fully trained lawyers. Generally, there is a single judge at first instance (in certain cases accompanied by two civil assessors) and a panel of three judges at second instance. The Curia consists of three or five judges, depending on the complexity of the case.

Pre-trial disclosure or class / group actions are not recognised in Hungarian procedural law. As a general rule, all legal fees of the successful party must be reimbursed by the unsuccessful party.

Arbitration

In addition to the ordinary court system, arbitration is possible in certain circumstances. Parties to a contract may agree to submit to the jurisdiction of an arbitral tribunal instead of an ordinary court. If so, ordinary courts will have no jurisdiction with regard to the dispute. Arbitration is frequently used by business entities.

The main permanent arbitral tribunals in Hungary are the three Permanent Courts of Arbitration (for Financial and Capital Markets, Telecommunications and the Energy Industry) and the Court of Arbitration attached to the Hungarian Chamber of Commerce and Industry.

The detailed rules, fees and costs of arbitration proceedings are set out in the rules of procedure of each arbitral tribunal.

Hungary recognises and enforces foreign arbitral awards.

Competition

The most important source of Hungarian competition law is Act No. LVII of 1996 on the prohibition of unfair market practices and restraints of competition (Competition Act). The Competition Act sets out the key provisions concerning:

► the prohibition of restrictive agreements and concerted practices between undertakings ("Anti-competitive agreements")
► the prohibition of abuses of a dominant position ("Abuse of dominant position") and
► provisions on the control of mergers between undertakings ("Merger control")

Anti-competitive agreements

Like European law, Section 11 (1) of the Competition Act prohibits agreements and concerted practices between undertakings as well as decisions by associations of undertakings which aim to or have the effect of preventing, restricting or distorting competition. Certain practices are set out in the Competition Act in a (non-exhaustive) list of prohibited measures, for example, the fixing of prices and conditions; the restriction and control of production, distribution, technical development and investments; the allocation of and the limitation of access to supply sources and customers; the obstruction of market access and the discrimination of customers or suppliers as regards price and sales conditions.

De minimis exemption: The prohibition of restrictive agreements does not extend to agreements of minor significance, i.e. if the parties to the agreement have a joint market share below 10% during the term of the agreement. The fixing of prices and the allocation of markets, however, are still prohibited regardless of market share.

Block exceptions: The Hungarian Government is entitled to exempt certain groups of agreements and concerted practices from the above prohibition if – similar to Article 101 (3) of the Treaty on the Functioning of the European Union – the agreement contributes to improving the production or distribution of goods and services, promotes technical or economic progress, or advances environmental protection or competitiveness, while allowing consumers or customers a fair share of the resulting benefit not imposing restrictions on the undertakings concerned which are more than necessary to achieve those objectives, and not eliminating competition in respect of a substantial part of the affected products. Accordingly, various governmental regulations provide block exemptions for vertical agreements relating to the repair of cars, insurance agreements, agreements on research and development and the transfer of technology. The Hungarian regulations are only
applicable if the agreements do not affect the Common Market (in which case they would be governed by the equivalent European regulations).

Special exemptions: Special regulations may be applicable in the agricultural sector, where the ministry in charge may establish that reasonable justifications exist to exempt an agreement from the applicable competitive regime. Also, in the agricultural sector, the competition authority may oblige the concerned parties to bring their commercial practices in line with the applicable competition regime, prior to imposing fines.

Participants in anti-competitive agreements may apply for leniency under the leniency policy set out in the Competition Act. The first participant to inform the Competition Authority about the anti-competitive agreements and provide satisfactory evidence on its existence and participants may receive amnesty; the second, the third or fourth participants may receive reductions on the fine the Competition Authority might impose on them.

Abuse of dominant position

Hungarian competition law also prohibits the abuse of a dominant position by an undertaking. The Competition Act provides a non-exhaustive list of business practices which are considered abusive, such as applying unfair prices and sales conditions; requesting unreasonable benefits for the company against the customer (typically excessive costs for a service) and imposing disadvantageous conditions upon customers; restricting production, distribution and technical development to the detriment of consumers and customers; refusing or withholding goods from the market with the purpose of increasing their price or to obtain other unreasonable advantages; discriminating arbitrarily between customers in similar business dealings; applying unreasonably low prices which are not justified by increased efficiency; and restricting and obstructing entry into the market by other undertakings, etc.

In contrast to certain other jurisdictions, the Competition Act does not set out a specific market share threshold above which an undertaking is considered to have a dominant position. Instead, the existence of a dominant position is determined in each particular case, taking into account the financial, technical and legal barriers and risks associated with entering or leaving the market, the financial resources of the undertaking concerned and the structure of the affected market and, in particular, competitors’ market shares and their conduct as well as the economic influence exerted by the undertaking concerned on the affected market.

Merger control

The Competition Act also regulates the procedure for controlling mergers between companies. If the turnover thresholds of the Competition Act are met and the merger does not fall within the jurisdiction of the European Commission, a merger between undertakings will require the Hungarian Competition Authority’s (HCA – Gazdasági Versenyhivatal) prior approval. Hungarian merger control extends also to mergers between foreign companies if the Hungarian market is affected. Hungarian merger control is mandatory and supervisory, so if a merger is completed without prior clearance by the HCA, the undertakings concerned may be severely fined. Further, the HCA may also order the break-up of the merged undertaking if the merger would have not qualified for clearance.

The material test in Hungarian merger control is a combination of the ‘significant lessening of competition’ test which is meant to point out the possible changes in the relative strength of the competition on the affected market together with the ‘dominance’ test, i.e. the creation or strengthening of a dominant position in the affected market.

Penalties and fines

Breaches of the Competition Act may be subject to fines from HCA. The maximum fine is 10% of the respective undertaking’s turnover in the previous business year.

Furthermore, anti-competitive agreements and concerted practices in connection with public procurement procedures are considered a criminal offence and individuals could face imprisonment for up to five years.

Private enforcement

Hungarian legislation recognises the importance of privately enforcing damage claims arising out of anti-competitive arrangements. Accordingly, the Competition Act contains certain rules which aim to reduce burdens for claimants. In particular, decisions by the HCA as well as the European Commission are sufficient to establish an infringement in the context of a follow-on damages action. Further, for the purpose of facilitating damages calculations the Competition Act provides a
(rebuttable for both the claimant and defendant) presumption that a hard-core cartel resulted in a price increase of 10% and thus eases the burden of proof regarding the damage caused by the cartel.

**Intellectual property**

Intellectual property rights can be divided into two categories: industrial property rights and copyright. Industrial property rights includes patents, trademarks, designs, plant variety, utility model and topography protection, as well as the protection of geographical indications. Copyright covers literary and artistic works as well as related rights protecting artists or economic investors contributing to the dissemination of the works to the public (performers, producers of phonograms, broadcasters).

**How to obtain protection?**

In order to obtain protection for industrial property, an official protection procedure must be followed including registration on the Patent Register by the official body responsible for the management of industrial property rights.

The protection of copyright does not require a registration procedure since copyright protection exists as soon as the work is created.

**Extent of protection**

Intellectual property creates exclusive rights, which, similarly to property rights, ensure protection against all others for the creators of intellectual works, by recognising and safeguarding their economic and moral rights.

**Industrial property rights**

Patent protection lasts for 20 years from the day on which the patent application is filed and applies solely in the countries where the protection was granted.

A Hungarian patent may be obtained by national or European application or by an application submitted within the framework of the Patent Cooperation Treaty (PCT), provided that the application and the invention comply with the relevant statutory requirements.

Trademark protection lasts for 10 years from the date of filing the application, however, protection may be extended by further 10-year periods at the registered owner's request.

As a fundamental rule, the author's rights are protected for his lifetime and 70 years afterwards. After the death of the author, the rights may be exercised by the author’s heirs. In the case of works created by joint authors, cinematographic creations and when the author cannot be identified, the length of protection is determined in a different way.

An author may licence for consideration the use of his work (the “copyright” itself is not transferable, only the use of it is). The legal provisions concerning licence agreements are found in the Copyright Act. There are two basic rules that must be followed in any licence agreement: (i) the exploitation rights cannot be licensed for an indefinite period of time and (ii), the specific exploitation right must be set out in the agreement. The Copyright Act regulates publishing agreements and licence agreements concerning software and cinematographic creations as further special types of agreements. Besides copyright provisions, the provisions of the Civil Code on agreements must also be applied to licence agreements.

**Enforcement**

The Copyright Act and other statutes set out a large variety of ways to enforce Intellectual property rights. If an infringement of rights has occurred, the rightholder may seek a remedy under civil or criminal law (e.g. plagiarism, infringement of copyright and certain rights related to copyright, compromising or defrauding the integrity of technological measures for the protection of copyright and certain rights related to copyright, falsifying data related to copyright management, violation of industrial design rights), or initiate the customs protection, i.e. seizure. The rightholder may take legal action and claim (i) the Court's declaration of the infringement; (ii) cessation of the infringement; (iii) compensation from the infringer; (iv) surrender of any enrichment obtained through the infringement; (v) communication of information concerning the infringement; (vi) seizure of the means used for the infringement and of infringing products; (vii) measures by the customs authorities to prevent free circulation of infringing goods; and (viii) damages.
Marketing agreements

Agency agreements

In Hungary, agency agreements are governed by the Civil Code, which implements Directive 86/653/EEC on self-employed commercial agents.

The primary obligation of a commercial agent is to negotiate agreements on the sale of goods or otherwise concerning goods on behalf of his principal. It should be noted, however, that a commercial agent acts as an independent contractor, rather than an employee. Generally, a commercial agent is not authorised to conclude agreements, but the parties may agree otherwise. The principal is obliged to pay remuneration for the activities of the commercial agent and provide the agent with the necessary documentation and materials.

The parties to an agency agreement are entitled to stipulate a restraint of trade clause. Such a clause is valid only if it is concluded in writing, lasts for not more than two years after termination of the agency agreement, specifies the remuneration and relates to the scope of activity covered by the agency relationship in the contract.

Distribution agreements

Only basic elements of distribution agreements are regulated by the Hungarian Civil Code. The Civil Code contains model clauses which apply by virtue of law to all distribution agreements, including supply of products or of services. However, deviation from the model clauses is possible in all cases. In the following the key model the clauses are described:

► Protection of good reputation: According to the new Civil Code the distributor is obliged to protect the good reputation of the supplier

► Instructions & control: The supplier is entitled to instruct the distributor and control the performance of the distributor. However, if the instructions given by the supplier are unreasonable or unsuitable, the distributor is obliged to warn him, and any damage resulting from maintaining the instructions despite the warning will be the liability of the supplier

Franchising

Franchising agreements are regulated by the Hungarian Civil Code. With regard to franchising agreements, the Civil Code contains model clauses which apply by virtue of law to all franchising agreements. However, deviation from the model clauses is possible in all cases. In the following the key model clauses are described:

► The franchisor shall ensure that the franchisee has ongoing and uninterrupted access to the use, utilisation and exploitation rights, as are required for running the franchise, during the full term of the contract. The franchisee shall take measures to protect the know-how placed at his disposal

► Supply obligation: If the franchisor is obliged to supply the franchisee with the goods to be sold or to supply basic materials for the production of goods and the franchisor fails to fulfil the order of the franchisee, the franchisee shall be entitled to obtain the goods or the basic materials from other sources.

► Protection of good reputation: The franchisee is obliged to protect the good reputation of the franchisor

► Instructions & control: The franchisor is entitled to instruct the franchisee and control the performance of the franchisee. However, if the instructions given by the franchisor are unreasonable or unsuitable, the franchisee is obliged to warn him, and any damage resulting from maintaining the instructions despite the warning will be the liability of the franchisor

It should be noted that competition and anti-trust restrictions apply in the case of franchise agreements, as they are subject to the Act against Restrictions on Competition and EU competition law with the exceptions under the “Pronuptia” ruling of the ECJ.

E-commerce

The key Hungarian law on e-commerce is the Act on Electronic Commerce and Information Society Services, Act CVIII of 2001 (E-Commerce Act).
The E-Commerce Act regulates ‘information society services’ rendered from Hungary or directed from abroad to Hungary. The E-Commerce Act has a wide scope and applies to a very wide variety of electronic services provided at a distance (particularly to e-commerce services).

With regard to e-commerce contracts, the Act sets out conditions which must be followed in the course of the provision of e-commerce services. Contracts entered into by means of simple electronic correspondence (i.e. email and related technologies) are excluded from these legal provisions and in case of non-consumer e-commerce contracts parties can derogate from these conditions.

In addition to the above, the E-commerce Act contains special provisions on E-advertisements.

The Hungarian Decree on Consumer Contracts (Decree No 45/2014) – implementing EU Directive 2011/83/EU - applies to consumer distance selling contracts. Non-consumer contracts are generally exempted from the protective measures of this decree. The decree protects the interests of consumers by provisions such as the statutory cancellation right for consumers without prior notice within 14 days of contracting or delivery, subject to further conditions beyond the scope of this booklet.

The Hungarian Act on E-signatures (Act XXXV of 2001) sets out the statutory conditions for using authorised e-signatures in certain circumstances, such as company registration procedures. Where the law requires a statement to be put in writing, an electronic document furnished with an advanced security e-signature will have an identical effect.

Data protection

The new Privacy Act (Act No CXII of 2011 on Informational Self-Determination and Freedom of Information; Privacy Act) contains essentially the key principle with regard to the authorised processing of personal data. According to this key principle, personal data (meaning in broad terms all data related in some way to data subjects i.e. natural persons) may only be processed (i) with the prior consent of the data subjects or (ii) in limited cases with the prior authorisation by law. Since Hungarian law provides for statutory rights to process personal data only in limited cases (see point (ii) above), the consent of the data subject must be obtained in most cases.

One of the important provisions of the Privacy Act is that personal data may also be processed without the prior consent of the data subject, provided that it is impossible or requires disproportionate effort to obtain the data subject’s consent. However, this exemption is only applicable if data processing is necessary (i) for the data controller to comply with a legal obligation, or (ii) for the data controller to assert his legitimate interests and such interests are not overridden by fundamental privacy principles. Further, if personal data has been collected and processed on the basis of a data subject’s consent, such data may continue to be processed even if the data subject revokes his or her consent, as long as either condition (i) or (ii) above is met (note: the above provisions aim to implement Article 7 c) and f) of Directive 95/46/EC).

It should be highlighted in this respect that data subjects must be informed of all relevant aspects of the processing of their data because informed consent is required. This also means that even if the data subject has provided prior consent, personal data may only be processed within the scope of the actual and agreed data collection activity.

The Privacy Act established a new Data Protection Supervisory Authority (DPA) replacing the previous Data Commissioner. The new authority has an increased scope of activity, such as powerful investigative authority and the right to impose fines.

Significant changes were introduced in the field of data protection in 2015. The Hungarian Parliament has amended the Privacy Act. The most important amendments of the Privacy Act are described below.

A new tool, the binding corporate rules (BCRs) has been introduced in the amendment. BCRs are intra-group company global privacy policies which set out standard internal procedures and comply with EU data protection requirements. According to the new rules, Hungarian companies and multinational company groups having Hungarian subsidiaries may – subject to completing the approval procedure before the DPA – rely on BCRs when transferring personal data with their group. The approval procedure takes 60 days and the administrative fee is HUF 266,000 (approx. €900).

In order to help individuals inform on any wrongdoings to their personal data and to facilitate DPA-investigations, all data controllers is required to maintain a registry of data breaches for at least five years. It is not required however, to notify the authority of such breaches.

The upper limit of monetary fines that may be imposed by the DPA has been increased to HUF 20 million (approx. €65,000).
Several other acts (decrees) contain additional data protection provisions. For example, personal data collected for the purposes of direct marketing and research is regulated by Act CXIX of 1995. Also, the E-commerce Act (see above) contains special data protection provisions.

A gross infringement of data protection provisions may in some cases lead to criminal liability and can constitute a criminal offence (the relevant legal provisions are found in the Hungarian Criminal Code).

**Product liability**

Product liability is now mainly regulated by the Civil Code implementing the Directive 85/374/EEC). The Civil Code provides that the manufacturer of the defective product is liable for damage caused by the product defect and allows only few defences, e.g. the manufacturer did not put the product into circulation, the product was not manufactured or distributed in the course of the manufacturer’s business or the defect could not be discovered at the time the product was put into circulation according to the scientific and technical knowledge. A product is defective if it fails to provide the level of safety generally expected. The term ‘manufacturer’ is defined widely, and covers manufacturers in different phases of production. As well as the person attaching his name / trademark, the importer or the distributor can be held liable. Examples of damage which may be subject to compensation are: damage resulting in death, bodily injury or health damage. Property damage, other than damage to the defective product itself, exceeding the equivalent of €500 in the Hungarian currency is recoverable, if the other property is of a type ordinarily intended for private use or consumption and was used by the injured person for usually for such purposes.

Product liability claims can be made under contract and tort law or other claims stipulated by law in addition to pursuant to the Civil Code.

The general rules on product safety, applying to products that are intended for or made accessible to consumers are set out in Act CLV of 1997 (on Consumer Protection, (CPA) implementing Directive 2001/95/EC) and Act LXXXVIII of 2012. In addition, specific safety rules apply to certain product groups, e.g. pharmaceuticals under Act XCV of 2005 and Decree No. 52/2005 of the Minister of Healthcare.

The CPA and Act LXXXVIII of 2012 establish public law duties for the manufacturers of consumer products, e.g. marking the product with appropriate labels, monitoring product safety on a regular basis, investigating complaints raised in connection with product safety and withdrawing or recalling the product from the market.

Non-compliance with product safety requirements can be punished by the competent market surveillance authorities. Non-compliance with the CPA may be enforced by ordering the withdrawal or recall of the unsafe product or by levying fines.

**Bribery and corporate crime**

Bribery is punishable under Act C of 2012 on the Hungarian Criminal Code, either committed in the public or the private sector, or committed actively or passively. Bribery may give rise to imprisonment for between one and five years; in certain qualified cases, up to ten years. Criminal liability attaches to both the bribery of civil servants as well as directors and employees of companies and associations. Bribing directors and employees of foreign companies as well as civil servants of foreign countries and organisations also qualifies as a crime. Note that criminal liability attaches to the active conduct of bribing any of the above or requesting a bribe or another advantage, furthermore the passive acceptance of, and the agreement with, another person’s demand for such bribe.

The European Money Laundering Directive has been incorporated into Hungarian law by Act CXXXVI of 2007 on the prevention of money laundering and the financing of terrorism (Money Laundering Act). According to the provisions of the Money Laundering Act, companies in the financial sector, auditors, tax advisors, attorneys, notaries, casino operators and traders of precious metals have to identify their customers and monitor and report suspicious transactions. Failing to comply with the above reporting obligation qualifies as a criminal offence and may give rise to up to two years imprisonment.

Assistance to or participation in transactions relating to money laundering activities is also deemed a criminal offence and may result in imprisonment for up to eight years.

In general, only acts of individuals are subject to criminal liability and thus, only individuals may be subject to criminal punishments relating to their criminal liability. Certain criminal measures, however, can be made against companies as well, if the crime – committed by a director, supervisory board member, employee or member etc. in its competence – aimed to
obtain any kind of advantage for the company. These kinds of criminal measures against companies can range from imposing a fine or restriction of activity to their compulsory termination.

Real estate

Based on the provisions of Act CXXII of 2013 on the Transactions in Agricultural and Forestry Land, Hungarian or foreign entities and non-EU nationals are not allowed to acquire ownership of agricultural land, while EU-nationals may now acquire agricultural land if they meet the requirements set forth in the Act.

Foreign individuals and legal entities registered in the European Union may own any other real property without any further restrictions.

Acquisition of Real estate by foreign individuals and legal entities registered outside the European Union is subject to the approval of the relevant governmental body, as set out in Government Decree No. 251/2014.

Freehold and leasehold are not recognised concepts in Hungarian law, i.e. ownership rights are not limited in time.

Ownership of Real estate may either be by co-ownership or sole ownership. In the case of co-ownership, all owners have a theoretical ownership ratio in relation to the property, and which is the basis of decision-making voting rights and costs.

Condominium ownership is the combination of the two forms: certain parts of the property are solely owned, while other parts are co-owned by the owners.

With certain legal exceptions, the ownership of land and of the building on the land cannot be separated.

Other interests may also be registered in relation to real property, for example:

► A “right of usufruct” is a right for a person to hold and use a certain asset and to benefit from its products, without having the right to dispose of the property

► A “right of use” is a particular type of the right of usufruct, and, as the latter, is the right for a person to hold and use a certain asset to the extent that it serves himself and his family members

► An “easement” is the right to use a part of a real property of another without possessing it. Easements require the existence of at least two parties

Certain rights set out in Act CXLI of 1997 may only be validly created by registration in the land register. These rights are: ownership based on transfer, asset management rights, use of land, usufruct and the right of use, easement and mortgages based on contract.

This means that the transfer of ownership of a property is only effective if registered in the land register.

For the purpose of valid registration, sale-agreements need to be either countersigned by a lawyer or be prepared by a notary public in the form of a notarial deed.

The transfer of real property is subject to transfer tax, payable by the purchaser.

The standard transfer tax rate is 4% on the part of the purchase price up to HUF 1 billion (approx. €3.2 million) and 2% on the excess part, up to a maximum of HUF 200 million (approx. €630,000).

For properties registered as apartments: the transfer tax is 4% of the difference between the purchase prices of the apartment bought by the buyer and the previous apartment sold by the buyer if the sale of the previous apartment is within 1 year of the purchase of the new apartment.

The general rule is that the transfer of real property between legal entities is subject to VAT, with certain exceptions defined by law.

Existing law is stated as it applied in January 2015.
Further information
Noerr & Partners Law Office
Fő utca 14-18
1011 Budapest
Hungary
+36 1 2240900
Fax: +36 1 2240495

Contact Partners

<table>
<thead>
<tr>
<th>MANAGING PARTNERS</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Prof. Dr. Jörg K. Menzer</td>
<td>+36 1 2240900</td>
<td><a href="mailto:joerg.menzer@noerr.com">joerg.menzer@noerr.com</a></td>
</tr>
<tr>
<td>Partner</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Head of CEE offices</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dr. Zoltán Nádasdy</td>
<td>+36 1 2240900</td>
<td><a href="mailto:zoltan.nadasdy@noerr.com">zoltan.nadasdy@noerr.com</a></td>
</tr>
<tr>
<td>Partner</td>
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<tr>
<td>Head of Budapest Office</td>
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<tr>
<td>Ügyvéd, Attorney specialising in environmental law (H)</td>
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<th>CORPORATE</th>
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<tbody>
<tr>
<td>Dr. Ágnes Tompa</td>
<td>+36 1 2240900</td>
<td><a href="mailto:agnes.tompa@noerr.com">agnes.tompa@noerr.com</a></td>
</tr>
<tr>
<td>Ügyvéd (H)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dr. Viktor Füzi</td>
<td>+36 1 2240900</td>
<td><a href="mailto:viktor.fuezi@noerr.com">viktor.fuezi@noerr.com</a></td>
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<tr>
<td>Dr. Zoltán Nádasdy</td>
<td>+36 1 2240900</td>
<td><a href="mailto:zoltan.nadasdy@noerr.com">zoltan.nadasdy@noerr.com</a></td>
</tr>
<tr>
<td>Partner</td>
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<tr>
<td>Ügyvéd (H), Attorney specialising in environmental law (H)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dr. Szilvia Andriska</td>
<td>+36 1 2240900</td>
<td><a href="mailto:szilvia.andriska@noerr.com">szilvia.andriska@noerr.com</a></td>
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# Doing Business in Europe

## Media, IP & IT

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<th>Name</th>
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<tbody>
<tr>
<td>Dr. Szilvia Andriska</td>
<td>Ügyvéd (H)</td>
<td>+36 1 2240900</td>
<td><a href="mailto:szilvia.andriska@noerr.com">szilvia.andriska@noerr.com</a></td>
</tr>
<tr>
<td>Eszter Sieber-Fazakas</td>
<td>Ügyvéd (H) Rechtsanwältin (D)</td>
<td>+36 1 2240900</td>
<td><a href="mailto:eszter.fazakas@noerr.com">eszter.fazakas@noerr.com</a></td>
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## Employment & Pensions

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<th>Name</th>
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<tbody>
<tr>
<td>Dr. Edina Czeglédy</td>
<td>Associated Partner</td>
<td>+36 1 2240900</td>
<td>edina.czeglé<a href="mailto:dy@noerr.com">dy@noerr.com</a></td>
</tr>
<tr>
<td>Dr. Viktor Füzi</td>
<td>Ügyvéd (H)</td>
<td>+36 1 2240900</td>
<td><a href="mailto:viktor.fuezi@noerr.com">viktor.fuezi@noerr.com</a></td>
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## Litigation

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<th>Name</th>
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<tbody>
<tr>
<td>Eszter Sieber-Fazakas</td>
<td>Ügyvéd (H) Rechtsanwältin (D)</td>
<td>+36 1 2240900</td>
<td><a href="mailto:eszter.fazakas@noerr.com">eszter.fazakas@noerr.com</a></td>
</tr>
<tr>
<td>Dr. Szilvia Andriska</td>
<td>Ügyvéd (H)</td>
<td>+36 1 2240900</td>
<td><a href="mailto:szilvia.andriska@noerr.com">szilvia.andriska@noerr.com</a></td>
</tr>
<tr>
<td>Dr. Viktor Füzi</td>
<td>Ügyvéd (H)</td>
<td>+36 1 2240900</td>
<td><a href="mailto:viktor.fuezi@noerr.com">viktor.fuezi@noerr.com</a></td>
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## Regulatory & Governmental Affairs

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<th>Name</th>
<th>Role</th>
<th>Phone</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Dr. Ákos Bajorfi, LL.M.</td>
<td>Ügyvéd (H)</td>
<td>+36 1 2240900</td>
<td><a href="mailto:akos.bajorfi@noerr.com">akos.bajorfi@noerr.com</a></td>
</tr>
<tr>
<td>Dr. Ádám György Bodor</td>
<td>Ügyvéd (H) State Aid Specialist</td>
<td>+36 1 2240900</td>
<td><a href="mailto:adam.bodor@noerr.com">adam.bodor@noerr.com</a></td>
</tr>
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Introduction and legal system

The Italian legal system is a civil law system.

Italy is a founding member of the European Union (EU). The body of European Community law is effective in Italy, either directly or by incorporation.

Italy adheres to a number of international treaties and conventions, including the UN Convention on the International Sale of Goods (CISG).

Economy and government

Italy has high levels of freedom for investments, business and trade. According to the last Eurostat data, Italian per capita GDP at purchasing power parity remains approximately equal to the EU average, while the unemployment rate (11.7%) stands as one of the EU’s lowest.

Two-thirds of Italy’s GDP is contributed by the services sector, the main strength being tourism. Approximately 29% of national income is derived from industry (including the construction sector) and the remaining approximate 2% derives from agriculture. The strongest industrial sectors are machinery and clothing/textiles.

Attracting foreign investments has been an important factor in the economic and social development of the country, in addition to being one of the priorities of the Italian Government.

Foreign investment

Foreign exchange restrictions and controls were abolished in May 1990 following the implementation of legislation intended to align Italian regulations with the EU directive on the free movement of capital.

In principle, foreign investors wishing to start up a new business in Italy may operate subject to conditions of treatment reciprocity, i.e. when a similar right is granted to Italian investors operating in the State of origin of the concerned foreign investor. Verification of such treatment reciprocity prior to starting a business in Italy is not necessary where the foreign investor:

► is a citizen of a Member State of the EU
► is a citizen of one of the States of the EEA
► is a citizen of a country holding a specific international agreement with Italy i.e. an agreement governing international investment etc or
► has, as an individual, refugee or stateless person status

Italy encourages foreign investment by offering foreign-owned entities the same incentives, primarily subsidised loans, cash grants and tax credits, available to entities owned by Italian nationals. Available incentives are contained in regional laws, national laws or Community programmes.

Interventions and incentives for the benefit of business can be grouped into two main categories: financial incentives and tax relief.

Financial incentives consist mainly of: contributions to capital accounts determined as a percentage of allowable expenses, grants that do not foresee repayment of capital or of interest and contribution to interest accounts aimed at lowering the interest rate applied for financing a business. Tax relief is considered an indirect type of incentive as it does not consist of direct contributions but works by means of exemptions or reductions of the overall tax burden.

Foreign investment policy

With its diversified industrial economy, Italy is an ideal location for companies wishing to expand their international market share. Italy is centrally located in the heart of the Mediterranean, which is a crucial crossroads for land, sea and air routes linking the north and south of Europe. Moreover, it offers a skilled workforce and high standard of living.
The great strength of Italian economy lays in its small and medium sized firms, often located in specialised clusters. These focus on high quality consumer goods and on products that require high quality design and engineering, both of which have acquired large shares of the global market.

Foreign enterprises can find in Italy a system of conditions entirely favourable for investment: a major market, potential synergy with industrial clusters, competitive logistical facilities, targeted training, etc.

As mentioned above, Italy also encourages foreign investment by offering foreign-owned entities the same incentives as are on offer to domestically incorporated businesses. Financial assistance and advice are available from banks, special credit institutions, state agencies and specialised consultants.

**Types of business vehicles**

**Forms of business vehicle**

The most common forms of business vehicle used by foreign companies to conduct business in Italy are 2 different types of stock companies, and namely the company limited by shares (*società per azioni, SPA*) and the company limited by quotas (*società a responsabilità limitata, SRL*).

Since both the SPA and the SRL are legal entities in their own right, the shareholders / quotaholders are in no way responsible for the company’s debts. This, however, is subject to a specific limitation in the event that all of the shares / quotas are owned by one person.

Indeed, where an insolvent company has only one shareholder / quotaholder, said shareholder / quotaholder is responsible without limitation for the company’s obligations which arose during the period of sole ownership if the relevant capital contributions have not been properly effected or until the relevant disclosure formalities concerning the identity of the sole shareholder / quotaholder have been made in compliance with specific provisions of Italian law.

An important difference between an SPA and an SRL concerns the nature of their corporate capital. An SPA issues shares, whereas an SRL issues quotas.

In very broad terms, shares are indivisible units and may be issued in different classes. They are of equal nominal value (if any). In comparison, quotas are not necessarily of equal nominal value and may not be issued in different classes.

Shares are usually represented in the form of share certificates issued to the relevant shareholder, which are negotiable instruments and may be transferred by endorsement. In contrast, although a document may be issued to a quotaholder setting out details of his quotaholding, it will not constitute a negotiable instrument and will not be capable of being transferred by endorsement.

Finally, quotas (unlike shares) may not be the subject of a public offer.

**SPA**

**General information**

An SPA is the preferred legal form for large businesses on the basis that, among other reasons, Italian corporate law provides for a wide variety of ways in which the company can raise finance.

**Registration formalities**

The requirements for the incorporation of a company in the form of an SPA involves compliance with a number of provisions of substantive law. In the first instance, the deed of incorporation, including the by-laws, must be executed by the incorporators (or persons holding powers of attorney for them) before a notary public. Registration, incorporation and other minor taxes must be paid on incorporation and each filing of the required company’s documents.

Once an SPA has been incorporated, the notary public who has overseen the incorporation is required to file the registration application of the company with the competent Register of Enterprises within 20 days from the signature of the deed of incorporation. The company only legally exists following its registration with the Register of Enterprises and its status as a legal entity distinct from its shareholders becomes effective only subject to such registration. The average period required for the above registration procedure to be finalised depends on the Register of Enterprises.
In our experience, the entire incorporation process of an SPA by a foreign investor should normally be completed within 10/15 working days from the day on which the Italian representatives / consultants entrusted with its incorporation receive the necessary documentation.

**Corporate capital**

The minimum corporate capital for an SPA is 50,000 Euros.

**Issuing shares for non-cash consideration**

Contributions to the corporate capital of an SPA may be made in cash, or (if the articles of association so allow) in kind.

A shareholder may contribute to the corporate capital of an SPA by transferring ownership or the right to use assets which are capable of valuation. Contributions in kind may not be made in the form of the performance of work or services.

If the contribution is made in kind, it must be on the basis of a valuation made, in the case of an SPA, by an expert appointed by the Court. However, pursuant to a recent legislative decree implemented pursuant to Directive 2006/68/EC and only if certain specific conditions are met, a valuation is no longer required or otherwise can be issued by an independent expert appointed by the contributing party (and not by the competent Court).

**Restrictions on the rights that can attach to shares**

Shares confer upon their holders certain rights as permitted by the articles of association of the company or which are otherwise implied by law.

In 2014, article 2351 of the Italian Civil Code was amended (by Law Decree no. 91 of 2014 then converted and enacted by Law no. 116 of 2014) to allow company’s articles of association to provide for the creation of shares with multiple (up to three) voting rights; going beyond the principle of one share one vote.

Moreover, shares may be divided into different classes, each of which may confer upon the shareholder different rights. According to Italian corporate law, the articles of association of an SPA may permit the grant to some shareholders of a higher or lower number of shares representing a portion of the capital of the company which is not equal to the value of the actual equity contribution made by such holder. In this way, it may be possible to take into account other rights that a shareholder may provide in favour of the company, which cannot be formally treated as a contribution in kind, such as work and services. However, the aggregate value of the contributions made by all the shareholders must not be less than the company’s stated share capital.

**Restrictions on foreign shareholders**

Citizens of states of the EU or companies located in a State of the EU may incorporate an SPA or hold shares of an SPA under the same rules provided for Italian citizens or entities.

A non EU-based company may become shareholder of an SPA to the extent that a reciprocal right exists for Italian entities in the jurisdiction of the prospective shareholder.

**Management structure and restrictions on foreign directors**

The corporate governance of SPAs has been traditionally governed by mandatory provisions requiring a management board (in the form of a board of directors or a sole director) to be under the control of a supervisory board (board of statutory auditors).

More recent provisions create a choice of two further corporate governance systems. Those systems are: (i) a unitary / one-tier system (*sistema monistico*), where the management board is supervised by a committee composed of some of its members; and (ii) a two-tier system (*sistema dualistico*), where the management board is appointed and monitored by a supervisory board that has certain powers and responsibilities which would otherwise have been exercised by shareholders’ meetings under the traditional system.

There are no restrictions on the nationality of directors, except in specified sectors (for example, at least two thirds of the directors of trust companies – including the chairman and the managing director – must be Italian citizens). In any event, foreign directors must obtain an Italian Inland Revenue Code number.
Directors’ liability

Directors of an SPA may be liable for breach of their fiduciary duties to the company and its shareholders; they may also be liable to third party creditors for breach of their duties when it comes to safeguarding of company’s assets.

A corporate action can also be brought against directors by minority shareholders. In these circumstances, the claim is structured as a ‘derivative’ action brought by the minority shareholders in the name of the company and for the benefit of the company and its shareholders as a whole.

Reporting requirements

SPAs are required to draw up annual accounts, including a balance sheet, an income statement and related notes which, after presentation by the directors and confirmation by statutory auditors, must be approved by an ordinary shareholders meeting within 120 days of the end of its financial year. This period may be extended up to 180 days in certain circumstances. Thereafter, the company’s balance sheet needs to be filed with the Register of Enterprises and must be attached to its annual tax return.

Certain acts or events give rise to filing requirements with the Register of Enterprises, including, for example, any changes regarding the company’s directors, articles of association and corporate capital.

SRL

General Information

The SRL (unlike SPA) may be the most suitable legal form for certain small and medium-sized commercial businesses. In particular, the costs of incorporating and managing an SRL are generally lower than for an SPA. This appeals to many entrepreneurs who wish to start up their own businesses and do not yet have sufficient funding to incorporate an SPA.

With the purpose of incentivising business initiatives, the Italian government has recently introduced a particular sub-type of SRL (i.e. the so called “simplified SRL”), which – upon occurrence of certain requirements – may benefit from a simplified incorporation procedure regime as well as from certain tax relief and financial incentives, as better set forth below. Furthermore, the parties to a joint venture may prefer to incorporate the joint venture entity as a company limited by quotas which offers a flexible organisational structure.

Incorporation and registration formalities

Incorporation and registration formalities and requirements for an SRL are similar to those for an SPA. Therefore, the deed of incorporation (including the by-laws) has to be executed by the incorporating quotaholders (or persons holding powers of attorney for them) before a notary public.

If, upon incorporation, the relevant contributions by the incorporators are made in cash, each quotaholder must pay-up at least 25% of the relevant amount at the time of the execution of the deed of incorporation; the remaining three quarters may be drawn down by the directors at any time. However, if there is only one quotaholder, contributions must be paid in full in a single instalment at the incorporation of the company. Failure to do so may result in the unlimited liability of the sole quotaholder for the obligations of the company.

As for an SPA, registration, incorporation and other minor taxes must be paid on incorporation and each filing of the company’s documents with the competent offices; the notary public assisting the incorporation of the SRL is personally liable, jointly with the incorporators, for the payment of the registration tax and other duties on incorporation.

Once an SRL has been incorporated, the notary public who has overseen the incorporation is required to file the registration application of the company with the competent Register of Enterprises within 20 days of the signature of the deed of incorporation. The company only legally exists following its registration with the Register of Enterprises and its status as a legal entity distinct from its quotaholders becomes effective only on such registration.

The entire incorporation process for an SRL by a foreign investor should normally be completed within 5/10 working days from the day on which the Italian representatives / consultants entrusted with its incorporation receive the necessary documentation.
Corporate capital

As per general rule, minimum corporate capital for a regular SRL is 10,000 Euros. However, an exception to this rule has been recently introduced by Law Decree No. 76 of 2013 (converted and enacted by Law No. 99 of 2013) which has amended article 2463 of the Italian Civil Code, introducing the possibility to incorporate a SRL with capital of at least 1,00 Euros provided that, upon incorporation, it is fully paid in cash to those entrusted with the management of the company.

SRL capital is divided into quotas. Quotas, unlike shares in an SPA, are not represented by a negotiable instrument which means that transfer of quotas must be effected by execution of a notarial deed which takes effect towards third parties only once it has been registered with the competent Register of Enterprises.

Quotas for non-cash consideration

Flexibility is created by the types of contributions which may be made to an SRL. A quotaholder may contribute to the corporate capital of an SRL by transferring ownership or the right to use any assets which are capable of valuation (including, for example, goodwill, trademarks, patents, know-how and other similar rights).

A quotaholder (unlike a shareholder in an SPA) may also contribute the performance of work and services. In doing so, he will have to provide the company with a bank guarantee or an insurance policy in order to secure his obligations to perform such work and services.

If the contribution to the corporate capital of an SRL is made in kind, it must be on the basis of a valuation made by an expert (or firm of auditors) appointed by the quotaholders themselves (and not by the competent Court as is the case for SPAs).

Restrictions on the rights attaching to quotas

The rights of a quotaholder are generally dependent upon the value of the contribution which such quotaholder made to the company’s corporate capital. However, the articles of association may provide that a quotaholder is entitled to a quota which represents more or less than the proportion of the capital actually contributed.

The by-laws may also permit the grant to a particular quotaholder of further rights above and beyond those which the quotaholder would have received simply by virtue of his quotaholding. These rights may include an entitlement to a higher proportion of any dividends declared by the company or additional management rights but such rights do not attach to the quota itself and therefore would not be automatically transferred on any transfer of the quota.

Restrictions on foreign quotaholders

Citizens of states of the EU or companies located in a State of the EU may incorporate an SRL or hold quotas of an SRL under the same rules provided for Italian citizens or entities.

A non-EU based company may become quotaholder of an SRL to the extent that a reciprocal right exists for Italian entities in the jurisdiction of the prospective quotaholder.

Management structure and restrictions on foreign managers

An SRL enjoys great flexibility in respect of its organisational structure. Quotaholders can also become the management of the company, without the need to appoint one or more directors.

Conversely, quotaholders may adopt a formal decision-making structure to be responsible for all management issues; in particular, at the date of incorporation, the incorporators may decide that the SRL should be managed either by a board of directors or by a sole director.

When the management of the company is entrusted to two or more persons, a board of directors will have been formed. If permitted by the articles of association, the quotaholders may elect a sole director who shall have such authority and responsibility as the quotaholders may delegate.

There are no restrictions on the nationality of directors but any foreign directors must obtain an Italian Inland Revenue Code number.

An SRL may appoint a control body (i.e. a board of statutory auditors or a sole statutory auditor) and / or an external legal auditor.
Unless otherwise provided in the by-laws, the control body is composed by a sole statutory auditor.

SRLs are required to appoint a control body or a legal auditor if their corporate capital is equal to or higher than 120,000 Euros.

On the contrary, SRLs must appoint a control body or a legal auditor when they are required to draw up consolidated annual accounts, or control a subsidiary required to have its financial statements audited, or, for two consecutive financial years, they exceeded two out of the three thresholds provided for by article 2435-bis of the Italian Civil Code (namely: total assets of 4,400,000 Euros; annual turnover of 8,800,000 Euros; average employees employed during the fiscal year: 50).

Directors’ liability

Directors of an SRL are jointly liable to the company for damages as a result of breach of duty and for breaches of the SRL’s articles of association.

A corporate action can also be brought against directors by each quotaholder. A right to damages is also recognised for each quotaholder or third party directly damaged by wilful or negligent acts of the directors.

Quotaholders party to decisions or who have authorised acts causing loss to the company, other quotaholders or third parties will be jointly liable with the directors for any damages awarded.

Reporting requirements

SRLs are required to draw up annual accounts, including a balance sheet, an income statement and related notes which, after presentation by the directors and confirmation by statutory auditors, must be approved by an ordinary quotaholders’ meeting within 120 days of the end of its financial year. This period may be extended to 180 days in certain circumstances.

Thereafter, the company's balance sheet needs to be filed with the Register of Enterprises and must be attached to its annual tax return.

Certain acts or events must be recorded in the Register of Enterprises, including, for example, any changes regarding the company’s directors, articles of association and corporate capital.

Simplified SRL and SRL with reduced corporate capital

As mentioned above, for the purpose of incentivising young people’s business initiatives, the Italian Government has recently introduced in our legal system two different sub-types of SRLs which, subject to complying with certain requirements, may be benefit of certain tax reliefs and simplified incorporation formalities, and namely: the so called “simplified SRL” and the so called “SRL with reduced corporate capital”.

Simplified SRL -

As mentioned above, for the purpose of incentivizing business initiatives, the Italian Government has recently introduced in our legal system a particular sub-type of SRL — the so called “simplified SRL” - which, subject to compliance with certain requirements, may benefit of certain tax reliefs and simplified incorporation formalities.

Pursuant to article 2463-bis of the Civil Code (firstly introduced by Law Decree No. 1 of 2012, converted and enacted by Law No. 27 of 2012, and then amended by Law Decree No. 76 of 2013, converted and enacted by Law No. 99 of 2013), in order to be qualified as “simplified” and thus benefit of certain tax reliefs and simplified incorporation formalities set forth below, an SRL must comply with the following essential requirements:

(i) the entire corporate capital must be held, upon incorporation, by physical individuals and fully paid in cash;

(ii) the SRL must be incorporated and then governed through, respectively, a deed of incorporation and articles of association consistent with the relevant standard models issued by the Italian Ministry of Justice;

(iii) certain additional disclosure formalities must be complied with in connection with the corporate documents and the company’s web site.
The above requirements being met, the “simplified” SRL may benefit from the following simplifications and tax relief:

(i) the SRL’s corporate capital may be comprised between 1.00 and 10,000.00;

(ii) no Notarial fees will be borne by the quotaholders in connection with the incorporation of the SRL; and

(iii) quotaholders will be exempted from paying certain stamp duties and other incorporation related taxes to be paid for the incorporation of “normal” SRLs.

Innovative start-up

Through Legislative Decree No. 179 of 2012 (as converted and enacted by Law No. 221 of 2012 and subsequently amended by Law No. 99 of 2013), the Italian government has introduced in Italian legal system a new type of business form – so called “Innovative Start-up” – with the purpose of incentivising the development of new business initiatives with particular regard to the technology sector.

In fact, the obtainment of the status of Innovative Start-up(s) may benefit of certain simplified corporate formalities as well as tax reliefs as briefly illustrated below.

In order to obtain the status of “Innovative Start-up”, a legal entity must, inter alia:

(1) have the form of stock company (i.e. SPA or SRL), cooperative or European societies;

(2) be newly incorporated or have been incorporated by no more than 48 months before submission of the application to obtain such status;

(3) be registered in a special ad hoc section of the competent Register of Enterprises;

(4) have its business headquarter located in Italy;

(5) have an annual turnover not higher than Euro 5 million;

(6) have as its exclusive or main corporate purpose production and/or marketing of technologically innovative products or services;

(7) other requirements (for example, in terms of human resources skills, expenses sustained by the legal entity, patents owned by the legal entity) acknowledging that research and development activities play an important role in such legal entity’s business.

As mentioned, the obtainment of the “Innovative Start-up” status allows the relevant legal entity (and their investors) to enjoy certain tax reliefs and other simplified corporate formalities, such as:

► exemption from payment of certain costs and taxes connected with the incorporation process

► additional flexibility with respect to certain mandatory equity/re-capitalization requirement/terms

► additional flexibility as to the corporate governance of the legal entity as well as the issue of corporate financial instruments

► possibility of exploiting ad hoc advertisement and promotion instruments made available by ICE Agency (Italian agency for promotion of Italian businesses abroad)

► tax reliefs with respect to equity financial instruments issued by the legal entity in favour of employees, directors and/or collaborators on a permanent basis

► additional flexibility with respect to the possibility of entering into fixed term employment contracts

► favourable taxation regime applicable (for years 2013, 2014, 2015 and 2016) on income deriving from investments made in Innovative Start-up
The same above-mentioned legislation has introduced another new type of business form strictly connected with the development of the Innovative Start-up form: the so-called “Certified Incubator”.

In brief, the Certified Incubator is a stock company or a cooperative having as its corporate scope the provision of services instrumental to the setting-up and development of “Innovative Start-up(s)”. Upon the occurrence of certain requirements, Certified Incubators may benefit of tax reliefs, financial incentives and simplified corporate formalities/procedures very similar to the ones briefly illustrated with respect to the Innovative Start-up(s).

Finally, recent Law Decree no. 3 of 2015 has “cloned” the provisions mentioned above with reference to the Innovative Start-ups and has extended most of the benefits provided for to a new type of company, the so-called “Innovative SME” (Small and Medium Enterprises – PMI in Italian), i.e. companies having at least one audited account, unlisted in the stock exchange, not already entered into the Register of Enterprises as Innovative Start-ups and which meet certain requirements in relation to technological innovation.

Opening a branch or representative office

A branch may be set up either by a foreign company or by an Italian company.

The formalities for setting-up a branch in Italy by a foreign company are relatively simple, although they involve a certain amount of translation. Certain documents and other data must be filed with the Register of Enterprises of the Court of the district where the branch will be set up within 30 days of the board resolution establishing the branch. The documents to be filed are (a) the Articles of Incorporation and the By-laws of the foreign “parent” company and a certificate of its existence and good standing, together with the corporate resolution establishing the branch and a document stating that all notice formalities relative to third parties have been undertaken. In most circumstances, prior to filing, these documents will need to be notarised and, if necessary, legalised under the Hague Convention of 1961. These documents will also need to be translated into Italian and the translator will need to swear that his / her duties have been diligently performed in front of a Court clerk or a notary public; and (b) specimen signatures of the persons having authority to permanently represent the branch in Italy.

Even though there are no requirements for a minimum capitalisation, it is advisable that a branch office is provided with funds sufficient to cover, inter alia, notarial fees, certain indirect taxes, any rent and, more generally, all starting up costs.

A registration tax of 1% has to be paid on the funds contributed to the branch. Additional taxes of approximately 250 Euros have to be paid at the time of setting up of the branch. Moreover, a tax of approximately 650 Euros must be paid every year, plus other minor indirect taxes.

From a foreign investment perspective and in general terms, there are only minor differences in start-up costs and timing requirements between incorporating an SPA or SRL and registering a branch. However, using a branch structure provides significantly less protection from potential liabilities incurred through the activities of the branch not least because the branch lacks separate legal personality from the incorporating foreign investor.

Parent company liability

A company which directs or co-ordinates a group of companies is potentially liable to the shareholders of those group companies for damage to profitability and / or the value of their contributions as well as to creditors of those companies, to the extent that the parent company acts otherwise than in the interest of a subsidiary or breaches the principles of proper management. A parent company will not be liable, however, if the act or omission can be shown to have led to a concrete and direct advantage / benefit also for the subsidiary deriving from the global strategy pursued at group level.

Listing on the Italian stock exchange

Listing on the Italian MTA (Mercato Telematico Azionario), which is the main regulated financial market in Italy, is achieved through the admission clearance procedure of the Borsa Italiana, the Italian stock exchange. In order to meet the free float requirement which must be at least equal to 25% of the corporate capital (although this varies depending upon the listing market or market segment), a listing is usually accompanied by a public offer of the company’s shares. The offering of shares to the public requires the publication of a prospectus to be drafted in accordance with EU Regulation no. 809/2004; this must be approved by Consob, the Italian financial market regulatory authority.
Charging of assets

Italian laws provide for two main instruments to establish security over an asset: the pledge and the mortgage, both of which are governed by the general principles of the Italian Civil Code. A pledge may be created, inter alia, over shares and quotas.

Furthermore, Italy implemented the European Directive no. 2002/47/CE relating to “financial security agreements”, providing comprehensive regulations for the setting-up and enforcement of collateral over cash and securities, which applies to agreements entered into by certain entities.

Italian law provides that a company may not, directly or indirectly, grant loans and / or guarantees for the purchase and the subscription of its own shares, unless certain specific conditions (especially in terms of additional corporate actions to be carried out) are met (these include the passing of a resolution at an extraordinary shareholders’ meeting, the preparation by the directors of a report describing the transaction and the reasons for it and carrying out the transaction at arm’s length).

Employment

Recent updates to the Italian labour law

Recently, an important reform of the Italian labour market has been carried forward, following the so-called “Fornero reform” (Law no. 92/2012). In particular, a lot of reforms have been introduced through many legislative decrees – which have implemented Law no. 183/2014, better known as the “Jobs Act”. The aims of the reforms are to increase flexibility for the employer and to reduce the risks connected to dismissals, making costs forecastable.

Employee relations

Italian labour law is highly protective of the rights of employees, particularly those who are less qualified. By way of example, should an employee successfully challenge his / her dismissal from a company employing 15 or more people, the Court can, in given circumstances, order his / her reinstatement on the payroll.

There are also a large number of trade unions operating at both national and local level, with whom an employer must liaise and consult in relation to various rights and entitlements of their workforce.

Employment relationships are regulated by articles 2096 to 2129 of the Italian Civil Code and by Law no. 300 of 20 May 1970. These provide a complete set of obligations with which employers and employees must comply with during the employment relationship.

Staff leasing, manpower and work project agreements are dealt with by the Legislative Decree no. 276 of 2003 (the so-called Legge Biagi). Fixed term employment relationships are dealt with by Law no. 368 of 2001 as amended by the so called Jobs Act. Previously, an employer could hire employees on a fixed term employment contract for demonstrated technical, organisational and productive reasons only. It is now possible to insert an expiration date to a new contract without having to declare any specific reason. The most important limitation is that the fixed-term contracts can last up to 36 months, including any extension.

Contracts of employment

As a general principle, a written contract of employment is not required. Nonetheless, should the parties opt for executing a written document (which is usually the case), the following issues should be covered: (i) personal details of employer and employee; (ii) place of work to which the employee is assigned; (iii) date on which the employment relationship takes effect; (iv) duration of the employment relationship (depending on whether it is an open-ended employment relationship or fixed-term); (iv) the job specification and grading of the employee.

The parties cannot deal with other issues if they make reference to a National Collective Bargaining Agreement to be applied to the employment relationship. In the absence of such a reference, the following further issues should be dealt with in the agreement: (i) trial period, if any; (ii) monthly or annual gross salary, including the terms and conditions of its payment; (iii) holiday entitlement; (iv) working hours; (v) notice period on termination.

The recent reform has introduced a new contract type, the so called “Increasing Protection Contract”. Its aim is to reduce the circumstances of reinstatement and to make more certain the consequences in case of unfair dismissal. The employment agreement with rising protections based on seniority abolishes most of the guarantees on dismissal provided by Article 18 Law no. 300/1970 for employment agreements of indefinite duration.
Collective lay-offs and business transfers

Work councils at a company level and trade unions established in the relevant district must be informed and consulted in advance should an employer decide to implement a collective lay-off procedure and / or undertake the transfer of a business or branch involving more than 15 employees. In both instances, the consultation and notification requirements can have significant timing implications and failure to comply with the law in this area could result in the relevant trade union obtaining a court order to ensure compliance. The law on business transfers and employee rights is dealt with by Article 47 of Law no. 428 (1990); in relation to collective lay-offs, it is Law no. 223 (1991).

Under Italian law, employers cannot dismiss employees at will. Employees can be lawfully dismissed only when a “just cause” or “justified grounds” exist.

The term “just cause” means any “serious breach of duties by the employee which renders the continuation of the employment relationship impossible”. Examples of just cause are theft, serious insubordination, unjustified and repeated absences, as well as other misconducts seriously undermining the fiduciary relationship with the employer.

The term “justified grounds” means either (i) a less serious breach of duties by the employee (subjective justified grounds) or (ii) an objective reason relating to the employer’s need to reorganise his production activities or workforce, for example redundancy (objective justified grounds).

As mentioned above, the new legislation aims to reduce the circumstances of reinstatement and to make more certain and assessable the consequences in the case of unfair dismissal. In order to implement it, when the dismissal is declared unlawful, employees are entitled to an indemnity equal to 2 months’ salary for each year of service, with a minimum of 4 months and a maximum of 24 months. When the dismissals have been notified incorrectly, the indemnity amounts to 1 month’s salary for each year of service with a minimum of 2 months and a maximum of 12 months.

Work permits

All non EU citizens need a work permit and visa in order to be allowed to work in Italy. Those not requiring a visa (citizens of countries with which Italy have a bilateral or multilateral treaty) can enter for business or tourism for stays not exceeding 90 days in every 180 day period.

Processing time for work permits depends on the kind of permit applied for and on the city where the application is filed. Generally, it takes between one and four months.

The direct hiring of non EU workers by an Italian company is subject to the availability of work quotas which are approved by the Italian government on an annual basis.

Taxation

Taxation overview

The Italian tax system is based on three types of tax: income tax (IRPEF, i.e. individual income tax for individuals, and IRES, i.e. corporate income tax for companies, commercial and non-commercial entities), regional tax on productive activities (IRAP, which is applicable to companies, partnerships and individuals carrying on a business) and indirect tax. Indirect taxes include VAT, registration tax (for example, applicable to deeds of transfer of assets executed in Italy, deeds of transfer or lease of Italian real estate and to guarantees), inheritance and gift taxes, mortgage and cadastral taxes (generally applicable, in addition to registration tax, to deeds of transfer of Italian real estate and to mortgages on Italian real estate) and municipal tax on real estate (applicable in relation to the holding of Italian real estate).

Furthermore, starting from 2013, Financial Transaction Tax (FTT) was introduced on: (i) the transfer of shares (and other equity instruments) issued by companies resident in Italy and securities, representing such shares (and such equity instruments), irrespective of the residency of the relevant issuer of the certificate; (ii) the transfer of financial derivatives and transferable securities (provided that the underlying or reference value consists for more than 50 per cent of the market value of the instruments referred to point (i) above); and (iii) transactions executed on the Italian financial market deemed to be “High-frequency Trading”, with reference to financial instruments under points (i) and (ii) above. Relevant exclusions and exceptions from the FTT are, however, applicable.

Resident individuals, companies and entities are subject to income taxes on their worldwide income, while non-resident individuals, companies and entities are subject to income taxes on their Italian source of income. Resident partnerships are
transparent for income tax purposes (while non-resident partnerships are opaque for income tax purposes and, particularly, subject to corporate income tax on their Italian-sourced income).

Foreign real estate and investments in foreign countries may be subject to IVIE (Imposta sul valore degli immobili situati all’estero) and IVAFE (Imposta sul valore delle attività finanziarie detenute all’estero), providing that the fulfilling requirements are met.

Notably, starting from fiscal year 2012, individuals resident in Italy who hold property rights in real estates located outside of Italy are subject to IVIE. IVIE is calculated by applying a rate of 0.76 % to: (i) the cadastral value - as normally calculated in the country where the real estate is located - and if not available; and (ii) the cost of the real estate, as indicated in the purchase deed/in the contract(s). In case both (i) and (ii) are not applicable, the tax rate is applied to the market value that can be assigned to the property in the country where the real estate is located.

Criteria (i) (ii) and (iii) above mentioned must be used only for estates located EU/EEA countries. For real estates located in countries other than those belonging to the EU/EEA, the purchase/building cost of the real estate or - in default of those criteria - the market value are applicable.

IVIE is due provided that the tax burden is higher than 200 Euros.

Any property tax paid in the country where the real estate is located can be offset against IVIE. Taxpayers are also entitled to deduct income tax payable on properties located in EEA member states.

IVAFE tax, on the other hand, must be paid on financial interests held abroad by individuals who are tax resident in Italy. The taxable amount is calculated on the market value of the assets as at December 31 of each year, and the tax rates due are as follows: 1 per thousand (for year 2012); 1.5 per thousand (for year 2013 onwards).

IVAFE is payable by individuals resident in Italy, who operate financial activities and bank accounts in foreign countries, on a yearly basis and in proportion to their holding period during the year. Notably, the tax is levied (i) in case of financial activities, at a proportionate rate (2 per thousand of the value of the financial activity); and (ii) in case of bank account, at a fixed rate (34.20 Euros due for each account and provided that the average amount of money held in the account over the year is higher than 5,000 Euros).

**Tax residency of individuals**

As far as the taxation of individuals is concerned, an individual is regarded as resident in Italy for income tax purposes provided that, at least one of the following conditions is fulfilled for the greater part of the tax period (i.e. the calendar year):

- he / she is registered in the Official Register of the Italian resident population

- he / she has his / her residence in Italy for civil law purposes. Residence is defined as the place in which the person has his / her “habitual abode”. This means that the individual considers Italy his / her home country and that stays in other countries are merely incidental and of a temporary nature (although not necessarily short). Therefore, if factual circumstances show that an individual considers Italy as his / her home country (for the greater part of the taxable period), he / she might be regarded as a resident even if he / she is not physically present in Italy. Typically, such factual circumstances are family ties and the availability of accommodation that is not of a temporary nature and/or

- he / she has his / her domicile in Italy for civil law purposes. Domicile is defined as the place where a person has established the main seat of his / her business and interests. In order to assess the place where an individual has her / his domicile both economic and family ties have to be taken into account. Domicile is evaluated on the basis of actual facts and circumstances, including (i) family relations, (ii) economic interests, (iii) issuing of cheques (or the use of credit cards), (iv) financial investments, (v) ownership of Real estate and leasing / rent agreements, and (vi) job relations. Even though such an assessment is made on the basis of the overall situation of the individual by weighing up each circumstance, the Italian Tax Authorities consider that the mere presence of the family in Italy may be, by itself, sufficient to be considered as be domiciled in Italy even for individuals who work abroad.

If one of the three conditions outlined above is fulfilled, the individual will be deemed to be a resident in Italy for the whole tax period (i.e. calendar year). If all the three conditions are not met, individuals will be regarded as non-resident for the whole tax period (i.e. there is no split-year concept for residence purposes under domestic law).
Taxation of resident individuals

Resident employees are subject to individual income tax on their worldwide income. Individual income tax is currently levied at the following progressive rates: 23% on income up to 15,000 Euros; 27% on income between 15,000 Euros and 28,000 Euros; 38% on the income between 28,000 Euros and 55,000 Euros; 41% on income between 55,000 Euros and 75,000 Euros; 43% on income exceeding 75,000 Euros. On top of these rates, regional and municipal surcharges apply at rates that are laid down by the relevant municipality (the overall rate generally ranges between 1.23 and 2.83%).

Taxation of non-resident individuals

Non-resident employees are subject to income tax (as well as surcharges) at the above rates on their Italian-sourced income (including income derived from employment activities carried on in Italy).

Withholding tax obligations are imposed on employers, provided that they are either resident in Italy or non-residents acting through an Italian permanent establishment. The withholding tax system for employment income is based on the PAYE (Pay As You Earn) principle.

Tax residency of companies

Companies (as well as other entities and partnerships) are regarded as resident in Italy if they have in Italy, for the greater part of the tax period, one of the following:

► their legal seat or

► their seat of administration - (similar to the OECD treaty notion of "place of effective management") which is located where the key management decisions are taken. Therefore, the fact that a company is administered abroad on a day-by-day basis is not sufficient to conclude that the seat of administration is not located in Italy. The place of the meetings of the board of directors and the place where the directors carry on their activity generally plays a major role in establishing the seat of administration. On the other hand, the residence of the shareholders is immaterial for the purposes of locating the seat of administration to the extent that they have no powers to direct the management of the company or

► their main purpose - which refers to the place where the company’s day-to-day activity, as opposed to its highest management activities under the seat of administration criterion, are mainly carried on

Taxation of resident companies

Resident companies are subject to corporate income tax, levied at a rate of 27.5% on their worldwide income.

The taxable income of a resident company (or an Italian branch of a foreign company) for corporate income tax purposes is its business income, which consists of net income earned during a financial period. All income derived by an Italian company (or by an Italian branch of a foreign company) subject to corporate income tax is deemed to be business income, e.g. income from a trade, dividends, interest, royalties and capital gains. Taxable income is based on the results shown in the statutory profit and loss account, with certain adjustments.

Regional tax on productive activities is generally 39%. Capital gains rate is 27.5% (95% exempt under the conditions set out below). Losses may be carried forward indefinitely. On the contrary, no carryback of losses is allowed.

Dividends paid to a resident company are generally exempt as to 95% of their amount. For the tax treatment applicable to dividends and capital gains derived by Italian companies from black list subsidiaries please see below “Recent development in international taxation”.

Capital gains realised by resident companies upon the sale of shares or quotas of companies are exempt as to 95% of their amount provided that the following conditions are met:

► the securities must have been held continuously since the first day of the twelfth month preceding the month of sale

► the securities must have been entered as fixed financial assets in the first balance sheet after the acquisition

► the company issuing the securities must carry out a business activity (certain real estate investment activities are deemed not to be business activities for this purpose) and
the company issuing the securities must not be resident in a blacklisted jurisdiction.

The conditions under the final two bullet points must have been met for at least three tax periods before the disposal. Furthermore, if the participating company is a holding company, the same conditions are applied to the underlying subsidiaries.

Interest expenses (exceeding interest income) may be deductible up to an amount equal to 30% of EBITDA. The excess amount may be carried forward and back subject to certain limitations.

For corporate income tax purposes, in certain circumstances, a domestic (and, in very limited circumstances, worldwide) tax consolidation regime may be opted for.

Taxation of non-resident companies

Non-resident companies are subject to corporate income tax on their Italian-source income. Business income is deemed to be sourced in Italy if attributable to an Italian permanent establishment and is generally computed on the basis of the same rules applicable to resident companies. Dividends, interest and royalties are deemed to be sourced in Italy if paid by an Italian resident or by the Italian permanent establishment of a non-resident company; such items of income, when paid to a non-resident company, are generally subject to the following final withholding taxes (unless a more favourable treaty regime is applicable): 26% for dividends (and 1.375% for EU and EEA companies); 26% for interest and 30% for royalties. The withholding tax on outbound dividends, interest and royalties may not apply if the income is paid to a qualifying EC company pursuant to the domestic provisions implementing the EC Parent Subsidiary Directive and the EC Interest and Royalties Directive.

IRAP applies, generally, at the rate of 3.9%, to both resident and non-resident companies (as well as to resident and non-resident partnerships). IRAP is calculated with an allowance for labour costs and with a 10% allowance for interest costs if certain conditions are met (the tax base upon which IRAP is imposed depends upon the activity carried on). With effect from the 2015 fiscal year, the cost of employees employed for an indefinite period is additional deductible expense.

Both resident and non-resident companies (and partnerships) are subject to IRAP only on the net value added that is considered to be sourced in Italy.

Recent developments in international taxation

Legislative Decree n.147 dated 14 September 2015 (Internationalisation Decree) has introduced significant developments aiming at attracting foreign investments. Some of the most relevant developments introduced by the Internationalisation Decree and relevant for 2015 are listed below.

► Advance Agreements for enterprises with international activities. This type of international ruling applies to different kind of international tax issues set out by the law (transfer pricing, permanent establishment, etc.). The Advance Agreement is in principle valid for five years - i.e. for the year in which it is signed and the following four - to the extent that the underlying factual and legal circumstances remain unchanged

► Ruling for new investments in Italy. A new type of ruling as been introduced for investments of at least 30 million Euros and with a significant and durable impact on employment in relation to the specific business activity. The ruling is available both for non resident and resident companies and the Euros 30 million investment does not need to be realised in one year. The ruling provides for the taxpayer an advance confirmation on the tax treatment of the entire investment plan as well as, where needed, an assurance on whether a going concern is formed. In addition, the ruling may also confirm the absence of any abusive behaviors, the existence of prerequisites to exclude the application of anti-avoidance provisions or to recognise access to specific tax regimes

► Dividends from black list countries. Under the new rules, full taxation of the dividends (i.e. the inclusion of 100 per cent of the dividend amount in the taxable income of the shareholder) applies only to black list dividends arising - directly (from any participations in black list subsidiaries) or indirectly - from controlled foreign white list subsidiaries with black list participations. Moreover, under specific circumstances, in case of dividends arising from black list countries, shareholders are subject to full taxation but are allowed an underlying tax credit for any taxes paid abroad by the black list subsidiary. Similar rules provided for black list dividends apply for capital gains derived from the disposal of black list participations.
Cost arising from black listed countries. Under the old rules, deduction of costs incurred for the purchase of goods and services from black listed entities was not allowed unless proof was provided regarding the business substance of the black list company (first exemption) or the economic interest of the purchaser in entering the transaction, as well as its actual execution (second exemption). The Internationalisation Decree introduces the following changes to the above rules: black list costs may be deducted up to the limit of the relevant fair market value. The deduction of any exceeding value remains subject to the second exemption test (i.e. proof that the transaction at stake is grounded on an actual business interest and that the transaction has been carried out).

Horizontal consolidation. Based on the case law issued by the Court of Justice of the European Union (i.e. C-40/13), the Internationalisation Decree introduces the possibility to elect a domestic tax consolidation between two or more Italian sister companies with a common parent residing in any European Union (EU) or qualifying European Economic Area (EEA) countries which grant adequate exchange of information (horizontal consolidation).

Notably, the scope of the new rules above may be subject to further implementation by the regulations that may be potentially issued by the Italian tax authority.

Tax incentives

All incentives, which are based on the location and the size of the business must comply with EU rules. In general, investors may benefit from up to 200,000 Euros over a three-year period without infringing EU rules or having to notify the European Commission.

Incentives are available in the form of capital grants, loans on favorable terms or tax credits. Some incentives are granted automatically, provided the applicant meets the requirements for access, while others require successful completion of evaluation procedures. Incentives available for larger local development programmes involving the central and local government have a negotiation procedure.

In general terms, incentives may be granted for investment in new and existing production facilities, for the revitalisation of production areas, and for the activity of research and development.

Patent box tax regime

A new optional tax regime (Patent box) for intellectual property (IP) applies from 1 January 2015. Under these rules, taxpayers are entitled to partially exclude certain qualifying income arising from the license or direct exploitation of intangibles from its tax base, for purposes of the corporation tax and the regional tax on productive activities.

Patent box regime is available to Italian companies (and certain other bodies), as well as Italian permanent establishments of non-resident entities that are resident in ‘white-listed’ countries with an effective exchange of information with Italy.

A 30% exemption will be granted in 2015 (provided certain conditions are fulfilled), increasing to 40% in 2016, and then to 50% in 2017 onward. When a qualifying IP is directly exploited, the amount of income benefiting from the Patent box regime is determined by a specific agreement with the Italian tax authorities. A ruling may also be requested in the case of royalties paid by related parties but this is optional.

Capital gains arising from the sale of qualifying IP will not be included in taxable income provided that at least 90% of the proceeds are reinvested in the maintenance or development of other qualifying IP, within the following two tax years.

Research and development tax credit

Enterprises that invest in certain research and development (R&D) activities during the period 2015-2019 may be entitled to benefit from a tax credit calculated on an incremental basis, up to 5 million Euros, per year and per beneficiary. An annual minimum investment of 30,000 Euros per fiscal year is required. In particular, to the extent that the annual R&D costs incurred are higher than the average of the same costs incurred in the 2012 to 2014 fiscal years, the taxpayer can benefit from a tax credit equal to:

- 50% of the costs related to specific qualified personnel involved in R&D activities
- 50% of the costs arising from research agreements signed with universities, comparable research bodies or innovative start-up businesses
▶ 25% of the depreciation costs relevant for Corporate tax purposes related to laboratory instruments or equipment, with certain limits

▶ 25% of the costs related to purchase of know-how, patent rights for industrial or biotechnological invention patents, products topography, semiconductors or new plant varieties.

**Incentive for economic growth (ACE - Aiuto alla crescita economica)**

Starting from the year 2011, Italian companies and Italian branches of non-resident companies are entitled to income tax deduction, computed as a percentage of the annual increase in the company’s net equity (i.e. a notional interest deduction).

The deduction is equal to 4.5% for the 2015 fiscal year, and will be equal to 4.75% for 2016. Specific computational rules apply. The amount of the notional yield that exceeds the net taxable income of the relevant year may be carried forward and used to offset the net taxable income of a subsequent tax period or as a tax credit to offset (in five equal annual installments) the IRAP due for each fiscal year. Certain anti-avoidance rules also apply. The rules implementing the deduction are provided by a decree issued by the Ministry of Economy and Finance and include specific anti-avoidance provisions to prevent the inappropriate duplication of the ACE relief.

**Transfer pricing and anti-abuse provisions**

Italian legislation provides for transfer pricing provisions, which have been interpreted by tax authorities and case law in light of the updated OECD Transfer Pricing Guidelines, and a procedure for advance transfer pricing agreements between the taxpayer and the Italian tax authorities. There are no specific obligations in terms of transfer pricing documentation; however, pursuant to a recently enacted provision, a taxpayer is not liable for transfer pricing administrative penalties if contemporaneous documentation fulfilling certain standards is kept by the taxpayer.

Costs incurred vis-à-vis companies (or entities), even if unrelated, established in a blacklisted jurisdiction are non-deductible, unless the taxpayer proves that (i) the foreign company carries on an effective business activity, or (ii) the transaction is based on an actual economic interest and has been effectively carried on.

There are no thin capitalisation rules specific to interest on loans from foreign affiliates.

**Income tax treaties**

Italy has a wide network of income tax treaties (approximately 90 treaties are currently in force). The full text of these treaties can be found at:

http://www.finanze.it/export/finanze/Per_conoscere_il_fisco/fiscalita_Comunitaria_Internazionale/convenzioni_e_accordi/conv\enzioni_stipulate.htm.

**Dispute resolution**

**Court process**

Italian civil justice is structured as a three-tier courts system. Civil litigation in Italy is considered to be lengthy and cumbersome, though quite cheap when compared to certain common law jurisdictions. First tier trials may last from one to three years, and after any appeal, the parties may still go before the Court of Cassation, bringing the overall duration of any dispute to several years. According to the World Bank, the length of first tier trials is at 2.5 times the European Union average for commercial disputes.

**Arbitration / alternative dispute resolution**

Businesses resort very often to “ad hoc” arbitration or arbitration administered by a Chamber of Arbitration, having included standard arbitration clauses in contracts and company by-laws. The costs of arbitration in Italy are higher than those of court trial. In the case of arbitration managed by arbitral institutions, the costs can be estimated, whereas in “ad hoc” arbitration proceedings costs are less predictable. The arbitrators may grant provisional measures only to suspend the shareholders’ resolutions. This limitation means that the party who intends to seek an injunction should apply the ordinary courts, even in the presence of the arbitration clause in the contract. Invalid arbitration awards may be appealed before the Court of Appeals. It is possible to submit to arbitration labour and administrative disputes, only on condition that arbitration agreements are inserted in the contract and comply with the legislation.
Mediation is slowly growing as a dispute resolution method. In 2003, substantial benefits (stamp duty exemption, enforceability of the settlement, suspension of the limitation period) were introduced for mediations conducted by accredited providers in commercial and corporate disputes. A similar scheme was introduced in 2010, with regard to all civil and commercial matters, together with a duty for attorneys to inform clients about ADR. Telecoms companies and banks are starting to adopt non-binding arbitration or quasi-mediation schemes (conciliazione paritetica) in standard contracts with consumers, as a policy agreed with consumer associations. As of April 2016, a growing number of civil and commercial disputes (including family business transfer covenants, leases of business, insurance contracts and banking and finance contracts) must go through a preliminary mediation meeting with an accredited mediation provider before going to court.

**Competition**

Subject to certain exemptions, Italian Antitrust Law prohibits agreements between undertakings that have the purpose or effect of substantially reducing, preventing or distorting competition within the Italian market or within a substantial part of it. Both the prohibition and the exemptions are almost identical to those provided by TFUE. While it is still possible for a company to notify the existence of a restrictive agreement to the Italian Antitrust Authority in order to obtain an exemption, the policy and practice of the Authority is to refuse all such applications.

In 2007, the Italian Antitrust Authority published a Leniency Notice that is, in many respects, similar to the corresponding notice published by the European Commission in 2006. It covers horizontal secret agreements. The main differences are that under the 2007 Leniency Notice immunity is granted if the information / evidence provided is “decisive” in evidencing infringement (the threshold is therefore higher than that set by the Commission Notice) and that the Authority has a wider discretion in arriving at the level of any reduction in the fine.

Undertakings that are found guilty of engaging in anti-competitive behaviours may be subject to administrative sanctions by the Authority. The Authority is empowered to set a deadline within which undertakings concerned are to cease the infringing behaviour and remedy the infringements. In case of serious violations, the Authority may also impose a fine of up to 10% of the turnover of each undertaking during the financial year prior to the notification of the final decision. In setting the amount of the fine, the Authority must consider the gravity and duration of the violation.

In 2014 the Authority published its first fining guidelines. These guidelines are similar to those adopted by the EC Commission with some notable exceptions. In particular, the adoption and implementation of an effective compliance programme in line with the best European and national practices is considered one of the mitigating circumstance leading to a reduction of the fine. The undertakings under investigation may make commitments to the Authority. If the commitments are accepted, the Authority will close the investigation without the imposition of fines. Settlements are not available in Italy.

The victim of antitrust infringements may bring damages actions before the Civil Courts. Antitrust private enforcement is also available to consumers and class actions have been introduced in the Italian legal system not least so that consumers can seek damages for loss suffered as a result of anti-competitive practices.

Unlike other European legislations, the Italian Antitrust Law does not provide any criminal or administrative sanction on individuals involved in anti-competitive infringements. However, certain conduct, which constitutes a cartel (including bid rigging) may be caught by the Italian Criminal Code.

**Intellectual property**

Intellectual property rights are protected under civil and criminal law. Consolidating legislation was introduced in 2005 dealing with civil protection for patents, trademarks, utility models, designs and trade secrets (D.L vo 30/2005 – Industrial Property Code/IPC), while copyright is regulated by a separate act (L. 633/1941).

**Trademarks**

Under IPC, trademark holders may obtain protection by applying for registration with the Italian Office of Patents and Trademarks (UIBM). UIBM only verifies whether the mark complies with basic criteria set by the IPC (principally, distinctiveness and non-deceptiveness), without performing any novelty assessment.

Decree no. 33 of 2010 has recently implemented an administrative trademark opposition procedure that represents a further protection for trademark owners. The opposition procedure can be used to enforce some (but not all) of the grounds for refusal (existence of an earlier identical or similar registered trademarks and lack of consent to the use of the name, portrait and reputed mark).
Registration is renewable every 10 years. Rights granted with the registration may expire if the trademark is not used for more than five consecutive years. Protection is also granted to unregistered trademarks on the condition that the same are well-known among Italian consumers.

Italy is a signatory state of both the Madrid Convention and of the Madrid Protocol and has implemented the TM directive. Furthermore, Italy has applied the Council Regulation (CE) 40/94 (as amended).

Patents and utility models

Patents and utility models protect inventions that satisfy general requirements such as novelty, the need for an inventive step and industrial applicability. Utility models require less invention than patents.

Patent and utility model applications are submitted to UIBM. Since 1 July, 2008 patent applications are also subject to substantive examination. A patent lasts for a maximum of 20 years, while utility models last 10 years, both with effect from the date of application.

A Patent applicant is allowed also to submit a simultaneous application for utility model protection should the patent application be rejected. The IPC also provides for the possibility that a court decision may convert a patent into a utility model and vice versa.

If the owner of a patent does not exploit the invention within 3 years from the grant, the IPC provides for a mechanism of compulsory non-exclusive license for the benefit of any interested third party.

When the invention is created in the course of an employment agreement, the employer is entitled to patent the invention, but he may be subject to the payment of a fair premium to the employee if the inventive activity was not contemplated or foreseen on part of the employment nor rewarded with a specific remuneration.

Italy is party to the Paris Convention, the Patent Cooperation Treaty and the European Patent Treaty. Additionally, Italy is party to the EU enhanced cooperation on Unitary Patent Protection, and has signed but not yet ratified the Unitary PatentCourt Agreement.

Copyright

Under law no. 663/1941 copyright in an intellectual work belongs to its author. Copyright arises on the creation of the work and no formalities are required in order to obtain such protection. The right of economic exploitation lasts for seventy years after the author’s death.

An author is entitled to both exploitation rights (reproduction, performance, communication, etc.) and moral rights (i.e. the rights to claim the paternity of the work, to oppose any change to it that may harm the author’s reputation and to decide whether to publish the work or not). Economic rights may be transferred to third parties, whereas moral rights are not assignable.

Italy is a signatory state of the Berne Convention and the Universal Copyright Convention. Moreover, it has implemented the European Directive 2001/29/EC on copyright and related rights online.

Designs and models

UIBM grants the registration of national designs and models that are (i) novel and (ii) having “individual character”, this latter requirement meaning that an informed user has to receive a different impression from the general impression held in connection with earlier designs or models.

Italian law grants to registered designs and models a five-year term of protection renewable up to a maximum duration of twenty-five years.

Designs may be also eligible for copyright protection when they “have a creative character and an artistic value”. While the creative character requirement simply refers to the fact that the work must bear the author’s personal print, the artistic value occurs only in high level design works that have been publicly acknowledged as such in public exhibitions, catalogues, etc.

Italy is a signatory of the Paris Convention and the Locarno Convention.
Know-how

Commercial, technical and industrial information is protected under IPC if they satisfy three requirements: (i) they are secret, i.e. not already publicly known; (ii) they have an economic value; (iii) they are subject to adequate measures to keep them secret. The owner of the know-how is entitled to act against any third party’s appropriation and use.

Unfair commercial practices

Italian law prohibits (i) misleading and comparative advertising between traders and (ii) protection of consumers against unfair commercial practices (UCP).

The misleading and comparative advertising regulations ban any kind of advertising that can alter the economic behaviour of those to whom it is addressed, or is likely to damage a rival.

A trade practice becomes unfair (and thus a UCP), if it is contrary to the requirements of professional correctness and distorts or is likely to distort the economic behaviour of a customer.

The competent authority to enforce UCP and misleading and comparative advertising is the “Competition and market authority” (AGCM), which may act ex officio or upon complaint. AGCM also has investigative powers and can inhibit the continuation of UCP and issue penalties.

Marketing agreements

Agency

Agency agreements are governed primarily by the Italian Civil Code and Directive 653/86/CEE.

The essential characteristics of an agency relationship are: (a) autonomy of the agent in the organisation of the activity to be carried out on behalf of the principal. He / she has to organise the means of his / her work and assume the risks in which he / she may incur; (b) the agent acts in a stable way, assuming the obligation (not the faculty) to cooperate with the principal on permanent and professional basis.

Upon termination of the agency relationship, the agent is entitled, in certain circumstances, to an indemnity. Payments will be due under the indemnity if (a) the agent has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with those customers; and (b) the payment under the indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers.

Payments under the indemnity will not be due to termination of the agency relationship if: (a) the principal withdraws because of a serious breach of the contract by the agent; (b) the agent withdraws except where the principal may be deemed liable for the agent’s withdrawal; and (c) the agent, in agreement with the principal, assigns the agreement to another agent.

Distribution

Distribution agreements are one of the most common contractual arrangements used by foreign companies which have no Italian subsidiaries / branches in order to market their products or services in Italy.

In broad terms, a distribution agreement may be characterised as an agreement whereby a product manufacturer or service provider appoints another entity or person (i.e. the distributor having all the necessary expertise and knowledge of the relevant field) as its official distributor for promoting, marketing and sale of such products and / or services to customers in a defined territory. In addition, the distributor undertakes to promote, market and distribute the relevant products and / or services in favour of the customers in said territory by acting in its own name and on its own behalf (and, thus, as an independent dealer).

The most relevant and commonly negotiated contractual clauses which characterise the agreement itself are: (1) the “exclusivity clause” (whereby, on the one hand, the producer manufacturer or service provider undertakes not to appoint any other distributor in the same territory and, on the other, the distributor undertakes not to distribute any product / service which may be in competition with the products / services distributed under the distribution agreement); (2) the “territory clause” whereby the parties to the distribution agreement define the territory within which the distributor shall be entitled to act as distributor of the relevant products / services and in which they undertake not to distribute said products / services outside the
(3) the “minimum quantities clause” which may be inserted in order to impose on the distributor the obligation to purchase (from the relevant product manufacturer or service provider) and distribute a minimum amount of products / services in order for him to continue to act as (exclusive) distributor in the territory on the same terms and conditions.

It should always be remembered that competition law has a part to play in such agreements, for example the prohibition of conduct which constitutes an abuse by an undertaking of the economic dependence of another undertaking on the former.

In this respect, Italian law provides that an abuse of economic dependence may consist of the unfair refusal by the dominant undertaking (i.e. the supplier) to sell to, or purchase from, the dependent undertaking (i.e. the distributor) goods or services; or the imposition by the dominant undertaking on the dependant undertaking of contractual conditions which are unreasonably excessively onerous; and the arbitrary interruption by the dominant undertaking of its commercial relationships with the dependent undertaking (also by an arbitrary refusal to extend or renew the relevant agreement upon its lawful expiration).

Any such abuse gives rise to liability on the part of the abusing undertaking.

Franchising

Franchising is regulated in Italy under Law no. 129 of 2004. This sets out requirements relating to the form and the content of a franchising agreement. Moreover, it envisages some obligations of the franchisor and of the franchisee and establishes rules relating to the pre-contractual phase of franchise regulations.

The Italian Association of Franchising has drafted a code of ethics aimed at obliging franchisors that are members of the association to adopt rules of conduct founded on the principles of propriety and professionalism.

E-commerce


The law has, as its scope, the promotion of the development and free movement between the EC Member States of information technology business and commercial activities and services and, to this end, sets out certain specific measures and requirements to be complied with by those persons carrying out their business or commercial activities through IT information technology (including electronic commercial communications and e-commerce) (so called service providers).

Among the most relevant obligations imposed on service providers are certain specific information requirements aimed at ensuring that each consumer dealing with a service provider (including for e-commerce purposes) is able to access a minimum amount of information about the service provider.

This information includes: (a) the name and geographic address of the service provider; (b) contact details of the service provider; (c) the registered office of the service provider; (d) supervisory authorities overseeing the activities of the service provider; (e) professional qualifications of the service provider or professional bodies to which it belongs; (f) its VAT number (if any) or other pertinent tax data / information.

Italian law also prescribes further information which service providers must include on commercial communications launched online.

E-commerce is also potentially subject to the general Italian law requirements (which enact the relevant EC Directive) on distance selling. Distance contracts are governed by the Consumer Code (Legislative Decree no. 206/2005) as recently amended by Legislative Decree no. 21/2014 implementing Directive 2011/83/EU on consumers’ rights.

With reference to this peculiar contractual form, the Consumer Code provides for, inter alia, stringent pre-contractual information obligations of the trader vis-à-vis the consumer (trader identity and address, payment modalities, right of withdrawal and relevant deadlines, term of the agreement, etc.); material transparency requirements when the agreement is entered into through electronic means and provides for the consumer to pay upon ordering; strengthened consumer’s right of withdrawal (the consumer is entitled to withdraw within 14 days from execution of the agreement and the trader has to reimburse all payments received within 14 days from the notice of withdrawal); risk of loss or damage to the goods staying with the customer only when it gets the actual possession of the goods. Finally, alongside the consumer’s ordinary judicial protection, the Consumer Code now also provides for the Antitrust Authority to monitor and ensure application of the Consumer Code.
Data protection


The Code applies to the processing of personal data, including data held abroad, (i) performed by any entity established in the Italian State’s territory or (ii) that is performed by an entity established in the territory of a country outside the European Union, where said entity makes use in connection with the processing of equipment, whether electronic or otherwise, situated in the Italian territory, unless such equipment is used only for purposes of transit through the territory of the European Union.

Furthermore, the Code applies to the processing of personal data carried out by natural persons for exclusively personal purposes only if the data are intended for systematic communication or dissemination.

The following definitions are provided for and apply under the Code:

► Personal data: any information relating to natural persons that are or can be identified, even indirectly, by reference to any other information including a personal identification number

► Data controller: any natural or legal person, public administration, body, association or other entity that determines, alone or jointly with another data controller, the purposes and methods of the processing of personal data and the relevant means, including security matters

► Data processor: any natural or legal person, public administration, body, association or other entity that processes personal data on the data controller’s behalf

► Person in charge of processing: any natural person who has been authorised by the data controller or processor to carry out processing operations

The Code regulates the processing of personal data, defined as any operation, or set of operations, carried out with or without the help of electronic or automated means, concerning the numerous actions on data including:

► Collection

► Recording

► Organisation

► Communication

► Dissemination

► Deletion and

► Destruction

The Code applies whether or not the data is contained in a database.

In general terms, no notification or registration is required before processing personal data. However, a notification to the Italian Privacy Authority is required to process certain categories of personal data including:

► genetic data, biometric data, or other data disclosing the geographic location of individuals or objects by means of an electronic communications network

► data disclosing health and sex life where processed for the purposes of assisted reproduction, provision of health care services via electronic networks in connection with data banks and / or the supply of goods, epidemiological surveys, diagnosis of mental, infectious and epidemic diseases, seropositivity, organ and tissue transplantation and monitoring of health care expenditure
data disclosing sex life and the psychological sphere where processed by not-for-profit associations, bodies or organisations, whether recognised or not, of a political, philosophical, religious or trade-union character

data processed with the help of electronic means aimed at profiling the data subject and/or his/her personality, analysing consumption patterns and/or choices, or monitoring use of electronic communications services except for such processing operations as are technically indispensable to deliver said services to user

Data processed using electronic means, aimed at:

- profiling the data subject or his personality
- analysing consumption patterns or choices or
- monitoring the use of electronic communications services, except for processing operations that are technically indispensable to deliver these services to users

Sensitive data stored in databases for personnel selection purposes on behalf of third parties, as well as sensitive data used for:

- opinion polls
- market surveys and
- other sample-based surveys

Data controllers have, among others, the following main obligations:

- to provide a complete and adequate privacy notice to data subjects concerning the processing of their personal data
- to collect the data subjects' consent to the processing of their personal data for the purposes detailed in the privacy notice provided to them, unless an exemption applies
- to adopt appropriate security measures and to update them periodically as requested for each specific data processing activity
- to file notifications with the Italian Privacy Authority where necessary
- to help uphold data subjects' rights, as provided for by the Code and
- for data traffic, to respect the specific provisions concerning data retention and security measures provided for by the Code

The express consent of the data subject before processing his personal data is generally required, with certain exceptions. Consent must be specific and documented in writing (including online consent).

The written consent of the data subject, along with an authorisation (specific or general) issued by the Italian Privacy Authority is required if sensitive data are processed. In this case, online consent is not sufficient, unless provided through electronic means considered equivalent to a written signature (that is, an electronic signature).

Product liability

In 2005, all EU consumer protection legislation (including, inter alia, Directive No. 85/374/ECC concerning liability for defective products as well as Directive No. 2001/95/EC concerning general product liability) and pre-existing Italian law (including, inter alia, Presidential Decree no. 224 of 1988 on liability for defective products and Legislative Decree no. 172 of 2004 on general product liability) was consolidated by Legislative Decree no. 206 of 2005 (the Consumer Code).
The Consumer Code imposes a stringent liability regime with respect both to product safety and product liability. This primarily applies to: (a) manufacturers of products established in the EC; (b) importers of products in the EC; (c) intermediaries of product manufacturers; and (d) distributors of products.

The product safety rules under the Consumer Code impose a series of specific obligations and requirements on those (mentioned above) involved in the manufacturing, supply and distribution chain. Breach of those rules may lead to criminal sanctions. For example, manufacturers, importers and distributors are obliged to market only safe products; to provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use; to act with due care to ensure compliance with all applicable safety requirements; to immediately inform the competent authorities of any action required to prevent risk to the consumer whenever they know or ought to know that a product poses a risk that has not already been explained.

The rules also impose an onerous liability regime on manufacturers, importers and distributors of products since they will be liable for any damage caused by defects in the products manufactured and / or distributed by them.

In practice, consumers have tended not to invoke the provisions of the Consumer Code given the difficulties associated with the burden of proof they must meet before a manufacturer etc. can be held liable. Instead, they have tended to rely on actions founded on general contractual and tortuous principles.

In 2015, to implement Directive 2013/11/EU (Directive on consumer ADR), the Consumer Code has been amended so as to provide for a particular ADR procedure that offers - on a voluntary basis - a simple, fast and low-cost out-of-court solution to disputes between consumers and traders. The parties remain free to interrupt the procedure anytime as well if they do not accept the proposed solution, which is not binding, and to submit their claim to ordinary courts.

Bribery and corporate crime

Legislative Decree no. 231 of 2001 is the basis of the Italian law dealing with corporate crime. Its scope was initially limited to offences against the Public Administration (for example, bribery and fraud involving public bodies etc.). However, this has been substantially extended, not least to implement the OECD Convention on bribery and the EU Market Abuse Directive, and now covers, among other issues: (a) corporate crime; (b) crimes connected with the subversion of democratic order and financing of terrorism; (c) market abuse (abuse of inside information and market manipulation); (d) transnational crimes; (e) health and safety at work breaches; (f) money laundering, including self-laundering and related crimes; (g) cybercrimes; and (h) crimes associated with breach of copyright; (i) organised crimes; (j) crimes against industry and trade; (k) environmental crimes; (l) employment of illegally staying third-country nationals.

In particular, it introduced into Italian legislation the concept of "organisational negligence" for which an entity can be liable for failure to introduce adequate measures to prevent the offences mentioned above from being committed. In turn, this means that legal entities are now directly and independently subject to both pecuniary and restrictive sanctions as a consequence of offences committed by individuals linked to the entity because of their employment or some other activity.

On November 2012, Italy adopted the so called Anticorruption Law (Law no. 190 of 6 November 2012) containing provisions which concern both the public and private sector and Legislative Decree no. 231 of 2001. In this regard, the Anticorruption Law extended the corporate liability of companies pursuant to Legislative Decree no. 231 of 2001 to the new crime of "corruption in the private sector".

Money laundering has been criminalised under the Italian Criminal Code. This prohibits the substitution and transfer of money, goods or assets obtained through criminal offences and the concealment of their origin. It also prohibits the use of money, goods or assets obtained by means of criminal offences in economic and financial activities.

Real estate

No specific restrictions apply to foreign ownership or occupation of real estate in Italy.

Real estate is defined as anything that has a stable connection or link to the land.

Land and any buildings on it that are owned by the same entity are registered together in the Land Registry (Registri Immobiliari), which provides evidence to third parties of both property and other in rem rights over the real estate.
According to Italian law, all rights concerning land can be classified alternatively as “in rem” rights or contractual rights. While “in rem” rights are effective against everyone, contractual rights are only enforceable against the actual parties to an agreement.

Ownership, as provided in the Italian civil code, is the right according to which the owner is entitled to enjoy and dispose of the property asset fully and exclusively, within the limits and with observance of the duties established by the legal order (e.g. expropriation of property affecting national production or of predominant public interest).

Ownership can also be limited by different real estate rights of use (diritti reali di godimento), expressly provided by law as numerus clausus:

- **a surface right (diritto di superficie)** is the right to build up and maintain a building above land owned by someone else
- **an emphyteusis right (diritto d’enfiteusi)** is the right to enjoy the property with the duty to improve it and to pay to the owner a ground rent (rendita enfiteutica) with a sum of money or an amount of natural products
- **a usufruct (diritto d’usufrutto)** is the right to enjoy the property, limited to compliance with its intended use (destinazione d’uso) determined by the owner, and the restraint to alienation over the property. It is a temporary right because its term is for the life of the tenant or for 30 years if the tenant is a legal entity
- **a right of use (diritto d’uso)** is a limited type of usufruct giving the right to use the property and get the fruits from the ground (limited to their own, or their family’s, needs)
- **a right of housing (diritto d’abitazione)** is the right to live in a house (limited to their own, or their family’s, needs)
- **a land easement (servitù prediale)** is a burden imposed over land in favour of neighbouring land. The requirements here are the proximity of the two areas of land and the use of the dominant land.

Real estate can also have a mortgage (ipoteca) over it. In this case, there is a guarantee over the property covering the obligations that should be performed by the owner and it does not determine loss of possession. Mortgages can be voluntary or mandatory and must be registered in the same Land Register as the property.

Ownership rights

In light of the above, a natural or legal person may exercise – *inter alia* – the following ownership rights over property assets.

**Full ownership right (Diritto di Proprietà)**

When a natural or legal person owns Real estate property individually and exclusively.

**Co-ownership right (Diritto di Comproprietà)**

When two or more natural or legal persons co-own Real estate. In these circumstances, they will not have separate title to the same property, but rather the same right of which each participant has a “notional portion”. The Italian Civil Code favours the right of all the co-owners as a group rather than those of the single co-owner, who is not entitled either to sell the undivided asset or manage it alone. Acts of management or disposal of the Real estate requires respectively a simple majority and a two-third majority of the co-owners. Each co-owner may freely dispose of his separate entitlement.

**Condominium of buildings (Condominio)**

This is a special form of co-ownership, often used in relation to certain common areas of a building divided in units, such as its foundations and roof. The peculiarity of the condominium concept is (a) the indivisibility of the common parts; (b) the obligation to approve a condominium regulation, which sets out the terms and condition on which the owners of the different units in the building may use and share the common parts; and (c) the need to nominate an administrator of the condominium.

**Timesharing (Multiproprietà)**

This is generally used in relation to blocks of flats located in tourist areas and hotels. The owner of a single unit can use the building only for a certain periods of the year and for an undefined numbers of years.
Sale of real estate property

A real estate sale and purchase transaction is usually carried out through a letter of intent (sent to the seller by the prospective purchaser), a subsequent preliminary agreement and a final sale and purchase agreement.

As regards the letters of intent, it is noteworthy that they are not binding (except for exclusivity periods, confidentiality and jurisdiction, if and when these are provided) since they just summarise the common intents of the parties involved in carrying on possible future negotiations.

Conversely, a preliminary agreement sets out the terms of parties’ mutual obligations according to the understandings already reached, which will be inserted in the final agreement. This is to allow the parties to set, in a definitive and binding way, the terms that will be inserted into the final deed of sale.

In addition, pursuant to Article 2932 of the Italian Civil Code, if one party breaches the preliminary agreement and does not continue with the execution of the final agreement, the fulfilling party may request the enforcement of the sale and purchase agreement, obtaining a judgment having the same effect as the final agreement.

Preliminary agreements are not binding on third parties. The envisaged purchaser can safeguard himself against any possible claims from third parties by registering the preliminary agreement at the Land Registry.

As far as the content of the preliminary agreement is concerned, parties usually provide for a standard set of representations and warranties to be inserted in the pre-closing fulfilments of the final sale and purchase deed. Such representations and warranties usually cover:

- the capacity of the parties to enter into the agreement
- title and ownership
- lack of burdens or liens on the asset
- compliance with applicable laws or regulations.

With particular reference to the warranties typically given by the seller, it should be pointed out that some of them are directly provided for by law, by way of example, consider the following:

- Title of property (Article 1483 of the Italian Civil Code).
- Defects of the sold good (Article 1490 of the Italian Civil Code).

Warranties can be introduced by the parties (for example, existence of fit for use certificate, compliance with urban planning and building permits) or limited or excluded. Excluding warranties will not be valid if the seller, in bad faith, does not disclose the defects of the property to the buyer. Nevertheless, pursuant to Article 1491 of the Italian Civil Code, the seller shall not be liable for the defects of the property if, upon the execution of the agreement, the purchaser was aware of them or, failing that, in case such defects were easily recognisable by the same.

Furthermore, we have listed below the main documents required to validly transfer a real estate asset:

- cadastral plan of the asset
- energy performance certificate
- destination of use certificate (if the asset is land or an appurtenances of a premises exceeding 5,000 square metres).

Indeed, the sale and purchase agreement must be notarised for registration of the deed in the Land Registry, in order to give evidence of the transfer to third parties and to protect the purchaser against any third party claim, and in the Cadastral registers (catasto terreni and catasto fabbricati) for tax purposes.
Real estate leases

Generally, lease agreements regulated by the Italian Civil Code are freely negotiable, save for certain limitations provided by special legislations.

In this respect, real estate leases for commercial purposes are mainly subject to Law no. 392 of 27 July 1978 (Law 392/1978). This provides particular limits affecting parties’ negotiation such as the duration of the lease, renewal and withdrawal and the execution methods. These provisions are mandatory due to the first paragraph of Article 79 of the same Law 392/1978. Agreements that derogate from Law 392/1978, which are not favourable to the tenant, are null and void, without prejudice to the exceptions recently introduced by Article 18 of the Law Decree Sblocca Italia (i.e. Law Decree no. 133 of 12 September 2014, converted by Law no. 164 of 11 November 2014) which allows the free negotiation of the lease agreements in relation to non-residential properties with an annual rent higher than 250,000 Euros.

No particular formal requirements are provided under Law 392/1978 for non-residential leases. Nevertheless, real estate lease agreements are usually executed as a deed in writing even if just to permit registration to the tax authority. On the other hand, under the Italian Civil Code, lease agreements for more than 9 years where there are extraordinary administration acts must be in writing (otherwise the agreement is null and void) and must be registered in the public register.

As regards the duration of a real estate lease agreement, the minimum mandatory terms are the following:

- not lower than 4 years for residential assets
- not lower than 6 years for commercial assets and
- not lower than 9 years for hotels.

Indeed, parties could set a shorter term if the property or the activity is characterised by temporary use.

The maximum duration limit of a lease agreement, pursuant to Article 1573 of the Italian Civil Code, is 30 years and, should parties agree a longer term, the expiration date shall be automatically fixed on the 30th year.

After the first period, the agreement is automatically renewed for an equal period unless each party provides the other with a 6 months prior written notice of its intention not to renew the lease.

It is noteworthy that, upon the first expiration term, the landlord shall be entitled to refuse the renewal of the lease only in particular cases as listed in Article 29 of Law 392/1978.

Besides the provisions concerning the duration matters, paragraph 7 and 8 of Article 27 of Law 392/1978 establish, respectively, that parties can mutually agree that the tenant is entitled to withdraw from the agreement *ad nutum*, by giving the landlord at least 6 months’ prior written notice (via registered letter), with reference to the date in which the withdrawal will take place. In addition to the above, a tenant can, in any case, terminate the agreement in case of occurrence of “critical reasons” (*gravi motivi*) and provided that the landlord is provided with at least 6 months’ prior notice via registered letter.

For the sake of clarity, consider that “critical reasons” shall be intended as events falling beyond the tenant’s control, unforeseeable by the tenant itself and occurred after the execution of the lease agreement that make the lease relationship excessively burdensome for the tenant.

As already mentioned, according to the Law Decree Sblocca Italia, parties to the lease agreement are admitted to expressly derogate from the rules concerning duration for a lease which annual rent is higher than 250,000 Euros.

As far as the amount of the rent is concerned, the same can only be increased to the extent of the variation of the consumer price index (*ISTAT-FOI*) as ascertained by ISTAT on an annual basis.

The deposit is the sum of money that the landlord requires on executing a lease to prevent possible damages caused by the tenant to the property during lease agreement. It can never exceed 3 months’ rent.

Furthermore, the rent of a real estate property triggers the levy of the registration tax and VAT depending on the nature of the lessor and of the property rented. Stamp duty may apply on the rent deed at a fixed rate of 45 Euros.
For example, where an Italian company rents a commercial property, then that rent is subject to VAT at 22% on the option of the landlord and to registration tax at 1%.

Conversely, the rent of residential property is subject to VAT (at the reduced rate of 10%) on the option of the landlord, if the latter is the construction company, and to registration tax at fixed rate of 67 Euros. In all other cases, the rent of residential property is subject to registration tax at the rate of 2%.

As regards the assignment of a lease agreement or subletting, in general, the consent of the landlord is required for both of them. However, pursuant to Article 36, Law 392/1978, a tenant may sublet the property or assign the lease without the landlord's prior consent, provided that the relevant business will be sublet or sold jointly where notice is given to the landlord by registered letter. The landlord may, in any case, object for critical reasons, within 30 days as the receipt of the notice.

A tenant can also assign a lease to companies belonging to the same group, with the previous consent of the landlord, unless the parties do not provide otherwise in the lease agreement.

As a result of the subletting or of the assignment of the agreement, the subtenant or the cessionary takes over all tenancy obligations and the tenant shall be liable for the same, jointly with the subtenant, in favour of the landlord.

As established in Article 1576 of the Italian Civil Code, the tenant has to perform, at its own care and expenses, all activities concerning the ordinary maintenance of the asset and of the plants, while the landlord has to perform the extraordinary maintenance. Such provisions can be derogate by mutual agree of the parties, except for the obligation concerning the maintenance of the structural parts of the leased premises which pertains, in any case, to the landlord.

Pursuant to Articles 1592 of the Italian Civil Code, the tenant is not entitled to an indemnity for the improvements (miglioramenti) made to the property, unless otherwise agreed by parties. If such improvements are made with the landlord's prior consent, the landlord must pay to the tenant an indemnity equal to the lesser amount between the costs incurred and the value of improvements at the time of the release of the premises.

Furthermore, tenants that made additions (addizioni) to the property can remove those additions upon termination, for any reason whatsoever, of the lease agreement if the removal does not cause damages to the property, or if the landlord decides not to retain them. In this case, the landlord must pay an indemnity equal to the lesser sum between the amount of costs incurred and the value of the addition at the time of the release of the leased premises.

In addition to the above, should the provisions of the lease agreement be breached by the tenant, the landlord shall be entitled to terminate the agreement and claim for damages.

Lease agreements usually provide that non-fulfilment by the tenant occurs where there is non-payment of one monthly-rent within a term of 20 days, or non-payment of service charges when the unpaid amount exceeds two months' rent. The Italian Civil Procedure Code provides for special procedures (i.e. sfratto per morosità and sfratto per finita locazione) that may permit the landlord to get back the premises within a shorter time period than through the ordinary proceedings.

With tenant insolvency, the receiver can withdraw from the agreement at any time, giving the landlord fair compensation for early termination, which is quantified by a judge if the parties do not reach an agreement (see Article 80 of Insolvency Law).

Recent reforms

Law Decree Sblocca Italia, adopted on September 2014, contains several provisions concerning the real estate sector. It has implemented, and significantly improved, the regulation of real estate investment trusts (Società di investimento immobiliare quotato) (i.e. SIIQs), in order to promote its expansion, to provide the investors with a real estate investment instrument other than the most common real estate investment funds and to increase the appeal of the Italian real estate market for foreign investors.

Furthermore, as already mentioned in the section above, the Law Decree Sblocca Italia amended rules applicable to lease agreements for non-residential use (providing an annual rent higher than 250,000 Euros) and it introduced a particular type of agreement named “rent to buy”, to encourage real estate investments. Additionally, specific tax deductions were provided for building owners to encourage refurbishing activities on buildings and energy efficiency in plants.

Existing law is stated as it applied in April 2016.
Useful contacts

ITALIAN TRADE COMMISSION

www.ice.it  www.italtrade.com

The Italian Institute for Foreign Trade (I.C.E.) is the government agency entrusted with promoting trade, business opportunities and industrial co-operation between Italian and foreign companies, mostly by organising the participation of Italian firms in fairs, exhibitions, workshops and bilateral meetings in more than 100 countries all over the world.

CONFIDUSTRIA

www.confindustria.it

Founded in 1910, Confindustria is the principal organisation representing the manufacturing and services enterprises in Italy.

THE BANK OF ITALY

www.bancaditalia.it

The Bank of Italy is the Italian central bank. It was founded as a joint-stock company in 1893 and become a public-law institution in 1936. In more than a century it has progressively acquired a number of functions and become a modern central bank. The headquarters are in Rome. It has branches all over the country and six delegations abroad, in Brussels, Frankfurt, London, New York, Paris and Tokyo.

THE ITALIAN ANTITRUST AUTHORITY

www.agn.it

The Antitrust Authority is an "Independent Authority" established by Law no. 287 of 10 October 1990 (The Competition and Fair Trading Act). Being an independent Authority it has the status of a public agency whose decisions are taken on the basis of the Act without any possibility of interference by the Government.

It also has responsibility for ruling on misleading and comparative advertising under Legislative Decree no. 206 of 6 September 2005. Moreover, the Antitrust Authority has responsibility for ruling on conflicts of interests under Law no. 215 of 20 July 2004.

THE CONSOB

www.consofb.org

The Commissione Nazionale per le Società e la Borsa (CONSOB) is the public authority responsible for regulating the Italian securities market.

Further information

Nctm is one of the leading, independent law firms in Italy. Our strength lies with our 250 professionals, including 55 dynamic equity partners. With offices in Milan, Rome, London, Brussels and Shanghai, a vocation for quality and innovation - as recognised by the FT Most Innovative Law Firm rankings for five consecutive years - we offer a multi-focus, sophisticated and tailor-made expertise to our solid international client base.
The firm’s structure, strategy and development are all geared towards delivering the best possible services to its clients, both domestic and international.

Nctm has multidisciplinary skills and its professionals provide their activity within one or more practices, depending on the type of specialisation and the areas in which they are mainly involved.

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<td></td>
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For more information about Nctm please visit the website [www.nctm.it](http://www.nctm.it).
Introduction and legal system

Ireland, as a “gateway” country to Europe, has consistently performed strongly on the international stage in terms of attracting investment from all corners of the world in many important industries. For example, the value of US foreign direct investment in Ireland is greater than the combined value of US FDI in Brazil, Russia, India and China. Its ability to remain attractive to foreign multinationals, despite its economic troubles is testament to the breadth of incentives and ease of doing business which is part of an enticing package on offer to the prospective investor.

Legal system

The Irish legal system is based on the English common law tradition, similar (but not identical) to that in operation in the US. It is guided by decisions reached by the courts over the centuries, and has been modified by legislation enacted by the Oireachtas (Irish parliament) and by the Irish Constitution which was enacted in 1937. The Irish legal system is further influenced by Ireland’s membership of the EU, with EU law being applicable in Ireland, and with EU directives being implemented by way of Statute or Statutory Instrument. EU regulations and many EU treaty provisions apply automatically in the Irish Courts and do not need to be implemented into Irish law.

Under the common law system, the accumulation of hundreds of thousands of decisions over many centuries has ensured that the system has developed into a coherent body of law. These decisions have led to a system of precedents which ensure continuity in the decision making process of the courts.

Legislation is the means by which common law rules are altered. The law set down by the Irish parliament consists of primary legislation (statute law) which includes Acts passed by the Oireachtas and secondary legislation which consists of measures enacted by a person or body to whom the Oireachtas has delegated legislative authority.

The Irish Constitution established the Irish State and its institutions in 1937. It is the cornerstone for basic laws of the State and takes precedence over all other inferior forms of law but is subject to EU law. Articles of the Constitution can only be amended by means of a referendum of the people.

Finally, Ireland’s membership of the EU means that decisions made by the Court of Justice of the European Union are enforceable in Ireland and are binding on all Irish courts. Since Ireland joined the EU in 1973, this has led to a considerable amount of directives and regulations becoming part of Irish law.

Political structure

The political system consists of a President and two houses of parliament. The President is the Head of State and does not have executive functions. Executive power is exercised by the Taoiseach (prime minister) and his cabinet, with the power to make laws resting with the Irish parliament. Ireland is a member of the EU and UN, among other international organisations, but retains a neutral stance on military matters.

Government approach and economy

Like many countries worldwide, Ireland was hit very hard by the economic crisis. The economy which thrived from the early 1990’s up to 2007 has since contracted. Unemployment rates, which were as low as 4.5% in 2007, peaked at 15.1% in February 2011 (CSO). Irish house prices suffered a large decrease in value, with prices of residential properties falling by 51 per cent from their peak in September 2007 to March 2013 (ESRI, Quarterly Economic Commentary, Autumn 2013). Ireland’s well publicised bailout in November 2010 from the “Troika” of the IMF, European Commission and European Central Bank was a defining and difficult moment in Ireland’s relatively short history. The pathway out of economic troubles has been long and arduous but the blueprints for regaining economic independence, which were put in place by the Troika in conjunction with the Irish government, saw Ireland pass eleven consecutive quarterly Troika reviews since the bailout began (Department of Finance, July 2013). Ireland was the first bailed-out Eurozone country to wean itself off emergency aid, and did so without a pre-arranged precautionary credit facility (Department of Finance 14 November 2013). Ireland’s strict adherence to a policy of expenditure control and cost cutting has begun to yield positive results, with unemployment falling to 10.6%; the number of people registering as unemployed standing at 363,900 (CSO December 2014). The residential property market is showing signs of revival, particularly in the nation’s capital, Dublin, where prices have risen by 22.3% in the last 12 months (CSO, December 2014). Ireland re-entered the international debt markets in 2013. On 7 January 2015, the National Treasury Management Agency (NTMA) raised €4 billion through the syndicated sale of a new benchmark Treasury Bond maturing in March 2022. The funds were raised at a yield of 0.867 per cent and 85% of the issued bonds were purchased by overseas investors (NTMA), showing the continued international confidence in Ireland’s economic recovery.
Ireland continues to be reliant on tough measures in order to bring public expenditure in line with income, the government is restricted in terms of the incentives and policies it can implement to stimulate the economy.

However, the fundamentals which helped to attract foreign direct investment are still in place today. Almost 1000 companies have chosen Ireland as a hub for their European networks and the investment continues apace. There is a strong synergy between key stakeholders such as government, business, education and organisations who are tasked with attracting and facilitating business set-up, such as the Industrial Development Authority (IDA) and Enterprise Ireland.

Ireland offers a number of unique measures which ensure that it is the first port of call for many of the world’s leading companies who are looking for a prime location in Europe.

Its highly competitive low tax regime make it one of the most attractive worldwide investment locations. Ireland’s corporate tax rate of just 12.5% on trading income is applicable to any industry or sector. Other competitive tax incentives include a 25% R&D tax credit scheme which aims to encourage foreign and indigenous companies to undertake R&D activity in Ireland; and an intangible assets and Intellectual property scheme which allows for capital expenditure to be written off in line with accounting treatment or over a fixed period of 15 years. Furthermore, in an effort to eliminate or reduce double taxation, Ireland has double taxation agreements in place with 48 countries worldwide with further applications pending.

Other key attractions include Ireland’s young workforce (49.19% of the population is under the age of 35 (IDA Ireland)); high standard of education (Ireland ranks 12th in the 2014 IMD World Competitiveness Yearbook); and productivity and efficiency of labour (Ireland ranks 5th in the 2014 IMD World Competitiveness Yearbook). These factors have contributed to Ireland’s ranking as 1st for flexibility and adaptability of workforce, 1st for attitudes to globalisation and 1st for investment incentives in the IMD World Competitiveness Yearbook 2014.

Merger control regulations, regulated entities and restrictions

No significant barriers are imposed on foreign investment in Ireland. Nor are there any restrictions on the transfer of capital or the repatriation of profits except in pursuance to United Nations, European Union or Irish sanctions.

It is, however, important to be aware of certain restrictions or regulatory requirements which could apply depending on the circumstances of the particular investment. Their applicability will largely depend on the value of the proposed investment and / or the sector of industry involved.

A potentially significant restriction on foreign investment is in the area of mergers, acquisitions and joint ventures. Any merger, acquisition or joint venture which meets the relevant notification thresholds must be notified to the Irish Competition and Consumer Protection Commission (CCPC). The CCPC has the power to refuse to allow the merger or acquisition to proceed or may impose certain requirements on the transaction where the transaction would substantially lessen competition. Ireland operates a “pre-closing” clearance procedure so approval must be obtained before closing and time should be allowed for this to occur. Special provisions apply in relation to media mergers. Where a proposed merger, acquisition or joint venture meets certain threshold criteria, notification to the European Commission (instead of the CCPC) may be required.

Authorisations from regulatory bodies are required in certain sectors, for example, banking, financial services and telecommunications.

The financial services industry and banking sector are regulated by the Central Bank of Ireland (the Central Bank). In order to operate as a financial service or banking business in Ireland, a licence approval or authorisation from the Central Bank is usually required. Certain institutions may already be authorised in another member state and may, therefore, not require a licence from the Central Bank. To obtain a licence the undertaking must satisfy a number of criteria including capital requirements and having appropriate and proper procedures in place.

The Central Bank is also the competent authority in Ireland for the regulation of UCITS and non-UCITS funds. In addition, if the funds are listed on the Irish Stock Exchange (ISE) they will also be subject to regulation from the ISE.

In general, there are no restrictions on financial transfers into or out of Ireland. However, the Minister for Finance can restrict transfers between Ireland and certain designated countries e.g. Iraq and Sudan, provided the restrictions conform with EU law. There is also a requirement to comply with anti-money laundering legislation.
Foreign investment policy

Eurostat figures for 2013 show that Ireland continues to enjoy enviable levels of external trade (OECD 2013). Ireland is the second largest net recipient of foreign direct investment from outside the EU, attracting €36 billion in investment in 2013 (UNCTAD 2014). The USA continues to be Ireland's biggest net investor (OECD 2013).

The Government is keen to ensure that there are no barriers put in the way of international trade or investment. The Government, through organisations like the IDA, seeks to foster an environment which has led to Ireland being one of the most open economies in the world. The 2009-2013 Business Environment Ranking of the Economist Intelligence Unit placed Ireland 20th globally out of 82 countries, naming it as one of the most attractive business locations in the world (Economist Intelligence Unit).

Building on Ireland’s existing strengths is a key strategy for the government and other stakeholders going forward.

Incentives

Ireland offers an extremely cost competitive business environment with operating costs among the lowest in Europe. Working in tandem with a low cost business environment is an attractive package of generous grants available towards new start-up companies. Such grants, which are non-repayable, (subject to terms and conditions), are administered by the IDA and Enterprise Ireland. Some of the key grants include: Capital Grants which offer assistance in setting off costs related to setting up, such as asset acquisition or factory rental; Employment Grants which are available to those setting up businesses in low employment areas; and Training Grants which are available to meet some of the costs of training employees in certain new industries. There are also generous grants and incentives available for those who engage in R&D in key areas. It is important to ensure that these incentives are compatible with EU state aid or otherwise the recipient may have to repay the value of the aid (with interest) to the Irish State.

Types of business vehicles

Forms of business vehicle

Typically, an investor will use a private limited company as the investment vehicle. The main advantage of the private limited company is that shareholder liability is limited to the amount they agreed to pay for the shares. Companies are registered with the Companies Registration Office in accordance with the requirements of the Companies Act 2014 (Act). The Act was signed into law on 23 December 2014 and the majority of the Act commenced on 1 June 2015. The Act consolidates the previous Companies Acts 1963 – 2013 into a single piece of legislation.

Those wishing to offer their securities to the public may wish to use a public limited company. Such companies can be used to trade on a public market, such as the main market of the ISE.

In addition to private limited companies, there are also unlimited companies and partnerships.

Private limited companies

By far the most utilised investment vehicle in Ireland is the private limited company. The incorporation process is quick and inexpensive, taking between 5-20 days to complete depending on whether agreed form documentation is used.

Since the commencement of the Act, there are two types of private limited company – the Company Limited by Shares (LTD) and the Designated Activity Company (DAC). All private limited companies which are incorporated under the previous Companies Acts are required to convert to either an LTD or a DAC. Otherwise, after eighteen months from the commencement of the Act, they will be "deemed" to have become an LTD.

The LTD must have at least one shareholder, one director, a company secretary and an Irish registered office. The DAC must also have at least one shareholder, a company secretary and an Irish registered office. However, it must have at least two directors, although one of the directors may also act as a company secretary.

In both cases, at least one director must be a European Economic Area (EEA) resident, though this requirement may be avoided by entering into an insurance bond to the value of €25,395. There is no requirement that shareholders of either entity be Irish.
The LTD has a single-document Constitution (this is similar to the US Charter or Articles). The Constitution sets out the company’s parameters and regulations and is filed with the incorporation papers. It can be amended after incorporation by shareholder resolution. The LTD has unlimited capacity on the basis that its Constitution does not contain an objects clause.

The Constitution of a DAC consists of a Memorandum of Association and Articles of Association, and as is the case with the LTD, can be amended after incorporation by shareholder resolution. The Memorandum of Association of a DAC contains an objects clause, and so it may be a more suitable entity for a special purpose vehicle or a joint venture company.

The nominal share capital of either entity can be as large or as small as the promoters wish. The capital can be in any currency denomination, although usually it is expressed in Euros and there must be at least one issued share.

The maximum amount of shares to be issued in a DAC will be determined by the authorised share capital as specified in the Memorandum of Association. The amount of authorised share capital can be altered by amending the Memorandum of Association. The minimum number of issued shares is one share per shareholder.

There is a prohibition on the LTD and the DAC (1) offering its securities to the public, subject to specific exceptions for certain limited offers of debentures, shares or short-term money market instruments and (2) having any of its securities or interests in them admitted to trading or listing on any market, in or outside Ireland except that the DAC is permitted to list debentures which are the subject of certain limited offers. If the listing sought is for securities other than debentures, such as shares, the company would have to incorporate or re-register as a public limited company.

The day-to-day management of the LTD and the DAC is generally entrusted to a Board of Directors, each of whom has a wide range of duties (both statutory and derived from common law) and can be personally liable for the debts of a company in certain circumstances, such as non-compliance with the Act. Directors meetings are held as often as agreed by the directors, or as often as determined by the Constitution of the company. There is a statutory requirement to hold at least one board meeting per year to approve the annual financial statements of the company and to hold the Annual General Meeting at which all shareholders are entitled to attend. A person cannot be a director of more than 25 companies incorporated in Ireland.

Directors of a DAC or an LTD are required to ensure that the company secretary has the skills or resources required to discharge his statutory and other duties delegated by directors, and furthermore have a duty to ensure that the person appointed as secretary has the skills necessary to maintain (or procure maintenance of) the company’s records (other than accounting records).

Directors’ compliance statements are required for both company types which are over a certain size (balance sheet of over €12.5 million and turnover which exceeds €25 million). Directors must (1) acknowledge responsibility for securing compliance by their company with tax law, and also certain company law provisions imposing serious penalties for non-compliance, (2) draw up a “compliance policy statement” setting out the company’s policies in respect of compliance, (3) confirm procedures are in place to secure material compliance and (4) review during the financial year arrangements which have not been put in place; and if any of (2) or (4) above are not done, the directors must explain why not.

Where a DAC or an LTD either separately or together with all of its subsidiary undertakings has a balance sheet total which exceeds €25 million and the turnover exceeds €50 million in both of the last two financial years, there is an obligation to have an audit committee or explain why not.

A statutory obligation relating to audit information is imposed on directors of a DAC and an LTD (regardless of balance sheet or turnover thresholds), whereby directors must include a statement in the directors’ report that (1) so far as each director is aware, there is no relevant information that has not been disclosed to the auditors and that (2) each director has taken all the steps which he or she ought to have taken to make himself or herself and the auditors aware of any relevant audit information.

A DAC and an LTD must appoint a statutory auditor who will report to the shareholders on the accounts prepared by the directors. Both company types are obliged to publicly file audited accounts each year. The required detail in these financial statements varies according to the size of the company.

Public limited companies

Public limited companies, for the most part, have the same characteristics as private limited companies. Liability for members is limited to the amount of nominal capital subscribed for. Key differences include: shares in public limited companies are freely transferable and shares can be listed on a stock exchange (e.g. Irish or UK stock exchanges).
The nominal value of the company’s allotted share capital must not be less than €25,000, at least 25% of which must be fully paid up before the company commences business or exercises any borrowing powers. There is no upper limit on the level of issued share capital.

As most companies seeking to invest in Ireland will not require the ability to issue shares to the public, such companies are seldom used by foreign investors. The minimum requirements in relation to issued share capital can also prove unnecessarily onerous for most investors.

**Listing on the Irish Stock Exchange**

The ISE is the competent authority for listing in Ireland and is authorised as a “market operator” of regulated markets and multilateral trading facilities (MTFs) by the Central Bank of Ireland. The ISE has certain regulatory responsibilities which arise from its status as well as other requirements which arise from legislation. In order to take advantage of listing on the ISE a member firm of the ISE must be authorised as an investment firm or be authorised as a credit institution. If a company does not fall under either of the above categories the ISE, at its sole discretion, may admit a company to list on the ISE if certain suitability requirements are met. Companies listed on the ISE are also subject to numerous listing principles which ensure that adequate procedures and controls are in place. Only a public company can be listed on the ISE.

**Unlimited companies**

In an unlimited company, there is no limit on the liability of the members. Recourse may be had by creditors to the shareholders in respect of any liabilities owned by the company which the company has failed to discharge. Foreign investors generally do not use this type of company, due to the risk involved. Such risks can be minimised if the investor has a corporate set up whereby there is a limited liability company as the parent of the unlimited company. An unlimited company does not have to file its annual accounts with the Registrar of Companies, subject to certain exceptions. Such a company can also purchase its shares from its members and can reduce its share capital without recourse to the courts.

An unlimited company may be converted into either a private limited company or a public company.

**Partnerships – General**

Irish law defines a partnership as the relationship that exists between “two or more persons carrying on business in common with a view to profit”. While a partnership may exist between an individual and a company and between two companies, most partnerships are between individuals. Partnerships do not have a separate legal personality distinct from that of its partners. A partnership does not, therefore, enter into agreements in its own name, but in the name of its partners. The assets of a partnership usually belong jointly to the persons making up the partnership with each partner being jointly and severally liable for the debts of the partnership, subject to any agreement governing the partnership which may determine otherwise. Partnerships are generally not required to file accounts with the Registrar of Companies.

**Limited partnerships**

A limited partnership consists of at least one general partner (who has unlimited liability) and one or more limited partners. Limited partners are liable for partnership obligations only to the extent of the amount they contribute to the partnership. The total number of partners in a limited partnership cannot exceed 50. If the general partner is a limited company, the limited partnership is required to file its accounts with the Registrar of Companies. Partnerships can be formalised by way of a written partnership agreement. All partnerships are required to register the business name of the partnership with the Registrar of Companies.

**Branch operations**

Foreign corporations not wishing to incorporate a company in Ireland may choose to establish a branch operation. While not as advantageous as incorporating an Irish company, for some branches this may serve a particular purpose. A corporation will be deemed to have a branch in Ireland if its Irish operation is trading in Ireland, has an element of permanency, has a separate management structure which enables it to negotiate contracts with third parties, and has an element of financial independence.

Foreign corporations establishing a branch in Ireland are obliged by law to register with the Companies Registration Office. This is done by lodging a registration document along with copies of the corporation’s constitution and bye laws, particulars of the directors and secretary, details of the corporation’s address in Ireland and the name and address of one or more persons resident in Ireland authorised to accept service of proceedings or any notices required to be served on the corporation.
Registration must take place within one month of the branch’s establishment. Foreign corporations with branches in Ireland are required to file their accounts publicly each year in the Companies Registration Office.

**Societas Europaea**

A Societas Europaea (SE) is a European public limited company that can be formed on registration in any one of the member states of the European Economic Area, including Ireland. It can be formed in one of four different ways: by merger of two or more public limited companies; formation of a holding SE by two or more private or public limited companies; formation of a subsidiary SE by two or more companies, firms or other legal bodies and transformation of an existing public limited company governed by the laws of a Member State into an SE.

Before an SE is formed, negotiations must take place between the management of the companies proposing to form the SE and a special negotiating body (SNB), which represents the employees of those companies. The aim is to ensure that the employees are kept up to date with developments in the business.

The management structure of an SE can either be a "one-tier system" where an "administrative organ" is responsible for the day to day management of the SE (similar to an Irish corporate model) or a "two-tier system" where a "management organ" manages the SE and a separate "supervisory organ" supervises the work of the management organ.

An SE has the ability to migrate its registered office from one Member State to another.

SEs are still not widely utilised as a form of corporate vehicle. In large part, this is because there are only a few advantages that an SE structure would have over a traditional holding company structure, and because, once formed, they are essentially treated as, and are governed by, the same laws that apply to a typical public limited company.

**Taking security and charging of assets**

Irish law allows for a number of different types of security interest to be created over assets including mortgages, charges, pledges and liens. The choice of which type of security interest to create will depend on a number of factors, the most important of which are the value of the asset being secured, the level of protection required by the security taker, and the degree to which the security giver requires use and possession of the asset during the security period.

In Ireland the most common security interest taken over business assets is a charge. A charge can be either fixed or floating. A fixed charge creates an immediate right in the assets which are subject to the charge, from which it is implicit that the holder of the charge has control of the assets. In contrast, a floating charge gives the holder an immediate right in the class of assets charged but which only attaches to the specific assets when the charge crystallises, leaving the chargor to manage and dispose of the assets in the ordinary course of business until crystallisation. A floating charge is mainly used for assets which will be frequently changing in the course of business, e.g. book debts or trading stock.

Often, several different types of security interest may be taken over the assets of a business e.g. mortgage, fixed charge and floating charge. This can be done by way of separate security documents or by way of a single document, known as a debenture.

Where security is granted over the assets of an Irish company, this is required to be registered in the Companies Registration Office (CRO). Depending on the type of asset secured there may be further registration requirements. For example, where land is secured this may have to be registered in either the Land Registry or the Registry of Deeds.

Where a company has granted a number of different security interests in its assets, the question of priorities may arise. The rules on priorities are complicated due to the different types of security interests and methods of perfection. Fixed charges will take precedence over floating charges, which then may also rank behind certain preferential creditors. For mortgages and charges, priority in respect of the same type of charge will essentially depend on the date of creation of the charge. It is also possible for the various security holders to agree an inter-creditor arrangement which may affect the order of priority.

Enforcement of the security will depend on the terms of the security document. The most common method of enforcement in Ireland is the appointment of a receiver. Where a mortgage or charge has been granted, the security document will usually give the security holder power to appoint a receiver where an event of default has occurred e.g. default in the payment of principal or interest. The main function of the receiver will be to realise the secured assets and to distribute the proceeds to
the charge holder, subject to satisfying any other prior interests. The receiver will also frequently be appointed manager of the business.

Employee relations/industrial relations

Every individual has a constitutional right to join a union of their choice, however Irish law does not compel employers to "recognise" trade unions. In other words, employers are not obliged to enter into agreements with, or negotiate with trade unions, in relation to their employees. Under the Industrial Relations (Amendment) Act 2015, the Labour Court has power to adjudicate in industrial disputes and in limited circumstances a binding determination where voluntary procedures have not resolved the issue. References may not be made where the employer can demonstrate that it collectively bargains with its employees directly (for example through some form of employee council). The principal dispute resolution authorities in industrial relations matters in Ireland are the Workplace Relations Commission (WRC) and the Labour Court. The WRC provides a comprehensive range of industrial relations services to employers and trade unions, including an advisory service and a conciliation service.

The regulation of the employment relationship

Employment law in Ireland is heavily regulated by a variety of laws. Some of the most important of these are as follows:

 Terms of Employment (Information) Act 1994-2012

This Act provides that an employer, if it has not already done so, must within two months of the commencement of employment give the employee a written statement of the terms and conditions of their employment.

 Organisation of Working Time Act 1997

This sets out details of the maximum working week. The maximum average working week is 48 hours from which there is no derogation. The Act also details an employee's entitlement to annual leave. Employees have a statutory entitlement to paid annual leave on the basis of time actually worked.


Under these Acts employers are prevented from discriminating against employees and job applicants on grounds of sex, civil status, religion, age, race, disability, family status, sexual orientation and membership of the travelling community. Discrimination exposes the employer, irrespective of whether the individual becomes an employee, to a claim under the Employment Equality legislation. The legislation protects employees from direct discrimination, indirect discrimination, harassment and victimisation.


This legislation sets out the minimum periods of notice which both employees and employers are obliged to give in the case of termination of employment.

 National Minimum Wage Act 2000

Ireland has a national minimum wage. The current minimum wage for adult workers is €9.15 per hour. Employers of workers which are subject to Employment Regulation Orders (EROs) and Registered Employment Agreements (REAs) may set out other minimum rates of pay (which are usually higher than the national minimum wage rate) and terms.

Unfair Dismissals Acts 1977 to 2015

This legislation provides employees with protection against dismissal without cause. Dismissals will be unfair unless they are on the grounds of conduct, competence, capability, redundancy or some other substantial reason.

European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (SI 131 of 2003)

These Regulations are aimed at safeguarding the rights of employees in the event of a transfer of ownership of undertakings, businesses or parts of businesses which entails a change of employer.
Redundancy Payments Act 1967 – 2014
This legislation provides protection for employees where their position ceases to exist and they are not replaced.

The contract of employment
The terms of a contract of employment can be express or implied, oral or written. The contract of employment does not have to be in writing, however, each employee is entitled to a written statement of their terms and conditions of employment. This requirement is necessitated by the provisions of the Terms of Employment (Information) Act 1994 to 2012.

Terms may be implied from a variety of sources. They can be implied by law, by statute, by custom and practice and by the conduct of the parties. If a term is implied into a contract, it will have the same effect as if it were written down and expressed between the parties. Examples of terms implied by law include certain fundamental terms that may be implied into many contracts of employment. Many of these take the form of duties the employer and employee will have towards each other, such as the duty of loyalty and fidelity and the duty to carry out reasonable instructions of an employer. Terms implied by statute refer to the fact that legislation implies various terms into the contract of employment. The purpose of this is to afford certain minimum rights to employees out of which the parties cannot contract. Examples of such legislation include the Unfair Dismissals Acts and the Employment Equality Acts. A term may be implied by virtue of custom or practice where it is well known in that particular business.

A collective agreement is one made by or on behalf of an employer and a representative trade union which governs pay and/or conditions of employment. Such agreements may form part of the terms and conditions of employment in a particular body.

Consultation
As a result of our membership of the European Community, Ireland has had to transpose legislation imposing significantly enhanced obligations to consult with employees.

The main sources of this legislation are:
- Transnational Information and Consultation of Employees Act 1996. This legislation obliges multi-national organisations to establish European Works Councils (EWCs)
- Employees (Provision of Information and Consultation) Act 2006. This Act provides a general framework setting out the minimum requirements for the right to information and consultation for employees in enterprises employing at least 50 employees
- European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 (SI 131 of 2003). This Act requires that when there is a transfer of a business falling within the Regulations, the transferor and transferee must inform and, in certain situations, consult with the representatives of the employees that are affected by the transfer


Termination of employment
Dismissal of employees is regulated by statute and the employment contract. The Unfair Dismissals Acts 1977 - 2015 provide employees with significant protection against dismissal without cause. With the exception of employments that have been terminated allegedly on the grounds of maternity, an employee’s trade union activity, for exercising rights under the National Minimum Wage Act 2000, or for making a protected disclosure, only employees who have 12 months’ service with an employer (inclusive of any contractual or statutory notice period) are protected from unfair dismissal under the Unfair Dismissals legislation. A dismissal is generally presumed to be unfair unless the employer can demonstrate that it was lawful, i.e. wholly related to the capability, conduct or redundancy of the employee. A dismissal can also be fair if it can be justified on another “substantial ground”. A dismissal arising from an employee’s membership or proposal to join a trade union, an employee’s religious or political opinions, actual or threatened civil or criminal proceedings by the employee against the employer, the race, colour, sexual orientation of the employee, the pregnancy of the employee, or matters connected with that
or the employee’s age or membership of the travelling community, unfair selection for redundancy, and for making a protected disclosure, are all deemed to be unfair grounds for dismissal. The Unfair Dismissals Acts provides for three possible remedies: reinstatement, re-engagement or compensation of up to two years’ remuneration (five years in the case of unfair dismissal on the grounds of making a protected disclosure).

An employee may also take common law wrongful dismissal action in relation to a breach of contractual rights. In such circumstances an employee may apply to the court seeking an injunction restraining the purported termination. Wrongful dismissal is, essentially, an action at common law which is taken by an employee in circumstances where a contract is terminated by the employer and where damages have traditionally been assessed as the remuneration which the employee would have earned had he or she been permitted to work out the balance of the contract, or notice period to which the employee was entitled to had the contract not been unlawfully terminated.

Ireland does not have mandatory disciplinary procedures but best practice due process standards have been identified by the courts. There are also Codes of Practice governing grievance and disciplinary procedures which offer guidelines for employers. These codes are not legally enforceable but they are used as evidence that legal requirements have or have not been met. Employers are strongly advised to have a written disciplinary policy.

Redundancy

Redundancy is broadly defined under the Redundancy Payments Acts 1967 to 2014. It can range from a complete shutdown of a business to a change in the manner in which the work will be done in the future which necessitates a reduction in manpower.

The economic test is key to establishing that a valid redundancy exists. In a shutdown scenario this test is usually automatically satisfied. However, in individual redundancies the economic justification may not always be as clear cut. It is the position rather than the person that is redundant. If the person is to be replaced this suggests that it is not a valid redundancy. Specific statutory rights exist for employees with at least 2 years’ continuous service. These rights include an entitlement to redundancy pay and paid time off to look for alternative employment or arrange training. Redundancy pay is calculated on the basis of two weeks’ pay (capped at €600 per week) per year of service plus one weeks’ bonus pay.

Collective redundancies are governed by the Protection of Employment Act 1977 to 2014. A collective redundancy is one that involves making a specified number of employees redundant within a 30 day period. Where collective redundancies arise specific statutory notification and consultation obligations are triggered. Pursuant to the relevant requirements, when proposing to create collective redundancies, employers must consult with the appropriate employee representatives “in good time” and in any event at least 30 days before giving the notice to dismiss.

The Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 provides protection in the case of an exceptional collective redundancy. An exceptional collective redundancy is a dismissal which is collective and effected on a compulsory basis, and in circumstances where the employees have been replaced by other employees on materially inferior terms to the dismissed employees and who are employed either directly by the employer or whose services are to be provided to that employer by an independent contractor to perform essentially the same functions as those previously dismissed.

Employment permits

Generally, non-European Economic Area (EEA) nationals require an Employment Permit from the Department of Jobs, Enterprise and Innovation before commencing employment in Ireland. The employer or the employee, in certain circumstances, can apply for the permit by submitting the appropriate completed application form together with supporting documentation and appropriate fees. Fees for employment permits vary but are generally €1,000 up to a twenty four month period and €500 for six months or less. Depending on the type of permit required, processing times can vary from three weeks to six weeks. This can vary even more at busier times of the year and can, in certain circumstances, take up to twelve weeks. There is no automatic entitlement to an employment permit and the Department of Jobs, Enterprise and Innovation has a broad discretion in considering applications. The Employment Permits Acts 2003 and 2006 provide for various offences in respect of taking up employment or employing workers without the appropriate permit. The employer may find itself liable to a fine of up to €250,000 and / or face imprisonment. The Employment Permits (Amendment) Act 2014 came into effect in October 2014. The Act updates and amends the existing regime under the 2003 and 2006 Acts. Amongst the main changes is the introduction of nine new categories of employment permits.
Protected Disclosures Act 2014

In July 2014, the Protected Disclosures Act 2014 came into force. It introduced pan-sectoral whistleblowing protection for the first time in Ireland. The Act applies to a wide variety of workers, including employees, contractors, agency workers, and members of the Garda Síochána. The legislation provides broad protection for workers from being penalised where they disclose information relating to wrongdoing which comes to their attention in the workplace.

Workplace Relations Act 2015

This Act, which commenced on 1 October 2015 radically overhauled the employment rights structures in Ireland. The new Workplace Relations Commission replaces the existing Employment Appeals Tribunal, Equality Tribunal, National Employment Rights Authority, Labour Relations Commission and Rights Commissioner Service. The Workplace Relations Commission will deal with all complaints at first instance and a newly expanded Labour Court will be the single appeal body for all workplace relations appeals.

Taxation – Ireland

Overview

Ireland has, for many years, used tax incentives as a powerful tool to attract inward investment, and has been extremely successful in this regard, particularly in terms of US investment in Europe. The principal incentive has long been the standard corporation tax rate of 12.5% on trading profits, and the Government’s commitment to this rate has been reaffirmed on many occasions most recently by the Minister for Finance on 13 October 2014 in the course of giving his Budget speech for 2016.

To complement the 12.5% rate, Ireland has also introduced tax legislation intended to make Ireland an attractive location for holding companies and as regional headquarters, particularly for EMEA jurisdictions.

This legislation includes the introduction a number of years ago of a capital gains tax exemption for gains on the sale of certain shareholdings (the substantial shareholdings exemption) and making improvements to the taxation approach to foreign dividends - extending the 12.5% rate to certain dividends and facilitating pooling of credits.

In addition, continued improvements have been made to the Research & Development Tax Credit regime, which previously allowed for a tax credit of 25% of incremental R&D expenditure over a base year amount (the spend in 2003), with the first €300,000 of qualifying expenditure qualifying for the tax credit without reference to the base year expenditure, which can be set off against certain corporation tax or payroll taxes of key employees. Since the passing of the Finance Act 2014, the €300,000 base year restoration has been removed altogether making the R&D tax credit regime volume based. This is given in addition to the normal corporation tax deduction for the expenditure.

Also, tax depreciation was introduced a number of years ago in the case of the acquisition of IP – it can either follow the relevant accounting depreciation charge or be calculated on the basis of a 15 year write down. While there was an 80% restriction on the deduction (such that only 80% of the profits of a business exploiting these rights could be reduced), with any excess being carried forward that restriction has since been removed by the Finance Act 2014 for accounting periods commencing on or after 1 January 2015. There are also allowances for expenditure on scientific research and know-how.

The Finance Act 2015 introduced an OBCD BEPS compliant Knowledge Development Box (KDB) to encourage companies to develop intellectual property in Ireland. Income qualifying for the KDB will be subject to a reduced rate of corporation tax (6.25%).

Tax residence concepts - individuals

Under Irish tax law, there are three primary concepts – residence, ordinary residence and domicile.

An individual will be resident in Ireland for tax purposes where he is in Ireland for either a total of 183 days in any tax year or more than 30 days in a tax year where the total number of days in that year and the previous tax year exceed 280 (known as the “look back” rule). A day will be taken into account where a person is present at any time during the day (and not merely at midnight, as was once the case). It is also possible to elect to be resident in certain circumstances.
An individual will be ordinarily resident in Ireland where he has been resident in Ireland for each of the three preceding tax years. An individual will only cease to be ordinarily resident in Ireland when he has not been an Irish resident for the three preceding tax years (applying the foregoing rules for residence).

As a matter of Irish law, every individual must have a domicile, which is best described as his “permanent home”. A domicile of origin (the country of domicile of a parent, generally the father) is deemed to subsist until a domicile of choice is acquired. Physical presence, coupled with an intention to reside permanently in a country, are generally necessary to prove acquisition of a domicile of choice.

**Tax implications of domicile and residence**

Broadly, individuals who are both resident and domiciled in Ireland are subject to Irish tax on their worldwide income, wherever it arises. Individuals resident and non-domiciled in Ireland are only liable to income tax in respect of income from non-Irish sources (excluding income arising from an employment exercised in Ireland) to the extent that it is brought into Ireland – the “remittance basis”.

Individuals not resident in Ireland are, generally, only liable to Irish income tax on income arising in Ireland (subject to the terms of any applicable double tax treaty). Such individuals are generally only liable to Irish capital gains tax on gains arising on the disposal of certain specified assets.

The primary effect of being ordinarily resident is that, even if the individual is not actually resident for that tax year, there can be certain residual tax liabilities, for example in the case of disposals of capital assets or certain investment income.

**Income tax rates**

**Income tax** is charged at two rates. For the tax year 2016, the standard rate is 20% and the higher rate is 40%. The amounts (in Euros) beyond which the higher rate is relevant are as follows:

<table>
<thead>
<tr>
<th></th>
<th>(€)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single person</td>
<td>33,800</td>
</tr>
<tr>
<td>Married couple (one earner)</td>
<td>42,800</td>
</tr>
<tr>
<td>Married couple (two earners)</td>
<td>67,600</td>
</tr>
</tbody>
</table>

A universal social charge is payable on gross income of individuals in addition to income tax. For the year 2016 the following rates apply:

<table>
<thead>
<tr>
<th>(€)</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>First 12,012</td>
<td>1</td>
</tr>
<tr>
<td>Next 6,656</td>
<td>3</td>
</tr>
<tr>
<td>Next 51,376</td>
<td>5.5</td>
</tr>
<tr>
<td>Remainder</td>
<td>8</td>
</tr>
</tbody>
</table>

In the case of individuals who have non-PAYE income that exceeds €100,000 in a year there is a 3% surcharge.

**Pay related social insurance** is payable by individuals aged between 16 and 66 on their income.
Contributions in respect of employed individuals are as follows:

► Payable by employer: 10.75% of pay (certain lower rates may apply)

► Payable by employee: 4% of pay

Contributions in respect of self-employed individuals are made at 4% of all non-employment income, i.e. self-employed income and investment and other income.

**Tax residence - companies**

A company will be **tax resident** in Ireland if it is incorporated in Ireland, on or after 1 January 2015, except where the company is regarded as resident in a country other than Ireland and not resident in Ireland under a double taxation agreement between Ireland and that other country. A company will be tax resident in Ireland if it is incorporated in Ireland prior to 1 January 2015, subject to certain exceptions or, broadly, Ireland is the place of management and control of the company. In addition, such a company will be regarded as tax resident in Ireland from the earlier of 1 January 2021 or from the date, after 31 December 2014, of a change in ownership of the company where there is a major change in the nature or conduct of the business of the company in the period from one year before the change of ownership and five years after the change of ownership except where the company is regarded as resident in a country other than Ireland and not resident in Ireland under a double taxation agreement between Ireland and that other country.

**Corporate taxation – principles and rates**

The worldwide profits of an Irish tax resident company, wherever it arises, will normally be liable to Irish corporation tax. However, double tax treaties may impact on this.

Corporation tax is charged at 12.5% on all corporate trading profits, with the exception of mining, petroleum activities and dealing in land. Generally, other corporate income is taxed at 25% (although many foreign dividends are entitled to the 12.5% rate (and can avail of foreign tax credits); dividends from other Irish resident companies are generally exempt from tax).

The 12.5% rate of tax applies to a company’s trading income. There is no statutory definition in Irish tax law as to what constitutes a “trade”. Instead, one has regard to certain factors, known as the “badges of trade” (such as the frequency of transactions or supplementary work carried on in relation to the asset), the presence of some or all of which may indicate that the activities of the company are in the nature of a trading rather than a non-trading activity. Broadly, this distinguishes passive income arising from the mere holding of an asset from active income derived from real business activity or the active exploitation of property. Clearly where substantial human intervention is required to generate the income, this points to the existence of a “trade”. In order to qualify for the 12.5% rate of tax, it must also be shown that the trade is at least being partly carried on in Ireland.

Non-trading income of a company (apart from certain dividends as mentioned above) will be taxed at the rate of 25%. Capital gains of a company are taxed at a general rate of 33% of the chargeable gain. Undistributed profits are not generally exposed to any additional taxation, except in the case of “close companies”.

**Taxation of non-resident companies**

Subject to applicable double tax treaty provisions, a non-resident company carrying on business in Ireland through an agency or branch will be liable to corporation tax on all profits arising through that agency or branch.

Any Irish source income of a non-resident company which does not carry on business in Ireland through a branch or agency will be subject to Irish income tax (subject to treaty relief). Additionally, any non-resident company which disposes of certain assets, including Irish land, buildings or mineral rights, goodwill or assets of an Irish business, in certain cases, Irish patents, and unquoted shares deriving the greater part of their value from such assets will be subject to capital gains tax on the disposal.

**Transfer taxes**

Stamp duty is a one-off tax on documents implementing certain transactions. It is payable within 30 days of the execution of the document.
The most commonly encountered documents that are subject to stamp duty are transfers of Irish land and transfers of Irish shares. Transfers of land are generally charged at 2%, and transfers of Irish shares other than those listed on the Enterprise Securities Market (subject to the passing of a Ministerial Order) (including those effected through the CREST system) are charged at 1%.

Stamp duty also has application to certain agreements and transfers of other types of property but this mainly only arises in relation to transfers of goodwill of an Irish business, benefit of contracts or certain debts.

Exemptions exist in the case of Intellectual property (as well as any goodwill attributable to IP) and certain financial instruments and transactions. In addition, various reliefs apply in the case of company reconstructions and amalgamations and the transfer of assets between 90%+ “associated” companies.

**Taxation of dividends paid to foreign corporate shareholders**

Ireland operates a regime of dividend withholding tax which is charged at the standard rate of income tax, currently 20%, on dividends and other distributions paid by Irish resident companies. There are many exemptions by reference to the status and residence of a shareholder, and dividends paid to another Irish resident company are franked.

Exemptions are available in the case of dividends paid to the following foreign corporates:

► an EU company holding at least 5% of the Irish company (Irish domestic enactment of Parent / Subsidiary Directive)

► a company which is not resident in Ireland but which is resident in an EU Member State or a country with which Ireland has a double tax treaty, provided that company is not controlled by any person or persons resident in Ireland

► a company not resident in Ireland, which is ultimately controlled by a person or persons resident in an EU Member State or a country with which Ireland has a double tax agreement or

► a company not resident in Ireland whose (or whose 75% parent’s) principal class of shares is substantially and regularly traded on a stock exchange in an EU Member State or country with which Ireland has a double tax agreement

With the exception of the application of the EU Parent / Subsidiary Directive, these exemptions need to be vouched to the Irish dividend paying company by the shareholder lodging a declaration with appropriate certification of the circumstances grounding the exemption.

**Taxation of foreign dividends received by Irish companies**

Ireland introduced provisions a number of years ago to facilitate the use of Ireland as a holding company location. Broadly, the following is the position:

► there is an exemption from corporation tax in the case of portfolio dividends (max 5% holding) from companies resident in the EU or in tax treaty partner countries which are held for the purposes of the trade of the recipient

► otherwise, foreign dividends are taxable - the gross dividend is fully subject to tax with credit for foreign tax suffered as set out below

► foreign dividends paid by companies resident in the EU or in tax treaty partner countries or in countries which have ratified the Convention on Mutual Administrative Assistance in Tax Matters out of trading profits are taxed at 12.5%

► dividends from portfolio (max 5%) holdings in companies resident in the EU or in tax treaty partner countries or in countries which have ratified the Convention on Mutual Administrative Assistance in Tax Matters can avail of the 12.5% rate, whether or not paid out of trading profits (unless exempt as above)

► foreign dividends paid out of trading profits may also be taxed at 12.5% where the company paying the dividend is, or is a 75% subsidiary of, a quoted company (the principal class of shares of which is substantially and regularly traded on an exchange in an EU member state or treaty partner country or in a country which has ratified the Convention on Mutual Administrative Assistance in Tax Matters)
Credit is generally available for foreign withholding tax (and, subject to compliance with certain requirements (such as having 5% voting rights), for foreign underlying tax) on dividends with availability of pooling and carry forward (certain ring fencing rules for credits relating to dividends taxed at 12.5%).

Taxation of interest paid to foreign corporate shareholders:
Interest paid by an Irish company to a non-Irish resident is subject to interest withholding tax, currently at the rate of 20%.

There are many domestic exemptions from this withholding tax, including where, broadly, the interest is paid by a company in the ordinary course of its trade to a company which: (i) is tax resident in an EU Member State (other than Ireland) or a country with which Ireland has signed a double tax treaty; (ii) that country imposes a tax that generally applies to interest receivable in that jurisdiction by companies from sources outside that jurisdiction; and (iii) interest is not paid to recipient in connection with any trade or business which it carries on through an Irish branch or agency.

Note that interest can be re-characterised as a non-deductible dividend in certain cases — for example, when paid by a company to a non-EU 75%+ parent.

Taxation of royalties paid to foreign corporate shareholders:
Withholding tax applies to patent royalties at a rate of 20%, but an exemption is available where the patent royalties are paid by a company in the ordinary course of its trade to a non-Irish tax resident company which is resident in another EU member state or a treaty partner jurisdiction, where: (i) that country generally taxes foreign source royalty income received by companies; (ii) the royalty is not paid in connection with a trade or business carried on in Ireland by the payee; and (iii) the payment is made for bona fide commercial purposes and not for tax avoidance purposes.

In addition, a published concession provides that the Revenue will grant an exemption from the obligation to deduct withholding tax where patent royalties are paid in the normal course of the paying company’s trade to a company which is not tax resident in Ireland and does not carry on a trade in Ireland through a branch or agency, where: (i) the royalty is payable in respect of a foreign patent (originally registered outside Ireland in relation to an invention developed outside Ireland) under a licence agreement executed outside Ireland and subject to the law and jurisdiction of a foreign territory; and (ii) the payment is not part of a conduit arrangement whereby the payment represents substantially all of the income received or receivable by the paying company in connection with the licensing of the same foreign patent. Application must be made to Revenue for this exemption to apply.

Withholding is not imposed on other forms of royalties (e.g. copyright), nor on payments such as aircraft lease rentals unless exceptionally the payments could be regarded as ‘annual payments’ - payments in the nature of pure income profit.

No thin capitalisation
There are no specific thin capitalisation rules, so that a company can be primarily debt-financed. However, there are certain restrictions on interest deductibility – for example, where the interest is “connected with” shares in the company, is “excessive” or is paid to a 75%+ non-EU parent company.

Recently, several restrictions have been introduced in respect of interest deductibility on an loan granted by a related party, which was obtained in order to finance the acquisition of assets from another related party.

No CFC rules
Ireland does not have general controlled foreign company rules. However, it does have certain “close company” rules which in certain cases can attribute a gain of a foreign subsidiary to the Irish company.

Limited transfer pricing rules
In 2010, Ireland introduced certain limited transfer pricing provisions – the scope of these is limited to relatively large trading groups and their effect is limited to ensuring that deductions are not overstated / receipts are not understated for Irish tax purposes.
In addition, Ireland has long had an indirect form of transfer pricing rule in that a cardinal principle of deductibility is that an expense must have been incurred "wholly and exclusively" for the purposes of the relevant trade.

**Taxation of imports and exports**

Imports and exports are free of customs duties within the EU. VAT generally arises in the destination country, and this would apply to imports from non-EU countries. Exports to non-EU countries are not, generally, subject to EU VAT.

**Wide treaty network**

Ireland has a wide network of treaty partners - comprehensive double taxation agreements have been signed with 72 countries (see list), of which 70 are currently in effect. The agreements generally cover direct taxes, which in the case of Ireland are income tax, corporation tax and capital gains tax.

**List of 72 countries with which Ireland has signed a Double Taxation Agreement as at 1 April 2016**

(68 of these are currently in force)

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Dispute resolution

Litigation

There are currently five main courts in Ireland: in ascending order, they are the District Court, the Circuit Court, the High Court, the Court of Appeal and the Supreme Court. Civil proceedings in Ireland are conducted in the District Court, Circuit Court or the High Court. The Supreme Court is the final court of appeal. The Court of Appeal was established on 28 October 2014 following a Constitutional amendment. It provides an immediate tier of appeal between the Supreme Court and the High Court. The Supreme Court only hears cases on appeal from the Court of Appeal where the issue involved concerns a matter of general public importance or where it is in the interests of justice that the appeal be heard by the Supreme Court. In exceptional circumstances, there is also a right of appeal directly from the High Court to the Supreme Court.

Ireland has also recently introduced new monetary jurisdiction limits for the lower Courts. While most major commercial litigation will still be heard in the Commercial Court, parties do need to consider their choice of Court and the value of the claim.

For large commercial disputes which exceed a threshold of €1 million (though some disputes with a value less than €1 million can also be heard in this Court), the Commercial List of the High Court, colloquially known as the “Commercial Court”, deals with such disputes. Entry into the Commercial Court is at the discretion of the Judge in charge of the list. The main advantage of the Commercial Court is the speed with which it deals with cases. On average, it takes approximately 20 weeks for a case to be processed from start to finish.

While the courts have discretion in relation to awarding legal costs, the general rule is that the successful party is awarded most if not all of its costs.

Alternative Dispute Resolution (ADR)

Arbitration


The grounds for challenging an arbitral award are set out in Article 34 of the Model Law and are extremely limited. Under the Act, a single Arbitration Judge has been appointed to deal with any applications made to the court in connection with arbitrations. Irish courts are broadly supportive of the arbitral process, and there are precedent judicial decisions to that effect.

Expert determination

This process involves the parties to a dispute agreeing to appoint an expert from a particular specialist area to adjudicate their dispute. This process can be particularly useful in disputes involving technical issues. There is no statutory framework governing expert determination and the terms and conditions governing the expert’s appointment provide the expert with his / her jurisdiction to decide the dispute. Once fair procedures are observed in the expert determination process, it is difficult if not impossible to overturn an expert’s decision in the courts.

Mediation

Mediation is a process whereby an independent third party, appointed by the parties to a dispute, facilitates the parties in reaching a negotiated resolution of that dispute. The Rules of the Superior Courts promote the use of mediation and provide that the refusal or failure of a party to participate in mediation, without good reason, may be taken into account by the court when awarding costs. The courts have a broad discretion to recommend to disputing parties that they should have their dispute mediated.

It is also worth noting that the EU Mediation Directive 2008/52/EC was transposed into Irish law in May 2011 by the European Communities (Mediation) Regulations 2011 (the Regulations). The Regulations apply to cross-border disputes in civil and commercial matters only. While they do not extend to domestic mediations, the Regulations help to set standards for domestic mediations.
Competition

Introduction

Competition law in Ireland is set out in the Competition Act 2002 (as amended) (the Act). The Competition and Consumer Protection Commission (the CCPC) is an independent statutory body charged with the enforcement of the provisions of the Competition Act, the study and analysis of competition in Ireland and an advisory role to government and other public bodies on competition issues. The CCPC must enforce the Competition Act by court action – it does not have power to impose fines or other sanctions itself. The Competition Act applies to control the behaviour of “undertakings” – an undertaking is defined by the Competition Act as ‘a person being an individual, a body corporate or an unincorporated body of persons engaged for gain in the production, supply or distribution of goods or the provision of a service’.

Restrictive agreements

EU and Irish competition law both apply in Ireland. Section 4 of the Act mirrors article 101 of the Treaty on the Functioning of the European Union (the Treaty) (ex article 81 of the EC Treaty) and provides for a general prohibition in respect of all agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services in the State (i.e. the Republic of Ireland) or in any part of the State where those agreements do not meet certain efficiency criteria.

Specifically, section 4 of the Competition Act prohibits agreements, decisions or concerted practices that directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production, technical development or investment or share markets or sources of supply.

Breach of section 4 of the Competition Act or article 101 of the Treaty is a criminal offence under section 6 of the Competition Act as well as giving rise to a civil right of action under section 14 of the Competition Act. Higher penalties, including imprisonment, exist for hard-core cartels, which are defined in section 6(2) of the Competition Act as: agreements, decisions or concerted practices among competing undertakings the purpose of which is to directly or indirectly fix prices; to limit output or sales; or to share markets or customers. ‘Competing undertakings’ are undertakings that provide or are capable of providing goods or services to the same applicable market.

Section 4 applies to agreements or arrangements between ‘undertakings’, associations of undertakings or concerted practices involving undertakings. An undertaking may be an individual, a company or an unincorporated body that is ‘engaged for gain in the production, supply or distribution of goods or the provision of a service’.

The maximum fine for a restrictive agreement in breach of section 4 of the Competition Act is €5 million or 10 per cent of turnover, whichever is higher. Individuals (including company directors, managers or similar company officers) who authorised or consented to anti-competitive behaviour may also be criminally prosecuted for cartel activities and, if found guilty, are liable to the same fines as undertakings, imprisonment for up to ten years, or both. Directors and managers are presumed to have consented to anti-competitive behaviour unless they can prove the contrary. Provision is also made for maximum daily default fines of €50,000 for each day an offence continues after the date of its first occurrence.

On summary prosecution (ie in a trial without a jury), the CCPC may seek smaller fines and shorter imprisonment terms (e.g. up to six months).

Abuse of dominance

Abuse of a dominant position is prohibited by section 5 of the Competition Act. It is very similar to the provision in Article 102 of the Treaty, except that it refers to abuse of a dominant position in trade for any goods or services in the State (i.e. Ireland) or in any part of the State (which does not have to be a “substantial” part of the State).

The section 5 prohibition applies only to dominant “undertakings”. Public bodies that carry on an economic activity such that they satisfy the definition of an undertaking are subject to the Act.

There is no definition of dominance within the Competition Act. The Irish courts and the CCPC have adopted the definition formulated by the Court of Justice of the European Union in case 27/76, United Brands v Commission [1978] ECR 207, ECLI:EU:C:1973:22 as a “position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.”
Section 5(2) of the Competition Act sets out the examples of abuse reflecting those set out in Article 102 of the Treaty. Such abuse may consist of, for example:

► directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions limiting production, markets or technical development to the prejudice of consumers

► applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage or

► making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts

In enforcing the section 5 prohibition, the CCPC and the courts largely adopt an effects-based approach.

The maximum penalty that may be imposed for a breach of section 5 of the Competition Act or article 102 of the Treaty is a fine of €5 million or 10 per cent of turnover, whichever is the greater. There is no provision within the Competition Act for imprisonment in cases involving the abuse of a dominant position.

**Intellectual property**

**Patents**

In order to be eligible for the grant of a valid patent the invention must be new, involve an inventive step and be capable of industrial application.

Any person is entitled to make an application for a patent through a request for the grant of a patent, using the appropriate patent application form which must be submitted to the Irish Patent Office (www.patentsoffice.ie).

The owner of a registered patent is entitled to bring proceedings for the infringement of a patent if the patent is used by a third party without permission. Remedies available to the owner include an injunction to prevent the future use of the invention and an award of damages or an account of profits for infringement. Proceedings can be brought in the High Court, and either party can apply to have the proceedings entered into the Commercial Court list (the Commercial Court is a division of the Irish High Court).

Irish patents are valid for twenty years. Ireland also offers a "short-term" patent, valid for a maximum of ten years. To maintain a patent in force, annual renewal fees must be paid each year from the third year.

**Trademarks**

A trade mark is any sign capable of being represented graphically which is capable of distinguishing the goods or services of one undertaking from those of other undertakings such as words, designs, logos, letters, numerals or the shape of goods or of their packaging.

To apply for an Irish trade mark, the appropriate trade mark application form should be completed and submitted to the Irish Patent Office.

The owner of a valid Irish trade mark is entitled to bring proceedings for trade mark infringement in the Irish High Court and remedies available include injunctive relief to prevent the use of the trade mark and an award of damages. Either party to the proceedings can apply for the proceedings to be entered into the Commercial Court list.

Registration is initially for a period of ten years (from the date of filing of the application) but it can subsequently be renewed every ten years on payment of the renewal fee.

**Designs**

A design is defined under Irish law to mean the appearance of the whole or a part of the product resulting from the features of the lines, contours, colours, shape, texture and / or materials of the product or its ornamentation. A design is protected by a design right to the extent that it is new and has individual character.
Designs may be registered (for Ireland or the European Community). Only the owner of the design can apply for a design registration. The owner can be the author of the design or the employer of the person who created the design, subject to any contract or agreement to the contrary. To apply for an Irish design, the design application form should be completed and submitted to the Irish Patent Office.

An action for infringement of a design right may be brought in the High Court. In the case of a European Community design the Irish High Court acts as a Community Design Court. The proceedings may be entered into the Commercial Court list.

After registration of a design, protection is granted for five years. Protection can be renewed for four additional periods of five years each on payment of the renewal fee.

If the design is not registered, the design is protected for three years from the date on which the design was first made available to the public.

Copyright

Copyright protects original literary, dramatic, musical and artistic works, films and broadcasts, published editions of works and sound recordings, and recently, computer programs and databases.

A work is protected by copyright to the extent that the work is recorded in a certain form and to the extent that the work is original.

In Ireland, there is no registration procedure for copyright works. Generally, the act of creating a (original) work creates the copyright.

 Remedies available for infringement of copyright include injunctive relief in order to prevent the unauthorised use of the protected work and an award of damages or an account of profits for infringement. The proceedings may be entered into the Commercial Court list.

The duration of copyright protection varies according to the format of the work. In the case of most works the duration will be 70 years after the death of the author of the work. However, for broadcasts and the typographical arrangement of a published edition, the duration is 50 years from the date of first publication.

Marketing agreements

Agency

Agents act as intermediaries between suppliers and customers. The exact scope of the rights and obligations of agents is generally determined by contract and principles of common law.

Commercial agency relationships are governed in Ireland under the European Communities (Commercial Agents) Regulations 1994 and 1997 (Regulations).

The Regulations introduced the concept of a commercial agent into Irish law, which was defined as "a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the principal), or to negotiate and conclude such transactions on behalf of and in the name of that principal".

The Regulations give protection to the interests of the commercial agent and provide that the agent may be entitled to compensation on termination of the agency agreement. The Regulations (and in particular, the manner in which compensation is to be calculated), remain largely untested in the Irish Courts with some exceptions.

Special consideration should be given to the impact of the Regulations when negotiating agency agreements, particularly because aspects of the Regulations cannot be circumvented by contract.

Distribution

Irish distribution agreements are regulated by the general principles of Irish contract law and also by Irish and European competition law.
The Irish Competition and Consumer Protection Commission’s most recent Declaration in respect of Vertical Agreements and Concerted Practices (the Verticals Declaration) applies from 1 December 2010 until 1 December 2020. The Verticals Declaration and the related Guidance Notice (the Notice) brings the Irish regime largely in line with the EU’s position on vertical agreements. The Verticals Declaration closely resembles the European Commission’s Vertical Block Exemption Regulation (Regulation 330/2010) (the VBER), which applies from 1 June 2010 until 31 May 2022.

In terms of jurisdiction, the Verticals Declaration is most relevant to agreements which are solely confined to the Republic of Ireland, whereas agreements which have an effect on trade between Member States are subject to the VBER. The types of agreements covered include exclusive distribution, exclusive purchasing, selective distribution and franchising.

The Verticals Declaration and VBER both provide a safe harbour for vertical agreements where both parties do not exceed the relevant market share thresholds and where the agreement does not contain any “hard-core” restrictions of competition (subject to certain exclusions).

Franchising

Irish franchise agreements are regulated by the general principles of Irish contract law and by Irish and European competition law, including the Verticals Declaration and the VBER. The European Commission’s Guidance on Vertical Restraints offers guidance on franchising arrangements, including the licensing of IPR rights.

The franchising industry also provides for self-regulation. The Irish Franchise Association (www.irishfranchiseassociation.com) requires its member to comply with the Irish Franchise Association Code of Ethics.

E-Commerce

The key regulations governing e-commerce in Ireland are:

- The European Union (Consumer Information, Cancellation and Other Rights) Regulations 2013, (S.I. 484 of 2013) (The Distance Selling Regulations)
- The Electronic Commerce Act 2000
- European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 (SI 343/2015) (The ADR Regulations) and (Online Dispute Resolution for Consumer Disputes) Regulations 2014 (SI 500/2015) (The ODR Regulations)

The Distance Selling Regulations

The Distance Selling Regulations (the Regulations) apply to contracts concluded on or after 14 June 2014. They transposed Directive 2011/83/EU on Consumer Rights into Ireland law and revoke the EC (Cancellation of Contracts Negotiated Away from the Business Premises) Regulations 1989 and the EC (Protection of Consumers in Respect of Contracts Made by Means of Distance Communications) Regulations 2001. The Regulations only apply to contracts concluded between a trader and a consumer. There are a number of contracts outside the scope of the Regulations including contracts for financial services and certain construction contracts. The Regulations apply to businesses which sell goods or services to consumers by means of on-premises, off-premises (e.g. when a trader visits a consumer’s home) or distance contracts. Distance contracts include those concluded by telephone, email, fax, catalogue, or teleshopping.

The Regulations require certain prior and post contractual information to be provided to the consumer. A distance contract will not be enforceable by the supplier against the consumer unless the supplier has provided the required information.

The Regulations also provide for a ‘cooling off period’ after a distance or off-premises contract has been concluded. A consumer has a period of fourteen calendar days to decide to withdraw from its obligations under the contract. The duration...
of this cancellation period is extended by up to twelve months where the trader fails to inform the consumer of the right to cancel the contract.

A consumer must be provided with the model cancellation form as set out in Part B of Schedule 3 of the Regulations. If the right to cancel the contract is exercised, the trader must reimburse all payments received from the consumer, including delivery charges unless the consumer has opted for a more expensive delivery option. Therefore, the only amounts payable by the consumer where they exercise their cancellation right within the prescribed period of time, subject to some specific exemptions, is the cost of returning the goods.

The Regulations also provide that a trader cannot charge consumers in respect of the use of a given means of payment fees that exceed the cost borne by the trader for the use of that means of payment. Also, traders cannot obtain consumer consent to additional charges by way of default or opt-out options, such as pre-ticked boxes.

The E-Commerce Regulations

These Regulations apply to businesses operating online when engaging with both consumers and other businesses. The Regulations require businesses to:

► provide certain general information to customers on their website
► ensure commercial communications are clearly identified as such
► ensure any unsolicited commercial communications are clearly identified as such
► supply certain information prior to an order being placed and the contract being concluded electronically
► provide a receipt of the order without due delay and by electronic means

The E-Commerce Act 2000

This Act provides for the legal recognition of electronic contracts and electronic signatures. It implements the EU Electronic Signatures Directive 1999/93/EC, and some of the provisions of the E-Commerce Directive 2000/31/EC.


These Regulations provide that any unfair terms in a contract concluded between a seller of goods or supplier of services and a consumer are not binding on the consumer where the contract has not been individually negotiated.

The European Union (Alternative Dispute Resolution for Consumer Disputes) Regulations 2015 and The European Union (Online Dispute Resolution for Consumer Disputes) Regulations 2015

The ADR Regulations and the ODR Regulations require that traders selling goods or services online must provide a link on their website to the European Commission's online dispute resolution platform. Traders must also include their email address on their website so that consumers have a first point of contact in the event of a dispute and must inform consumers if they the trader is obliged to follow any alternative dispute resolution scheme.

Data protection

The Data Protection Acts 1988 and 2003 (the Acts) are the primary laws applicable to data protection in Ireland. The Acts aim to protect the privacy of individuals in regard to the processing of their personal data. The Acts confer rights on individuals as well as placing responsibility on those persons processing personal data.

Strict legal obligations exist in respect of the use of personal data for direct marketing. The rules governing electronic marketing (phone, fax, text message, email) contained in the EC (Electronic Communications Networks and Services) (Privacy and Electronic Communications) 2011, S.I. 336 of 2011, toughened the law in Ireland in respect of penalties for unsolicited communications for direct marketing purposes.
Under the Acts, individuals or organisations which collect, store or process any data about living people on any type of computer or in a structured filing system are data controllers. A data controller has serious legal responsibilities under the Acts. A data controller must: (i) comply with the eight fundamental data protection rules; and (ii) may be required to register its activities with the Data Protection Commissioner (DPC).

A data processor is a person who processes data on behalf of a data controller. Data processors have a very limited set of responsibilities under the Acts in comparison to data controllers. Data processors are essentially required to: (i) register their activities with the DPC if they process personal data on behalf of a data controller who is required to register; (ii) act only on and in accordance with the instructions of the data controller; and (iii) keep personal data secure from unauthorised access, alteration, disclosure, destruction or any other unlawful processing.

The DPC is responsible for upholding the rights of individuals as set out in the Acts, and enforcing the obligations of data controllers.

The incoming General Data Protection Regulation (GDPR) will make several changes to data protection legislation throughout the EU. Agreement was reached at EU level on a final compromise text on 15 December 2015. On 12 February 2016, the Council confirmed the agreement on the text of the GDPR (5455/16). The European Council approved the GDPR text on 8 April 2016 and the European Parliament formally adopted the GDPR on Thursday 14 April 2016. The text of the GDPR will next be published in the Official Journal. Businesses will then have a two year transitional period to comply with the new laws, which will be applicable as of Spring 2018.

Product liability

Liability for defective products arises under statute law, tort, contract, and criminal law.

Statute

The Liability for Defective Products Act, 1991 (the 1991 Act) implements Directive 85/374/EEC on liability for defective products into Irish law. The 1991 Act provides that a producer is liable in damages in tort for damage caused wholly or partly by a defect in his product. Liability is strict, based not on wrongful conduct by the producer, but on proof of the fact that a defect in the product caused damage to the plaintiff.

A limitation period of three years applies to proceedings for the recovery of damages under the 1991 Act. This period runs from the date on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. There is also a longstop provision which extinguishes the rights conferred on the injured party on the expiry of ten years from the date on which the producer put into circulation the actual product which caused the damage.

The EC (General Product Safety) Regulations 2004 (the 2004 Regulations), which implement Directive 2001/95/EC, prohibit a producer from placing unsafe products on the market. In February 2013, the European Commission proposed a new package of rules to improve the safety of products, including a proposal for a new Regulation on Consumer Product Safety which will replace Directive 2001/95/EC. It is anticipated that the new Regulations will simplify the legal framework by consolidating various pieces of legislation into a new Consumer Product Safety Regulation.

Tort

The producer of a product owes a common law duty of care to all those who may be foreseeably injured or damaged by his product. The plaintiff must prove that there was a breach of that duty of care, and there exists a causal relationship between the breach of duty and the damage caused to the user of the product. Unlike liability arising pursuant to the 1991 Act, liability in tort is fault based.

Generally, a plaintiff has six years from the date on which the cause of action accrued to institute proceedings. However there is a shorter time limit in respect of actions for personal injuries, namely two years from the date of accrual of the action, (or the date on which the injured party became aware of the existence of the cause of action, whichever is later), for those accruing on or after 31 March, 2005.
Contract

Sellers of products have contractual obligations to buyers under the Sale of Goods Act, 1893 and the Sale of Goods and Supply of Services Act, 1980. There is an implied condition in contracts for the sale of goods that the goods supplied are of merchantable quality. However there is no such condition:

► as regards defects specifically drawn to the buyer’s attention before the contract is made or

► if the buyer examines the goods before the contract is made, as regards defects which such examination ought to have revealed

There is a time limit of six years from the date of the accrual of the action, the date breach of contract occurred, to issue proceedings.

Contract terms must also be fair and written in plain and understandable language. Under The European Communities (Unfair Terms in Consumer contracts) Regulations 2014, a standard term is unfair if it gives the trader an unfair advantage over the consumer, or takes away the consumer’s legal rights.

A Consumer Rights Bill is currently undergoing legislative review which aims to streamline and clarify the existing consumer rights legal framework.

Criminal

The 2004 Regulations provide that it is an offence to place unsafe products on the market. The Regulations place an affirmative duty on producers and distributors to inform both the manufacturer (if it is not the manufacturer) and the competent authority where they know, or ought to know, that a product that has been placed on the market by them is incompatible with safety requirements. In Ireland it is the Competition and Consumer Protection Commission who enforces consumer protection law.

The 2004 Regulations do not provide for a period within which prosecutions must be brought. However, the general period applicable to summary offences is six months from the time the alleged offence is committed.

Bribery and corporate crime

Bribery

The principal bribery offence in Irish law is the offence of “corruption of agents”, which prohibits the corrupt giving or offering, and accepting or soliciting, of gifts, consideration or other advantages. The offence extends to corrupt acts done by both private individuals and public officials.

Irish bribery laws, which have been criticised by the OECD as being outdated, have been strengthened by the Prevention of Corruption (Amendment) Act, 2010, which widens the territorial reach of the “corruption of agents” offence, to include corrupt acts done outside of the jurisdiction, and which puts in place on a statutory footing, whistleblower protection for persons (including employees) reporting bribery and corruption offences.

Irish bribery and corruption laws are due to be further enhanced by further anti-corruption and bribery legislation. The Irish Government approved publication of the Heads of the General Scheme of the Criminal Justice (Corruption) Bill on 20 June 2012. This legislation will consolidate and reform all the anti-corruption legislation currently cited as the Prevention of Corruption Acts 1889-2010 into a single statute. It creates a series of new offences, such as active and passive corruption offences applicable to public and private persons, and provides for the specific liability of companies for the corrupt acts of their officers and employees. It will be a defence if a company can show it took “all reasonable steps” and exercised “all due diligence” to prevent corruption taking place.

Lobbying

The Lobbying Act 2015 introduced provisions to make the lobbying of public officials in Ireland more transparent. Persons or companies that engage in lobbying must register and log details of their lobbying activity on a public register. Lobbying involves making communications to relevant designated public officials on the initiation or development of public policy or laws, the awarding of public funds or contracts or the zoning and development of land.
Corporate Crime

Significant legislative developments in the last ten years have resulted in an increase in the number of regulatory and enforcement actions targeted at companies operating in Ireland, and their directors. Key legislation includes the Criminal Justice (Theft and Fraud Offences) Act, 2001, which is the principal reference point for prosecuting fraud; the Act which contains a number of indictable offences specific to companies and their directors, and the Proceeds of Crime Acts 1996 and 2005, which give the Irish police significant powers to restrain, confiscate and ultimately seize proceeds which are tainted by crime.

The anti-money laundering legislative framework is set out in the Criminal Justice (Money Laundering and Terrorist Financing Acts 2010 and 2013. The 2010 Act brought Irish anti-money laundering law into line with the EU Third Money Laundering Directive. In addition to banks and similar institutions, the law requires accountants, trust or company service providers, estate agents, gaming clubs, dealers in high value goods (such as car dealers) and lawyers to apply customer due diligence measures such as obtaining evidence of identification from customers, monitoring transactions and services and reporting any suspicions of money laundering to the relevant authorities. The 2013 Act is aimed to enhancing Ireland’s compliance with the Financial Action Task Force on Money Laundering (FATF) standards following its evaluation of the 2010 Act. Key changes included a tightening of the requirement to apply enhanced due diligence in circumstances where there is a heightened risk of money laundering, amendment of the rules relating to politically exposed persons, and an extension of the requirements relating to internal policies and procedures to prevent and detect money laundering. The Central Bank of Ireland published a report in 2016 flagging the 4th EU Money Laundering Directive (Directive (EU)2015/849) which Member States are required to be compliant with by 26 June 2017.

The Criminal Justice Act 2011 introduced legislative measures to accelerate the investigation and prosecution of white collar crime. The most significant development is the creation of a new offence of “withholding information”. This offence criminalises a failure, without reasonable excuse, to disclose information to the Irish police, which a person knows or believes, might be of material assistance in preventing or prosecuting certain corporate criminal offences. It applies to individuals, companies and unincorporated associations, and will impact significantly on how corporate crime is investigated and the degree of cooperation which business people will be compelled to provide to investigators.

The Central Bank (Supervision and Enforcement) Act 2013 (as amended) significantly enhances the powers of the Central Bank to monitor, supervise, query and investigate the conduct and activities of financial service providers. It provides specific protection for whistleblowers, and increases the monetary penalties which may be imposed on corporate bodies to €10m or 10% of annual turnover, whichever is greater. It also provides the Central Bank with the power to issue a direction requiring the making of appropriate redress to customers who have suffered loss as a result of failure by a financial services provider to comply with its obligations under financial services legislation.

The Government also recently enacted the long awaited Protected Disclosures Act 2014, more commonly known as the “Whistleblowers’ Act”. This legislation aims to promote the disclosure of wrongdoing in the workplace by offering protection for all workers against penalisation in circumstances where they make a protected disclosure. It provides a single overarching piece of legislation, as previously whistleblower protection was introduced on a sectoral basis.

Real estate

The law governing Real estate in Ireland was consolidated in the Land and Conveyancing Law Reform Act 2009. Irish Land Law has many similarities to its English counterpart.

In Ireland a person can hold either a freehold or leasehold interest in land. A freehold interest amounts to absolute ownership of the land and all buildings thereon, whereas in the case of leasehold title, the land or building is held under a lease from a party with a superior interest, for a specific period subject to a rent and the covenants and conditions contained in that lease.

► The duration of occupational leases varies depending on the property type and other circumstances

► Generally, the tenant is responsible for the rent and for payment of all outgoings in respect of the property (including local authority rates and the cost of insurance) and the cost of repairing and maintenance of the buildings. Such leases are known as full repairing and insurance (FRI) leases and they would also be usual in England)

► Rent reviews are generally at 5 year intervals
► The rent is normal reviewed to open market rental value, but other options such as reviews in accordance with variations in a Price Index or turnover rents are also used, but to a much lesser extent

► In the case of leases granted since 2010, any provision for rent review cannot provide that the rent review is "upwards only"

► A tenant of commercial property can, after 5 years continuous occupation for business purposes, acquire rights to renew its lease, unless it has executed a formal document called a “Renunciation of Renewal Rights” or certain other matters which mean that the landlord can override the tenant’s entitlement

As with the position in England and Wales, there is no restriction on a foreign incorporated company or non-Irish citizen owning real property in Ireland.

In Ireland, title to property may be: (a) registered in the Property Registration Authority (which is State guaranteed title); or (b) the deeds to the property may be registered in the Registry of Deeds (which is a system of registering the priority deeds based on the timing of registration). The registration system is in the process of being streamlined and from 1 June 2011, on the purchase of any property in Ireland which had not previously been registered in the Property Registration Authority, the purchaser is obliged by law to register the title with the Property Registration Authority. This means that, in time, the title to all property will be State guaranteed (which will be similar to England). The fee payable for first registration of unregistered land is €500, and the fee for registration of registered land will range from €400 to €800 depending on the value of the land.

On the acquisition of real property in Ireland, a purchaser must pay stamp duty to the Revenue Commissioners. Stamp duty is an ad valorem tax on the instrument transferring an interest in property from one party to another. The applicable rate will also depend on the type of property (residential or non-residential) and the status of the purchaser. At present a rate of 2% applies to the transfer of all non-residential property.

An acquisition of lease of property may also be subject to VAT, many businesses can reclaim the VAT incurred on the acquisition or on the rent under a lease.

As in England and Wales, the law governing real property in Ireland also provides for a distinction between legal and beneficial ownership. Usually, the same party will hold both the legal and beneficial interest. However, this distinction facilitates concepts such as trusts, where there is a split between the party holding the legal title (the trustees) and the party entitled to the benefit of the real property (the beneficiary).

Existing law is stated as it applies in April 2016.
## Further information
### Key contacts at A&L Goodbody

<table>
<thead>
<tr>
<th>OFFICES</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Dublin</strong>, International Financial Services Centre, North Wall Quay, Dublin 1</td>
<td>+44 28 9031 4466</td>
</tr>
<tr>
<td><strong>Belfast</strong>, 6th Floor, 42/46 Fountain Street, Belfast BT1 5EF</td>
<td>+353 1 649 2000</td>
</tr>
<tr>
<td><strong>London</strong>, Augustine House, Austin Friars, London EC2N 2HA</td>
<td>+44 20 7382 0800</td>
</tr>
<tr>
<td><strong>New York</strong>, Suite 33D, The Chrysler Building, 405 Lexington Avenue, New York, NY 10174</td>
<td>+1 212 582 4499</td>
</tr>
<tr>
<td><strong>San Francisco</strong>, The Shell Building, 100 Bush Street, San Francisco, CA 94104</td>
<td>+1 415 767 5260</td>
</tr>
<tr>
<td><strong>Palo Alto</strong>, 228 Hamilton Avenue, Palo Alto, CA 94301</td>
<td>+1 650 798 5183</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>INDIVIDUAL CONTACTS – REPUBLIC OF IRELAND</th>
<th></th>
</tr>
</thead>
</table>
| Banking & Financial Services            | +353 1 649 26036  
petermurray@algoodbody.com |
| Peter Murray                            |  |
| Commercial Property                     | +353 1 649 2113  
gotoole@algoodbody.com |
| Ger O'Toole                             |  |
| Corporate & Commercial                  | +353 1 649 2309  
dwidger@algoodbody.com |
| David Widger                            |  |
| Employment                              | +353 1 649 2401  
dinverarity@algoodbody.com |
| Duncan Inverarity                       |  |
| Energy & Natural Resources              | +353 1 649 2108  
aroberts@algoodbody.com |
| Alan Roberts                            |  |
| EU & Competition                        | +353 1 649 2226  
vpower@algoodbody.com |
| Vincent Power                           |  |
| Intellectual property & Information Technology | +353 1 649 2943  
jcahir@algoodbody.com |
| John Cahir                              |  |
| Litigation & Dispute Resolution         | +353 1 649 2501  
lkennedy@algoodbody.com |
| Liam Kennedy                            |  |
# INDIVIDUAL CONTACTS – REPUBLIC OF IRELAND

<table>
<thead>
<tr>
<th>Service</th>
<th>Contact Name</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Projects &amp; Construction</td>
<td>Kevin Feeney</td>
<td>+353 1 649 2241</td>
<td><a href="mailto:kfeeney@algoodbody.com">kfeeney@algoodbody.com</a></td>
</tr>
<tr>
<td>restructuring &amp; Insolvency</td>
<td>David Baxter</td>
<td>+353 1 649 2514</td>
<td><a href="mailto:dbaxter@algoodbody.com">dbaxter@algoodbody.com</a></td>
</tr>
</tbody>
</table>
Introduction and legal system

Legislation forms the backbone of law in the Netherlands. The role of case law is modest in theory but, in practice, case law is crucial for the interpretation of legislation.

The laws of the European Union are applicable in the Netherlands and are influential in areas such as anti-trust and consumer protection. Further, the Netherlands has signed and ratified many international treaties and conventions such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Foreign investment policy

The Netherlands has an open economy and welcomes foreign investment. To encourage investment, the Ministry of Economic Affairs established the Netherlands Foreign Investment Agency (NFIA). The NFIA provides foreign investors with information and strategic or practical advice.

Investment incentives are available to foreign companies. Substantial subsidies are provided by the Ministry of Economic Affairs in the form of energy grants, labour subsidies, subsidies to encourage research & development and subsidies to stimulate innovation. In addition, loans and credit guarantees can be provided. State development and state venture capital companies can provide risk-bearing capital or reimburse losses.

Furthermore, the Netherlands has entered into investment protection agreements (‘investeringsbeschermingsovereenkomsten’) with more than 95 countries in Asia, Latin America, Africa and East-Europe. Such agreements are designed to encourage investment by shielding a foreign investor from certain losses they would not have suffered were it not for their investment overseas.

Types of business forms

Business forms can be categorised into:

► business forms with legal personality and
► business forms without legal personality.

Business forms with legal personality are legal entities, they are considered (from a civil law perspective) as equivalent to a natural person - being capable of owning rights and obligations towards third parties.

In this guide we will describe five business forms that are most relevant to international investors. These will include three business forms with legal personality:

► a private company with limited liability (‘besloten vennootschap met beperkte aansprakelijkheid’, hereinafter BV)
► a public company with limited liability (‘naamloze vennootschap’, hereinafter NV) and
► a cooperative (‘coöperatie’),

and two business forms that do not have legal personality:

► the general partnership (‘vennootschap onder firma’) and
► the limited partnership (‘commanditaire vennootschap’).

Then we will briefly explain how a foreign company can establish a branch in the Netherlands.

The BV or NV

Given the fact that BV and NV companies are quite similar, they will be discussed together; highlighting differences where appropriate.
General characteristics

Both BV and NV companies have capital divided into shares. However, only the shares in the capital of an NV can be listed on a stock exchange.

As noted above, a BV or NV company has legal personality. This means, inter alia, that the assets of a BV or NV are separated from the assets of the shareholders. The shareholders are (in principle) not liable for the debts of the company.

Incorporation

A BV or NV is incorporated through the execution of a notarial deed of incorporation. This deed contains, in any event:

► the articles of association, including the name, corporate seat and objects of the company
► details of the incorporators/first shareholders
► details of the capitalisation of the company (the nominal value of the shares and the issued share capital)
► the appointment of the first managing director(s) and supervisory director(s) (if any) and
► the determination of the first financial year of the company.

At incorporation, one or more shares in the capital of a BV or NV must be issued. The minimum share capital for an NV is €45,000. No minimum capital applies to a BV since the introduction of the so-called Flex-BV Law as of 1 October 2012 (a BV can, for example, be incorporated with a capital of €0.01).

Payment on the shares can be made in cash or in kind. For the NV, payment in cash must be demonstrated by a bank statement and payment in kind must be assured by an auditor’s opinion. A bank statement or auditor’s opinion is not required for the BV.

Shares

The articles of association of a BV or NV must mention the nominal value of the shares. The nominal value of the shares in the capital of an NV must be in Euros, whereas the nominal value of the shares in the capital of a BV can be in any currency.

Any amount paid in excess of the nominal value of shares is called share premium. For the NV, the law prescribes that not only the nominal value, but also the share premium must be paid when subscribing for shares. For the BV, this is not required by law.

Shares in the capital of a BV are always registered shares. Shares in the capital of an NV can be registered shares or bearer shares. Bearer shares are freely transferable. The articles of association of a BV or NV may contain restrictions on the transfer of registered shares, such as the requirement that the transfer should be approved by a corporate body (for instance the company’s general meeting, the managing board or supervisory board). However, share transfer restrictions may not render a transfer impossible or extremely difficult.

Corporate bodies

A BV or an NV has at least two corporate bodies: (i) the general meeting of shareholders (‘algemene vergadering van aandeelhouders’); and (ii) the managing board (‘bestuur’). A supervisory board (‘raad van commissarissen’) is an optional corporate body, unless a BV or an NV qualifies as a “large” company which meets certain statutory requirements, in which case a supervisory board (or an one-tier board) must be established.

The general meeting of shareholders

The general meeting of shareholders has rights that are not attributed to the managing board or the supervisory board. Without going into the details of all differences, rights of the general meeting include:

► appointment, dismissal and suspension of managing directors
► adoption of the annual accounts
distribution of profits or reserves

issuance of shares

amendment of the articles of association and

dissolution of the company.

The managing board (including one-tier board)

The managing board is responsible for the management of the company. It is responsible for the day-to-day affairs of the company and determining the strategy and policy of the company.

More specifically, the managing board has inter alia the following tasks and responsibilities:

overseeing the financial affairs and activities of the company

keeping the books, records and other data carriers pertaining to the administration in such a manner that the company’s rights and obligations can be ascertained at any time (for a period of at least 7 years)

preparing the annual accounts of the company and filing these with the trade register

approving shareholders’ resolutions to distribute dividends

registration of certain data with respect to the company with the trade register and

providing the general meeting with all information requested by it, unless an important interest of the company dictates otherwise.

From a civil law perspective, there are no legal requirements regarding the number, nationality, age or residence of the managing directors. Natural persons, as well as legal entities, may be appointed as managing directors.

Within the limitations of the law, the managing board is authorised to represent the company. In principle, individual managing directors are authorised to represent the company as well, but the articles of association may prescribe that they are not (or not solely) authorised to represent the company.

Traditionally, supervision of the functionality of the managing board is carried out by a supervisory board (as will be explained below). This system is generally known as the "two-tier" or "dualistic" structure. However, as of 1 January 2013, a BV or NV may also implement a "one-tier" or "monistic" structure.

A one-tier structure entails that the managing board consists of executive and non-executive directors. The executive directors are responsible for managing the company, whereas the non-executive directors are responsible for supervising and advising the executive directors. Both the executive director and the non-executive director are within the same corporate body.

A BV or NV is not allowed to implement a one-tier structure and a two-tier structure at the same time. If an existing company wishes to implement a one-tier structure, this would require an amendment of the articles of association.

The supervisory board

As mentioned above, the supervisory board is (in principle) an optional corporate body. A supervisory board exists if so determined by the articles of association. A legal entity cannot act as a supervisory director.

The supervisory board has two main duties: to supervise and advise the managing board as regards the general affairs and business of the company. The managing board is required to supply the supervisory board with the data and information required for proper performance of the duties by the supervisory board. The managing board must inform the supervisory board, at least once a year in writing, on the general outlines of management strategies, the general and financial risks and the administration and control system of the company. Furthermore, the articles may prescribe that certain decisions by the managing board require the prior approval by the supervisory board.
The structured governance regime (‘het structuurregime’).

The structured governance regime is a statutory regulation applicable to "large" BVs or NVs under certain conditions. A BV or NV is obliged to apply the structured governance regime if all three of the following conditions are met for three consecutive years (unless it is entitled to rely upon one or more of the exemption grounds):

- the issued capital (‘geplaatst kapitaal’) together with the reserves amounts to at least €16,000,000 according to the balance sheet of the company and the explanatory notes
- the company or a dependent company (‘afhankelijke maatschappij’) has established a works council (‘ondernemingsraad’) pursuant to a statutory obligation and
- the company, together with the dependent companies, generally employ at least 100 employees in the Netherlands.

For the application of the above, a dependent company means:

- a company to which the BV or NV or a dependent company provides at least 50% of the issued capital or
- a partnership of which a business has been registered in the trade register and in respect of which the BV or NV or a dependent company is fully liable as a partner towards third parties.

One of the consequences of applying the structured governance regime is that the BV or NV must have a supervisory board or a one-tier board. Another important consequence is that the prior approval of the supervisory board is required with respect to certain decisions of the managing board.

The cooperative

Characteristics

A cooperative is an association incorporated by a notarial deed. The purpose of a cooperative is to meet specific material needs (financial benefits) of the members of the cooperative pursuant to agreements entered into between the cooperative and the members. At least on incorporation, a cooperative must have at least two members. These members can be two companies belonging to the same group. The cooperative does not have a capital divided into shares. However, profits can be distributed to the members and members can make capital contributions to/through the cooperative. Nowadays, the cooperative is often used as a holding company.

The initials W.A. (‘wettelijke aansprakelijkheid’), B.A. (‘beperkte aansprakelijkheid’) or U.A. (‘uitgesloten aansprakelijkheid’) form part of the name of a cooperative as registered with the trade register. W.A. means that the (former) members are personally liable (in principle each for an equal part) towards the cooperative. They are only liable for any deficit of the cooperative after its dissolution. B.A. means that the liability of the (former) members is limited in the articles of association (for example, up to a certain amount). U.A. means that the (former) members are not liable at all towards the cooperative.

Incorporation

The cooperative is incorporated through the execution of a notarial deed. The deed of incorporation contains the articles of association of the cooperative. The articles of association include, amongst others, the name and the object(s) of the cooperative.

Upon incorporation, a certified copy of the original deed of incorporation of the cooperative must be filed with the trade register. The details of the cooperative and the members of the board of managing directors must also be registered with the trade register. Further, any service agreements between the cooperative and its members must be drafted and signed.

Corporate bodies

The cooperative must have a board of managing directors. The members of the board are, in principle, appointed by the general meeting of members. The members of the board are suspended and dismissed by the corporate body that appointed them.
From a civil law perspective, there are no legal requirements regarding the number, nationality, age or residence of the managing directors. Natural persons, as well as legal entities, may be appointed as managing directors.

The board of managing directors, as such, is always authorised to represent the cooperative to third parties. Moreover, each of the managing directors is also authorised to represent the cooperative, unless otherwise is provided for in the articles of association. The articles of association may (amongst others) state that a managing director is only authorised to represent the cooperative acting jointly with another managing director.

A cooperative has a general meeting of members. All powers which are not vested in other corporate bodies are vested in the general meeting. The general meeting (amongst others) has the right to amend the articles of association.

A cooperative can have a supervisory board. The supervisory board supervises the board of managing directors. If a cooperative meets certain statutory requirements, the structured governance regime is applicable. In which case, a supervisory board must be established and part of the authorities of the general meeting of members will shift to the supervisory board.

A general partnership (‘vennootschap onder firma’)

The general partnership is not a legal entity, but an agreement between partners. The partnership agreement is governed by general Dutch statutory provisions on contractual relationships, as well as by a number of specific statutory provisions regarding the general partnership contained in the Dutch Commercial Code and the Dutch Civil Code. These specific provisions apply if:

► they are of a mandatory nature or

► the partnership agreement does not provide for arrangement on particular subjects.

The partners may be natural persons or legal entities. From a civil law perspective, none of the partners is required to be a Dutch national or a legal entity, or to have residency in the Netherlands.

All partners make a contribution to the partnership. The partners can contribute cash, property, labour or goodwill. The contribution of business relations or know-how is also accepted.

Dutch Law does not permit the establishment of a general partnership in which a partner is liable for all or specific losses without having a share in the profits. Unless the partnership agreement provides otherwise, profits and losses will be divided in proportion to the contribution of each of the partners to the capital of the partnership.

General partnerships operating a business must be registered at the trade register. The names of the partners, their nationality and signatures and description of the partnership’s business must be disclosed. However, the capital and the annual accounts of the partnerships do not need to be disclosed to the public or filed at any register (save for partnerships engaged in banking or insurance activities).

As mentioned above, the general partnership is not a legal entity. Any assets of the partnership are treated as property belonging to the partners jointly.

Unless the partnership agreement explicitly provides otherwise, each partner has the authority to manage the general partnership, as well as the power and authority to solely and individually represent and bind the general partnership.

In principle, each of the partners is jointly and severally liable (‘hoofdelijk aansprakelijk’) for all of the partnership’s debts. However, if one of the partners has represented and bound the general partnership towards a third party through a legal act outside of the scope of the partnership’s objects, or beyond the partner’s authority to represent the general partnership, the other partners will generally not be jointly and severally liable for the partnership’s debts caused by said legal act.

A limited partnership (‘commanditaire vennootschap’)

A limited partnership is a special form of the general partnership. A crucial difference between a general partnership and a limited partnership is that a limited partnership has two kinds of partners: general partners and limited partners.
A general partner may perform acts of management. Further, general partners are jointly and severally liable for all obligations of the limited partnership. A limited partner is only liable for the amount of its (financial) contribution, provided that it refrains from performing any act of management. In the event it does perform an act of management, the limited partner will be jointly and severally liable for all obligations of the partnership as well.

Branch

A branch is not a legal entity itself; it is a (permanent) office of a foreign company in the Netherlands. All rights and obligations arising from a contract (including employment contracts) will be for the account of the foreign parent company. Also, only the parent company (and not the branch) can be held liable.

A branch does not have its own corporate bodies. Usually, a person that is stationed in the Netherlands is registered as an authorised representative with the Dutch trade register. This person is authorised to sign documents on behalf of the branch/foreign company, pursuant to a power of attorney granted by the foreign company.

A branch that is located in the Netherlands must be registered with the Dutch trade register. In addition, the person(s) who is (are) authorised to represent the foreign company must be registered with the Dutch trade register. Such registration is done by means of filing the relevant trade register forms with the Dutch trade register.

Employment

General overview

According to the Dutch Civil Code, an employment relationship shall be constituted if the following three elements are present:

► an obligation to perform work personally

► in return for remuneration and

► under the supervision of the employer.

Although an employment agreement may be agreed orally, every employee must be provided with a written record of certain terms and conditions governing their employment within one month of commencing their employment. This written record is required to be signed by the employer.

Employment agreements may be entered into for an indefinite or a definite period of time. The differences between these types of agreement relate to a probationary period, non-competition clause and the way in which the agreement may come to an end.

Minimum benefits

► The minimum wage is currently €1,524.60 gross per annum

► An employer should award holidays equal to at least four times the agreed working hours per week for employees that are 23 years or older, i.e. four weeks (twenty days) for full-time employees

► The statutory minimum holiday allowance equals 8% of the annual gross wage. If an employee earns more than three times the minimum wage, a lower holiday allowance can be agreed upon

Collective Labour Agreement (CLA)

A CLA is a written agreement concluded between employers or associations of employers and one or more trade unions. A CLA may cover aspects of working conditions. Employers that are bound by a CLA, and employees who are members of one of the trade unions party to the CLA, are required to observe all the provisions of the CLA. Said provisions constitute a binding part of the individual employment agreement. The scope of a CLA may be extended by a decree of the Minister of Social Affairs. In this case, every employer in the branch or industry to which the CLA relates is required to apply the terms of the CLA to all employees concerned, regardless of whether or not the employer and employees are a member of one of the parties to the CLA.
Sickness

An employer is required, by law, to pay a sick employee a minimum of 70% of his/her salary up to the maximum daily wage (currently €202.17) during the first two years of illness. However, during the first year, the amount to be paid to the employee cannot be less than the minimum wage. The employer may take out insurance against the risk of payment of statutory sick pay. In a written employment agreement, it may be agreed that, during the first two days of illness, an employee is not entitled to any salary whatsoever.

The employer is required to re-integrate a sick employee as soon as possible. The employee is required to co-operate fully in this process. Both employer and employee are obliged to fulfil certain obligations. If the employer fails to comply with his re-integration obligations, he may be required to continue to pay the employee’s salary for an additional period (up to a maximum of one year) after the obligatory period of two years. On the other hand, if the employee does not co-operate with the re-integration, he may lose his entitlement to salary and the employer may, in certain circumstances, terminate the employment agreement.

Termination of an employment agreement

An employment agreement can be terminated:

► by operation of law
► by mutual consent
► by consent of the employee
► dismissal (UWV-route)
► dissolution using the Sub-District Court-route or
► urgent cause.

By operation of law

An employment agreement in the Netherlands will terminate by operation of law upon expiration of the initial definite period of time (as long as it is not renewed).

By mutual consent

An employment agreement may be terminated by mutual consent. The parties stipulate, in writing, the arrangements in a termination agreement. It must be clear that the parties have reached a consensus on the essential elements, such as termination, the termination date and whether or not compensation is to be paid. However, the employee has the right to withdraw his consent within two weeks after the date of the agreement, or, if the employer did not inform the employee about this right in writing, three weeks.

By consent of the employee

Giving notice is only possible after the UWV or the employee gave prior consent. The statutory notice period is one month for the employee. The statutory notice period for the employer depends on the duration of the employment agreement.

Dismissal: “UWV-route”

The ground for the termination will dictate which authority the employer should go to in order to assess the termination: UWV or the Sub-District Court. Termination of the employment agreement due to economical reasons or after long term sickness will be assessed by UWV. UWV will assess if all the mandatory requirements for termination on the requested ground are met.

Notice of termination may not be given to an employee who is pregnant, in military service, or a member or a former member of a works council, nor to a sick employee during the first two years of his illness (unless the illness occurred after the employer’s request for permission of the UWV). If notice is given under such circumstances, the dismissed employee may cancel the notice by expressly stating so in writing within two months.
Dissolution Sub-District Court-route

The procedure at the Sub-District Court is intended exclusively for a termination for reasons related to the actions of the employee such as a non-performance, culpable behaviour and disrupted employment relationships.

Urgent cause

Under specific circumstances the employer is entitled to terminate employment immediately, without observing any term of notice. This is the case if, as a consequence of serious misconduct, a situation occurs where the employer could not be reasonably expected to continue the employment. Examples of this are theft, violence and fraud. In practice, Sub-District Courts tend to be reluctant to accept such summary dismissals.

Severance package

Every employee that is employed for at least 24 months has a statutory right to a transition payment. This must be paid if the employer gives notice, after dissolution by the Sub-District Court or if an employment agreement for a definite period of time is not extended.

The transition payment equals the sum of 1/6 of the monthly salary for each period of six months during the first ten years of service (1/3 month per year) and 1/4 of the monthly salary for each period of six months thereafter (1/2 month per year). “Monthly salary” means the employee’s base salary, increased with pro-rata holiday pay, fixed end year payments (13th month), bonus and variable pay and any other fixed payments.

Maximum payment is €76,000 gross or up to the amount of the annual salary if that is greater.

The transition fee is not payable in the case of gross misconduct on the part of the employee. In the case of gross misconduct on the part of the employer, the employee can claim additional compensation. This additional compensation is not subject to a maximum and nor is there any formula to calculate it.

Employee representation

Under the Works Councils Act (‘Wet op de ondernemingsraden’), the employer is required to establish a works council if a minimum of 50 employees work in the company. Pursuant to the Works Council Act, the works council must be given the opportunity to give its opinion about various decisions to be taken by the employer. Certain decisions even require the approval of the works council before they may be implemented.

New developments

In 2016, we expect a revision of the Dutch Work and Security Act to take place. This may result in changes with regard to the use of a definite period of time employment agreement and transition payments.

Moreover, a new Dutch Whistleblowers Act will be introduced. This will offer more protection to whistleblowers.

Economy and government

The Netherlands has an open and competitive economy. The country now holds the 5th position in the Global Competitiveness Report 2015-2016, published by the World Economic Forum.

According to the Central Bureau of Statistics in the Netherlands (‘Centraal Bureau voor de Statistiek’), the economy is expected to grow by 2.1% in 2016.

Currently, the Netherlands is governed by a coalition of the People’s Party for Freedom and Democracy (‘Volkspartij voor Vrijheid en Democratie’, VVD) and the Labour Party (‘Partij van de Arbeid’, PvdA). The next general election is to be held in March 2017.

Taxation

Personal income tax

Personal income tax is levied on individuals who are:
Residents of the Netherlands or non-residents with income from sources in the Netherlands.

Under case law, residence is to be determined according to the facts and circumstances. The following circumstances are considered particularly relevant: the availability of a permanent home, the place where the spouse and children live and the place of personal and economic relations (e.g. the place of employment).

A resident of the Netherlands is taxable on its worldwide income. However, tax treaties or domestic tax law may avoid international double taxation on foreign source income. A non-resident of the Netherlands is only subject to personal income tax on income and profits derived from certain sources in the Netherlands.

Based on the Dutch Personal Income Tax Act 2001, taxable income is separated into three boxes:

- **Box 1**, income from employment, includes present and past employment and business activities. Such income is taxed at progressive rates (with a maximum of 52%).
- **Box 2**, income from substantial shareholdings, includes dividends and capital gains derived from substantial shareholdings of 5% or more in resident and non-resident companies. Such income is taxed at a flat rate of 25%.
- **Box 3**, income from savings and investment, is based on a deemed yield on net assets of 4%, taxed at a flat rate of 30%. There is no deduction for expenses associated with deriving Box 3 income.

Non-residents are subject to tax in the Netherlands with respect to certain categories of income originating from sources in the Netherlands, e.g. profits from a business conducted through a permanent establishment (Box 1) or representative and income and capital gains on substantial shareholdings in a resident company (Box 2). In addition, the tax on income from savings and investments is levied on immovable property (and rights thereon) situated in the Netherlands.

### Dutch taxation and other charges of employees

**General**

If employees of a Dutch entity are Dutch resident employees, these employees are always subject to Dutch taxation for their entire Dutch employment income.

The 2016 wage tax rates are as follows:

<table>
<thead>
<tr>
<th>ANNUAL TAXABLE WAGE (IN €)</th>
<th>RATE (EXCLUDING NATIONAL INSURANCE PREMIUMS, SEE PARAGRAPH 2.3. BELOW)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 – 19,922</td>
<td>8,40%</td>
</tr>
<tr>
<td>19,923 – 33,715</td>
<td>12,25%</td>
</tr>
<tr>
<td>33,716 – 66,421</td>
<td>40,40%</td>
</tr>
<tr>
<td>66,422 or more</td>
<td>52,00%</td>
</tr>
</tbody>
</table>

Please note that wage tax is a pre levy for personal income tax. The same rates consequently apply for income tax purposes. The withheld wage tax can consequently be deducted from the personal income tax due as a pre levy. An employer needs to withhold wage tax, pay these to the Dutch tax authorities and is also obliged to include an employee in a Dutch payroll administration.
If the employer attracts non-resident employees, these employees are subject to Dutch taxation if the tax treaty between the Netherlands and the state of residence of the employee attributes the right of taxation over employment income to the Netherlands. This will generally be the case if:

► the employee fully performs his employment in the Netherlands

► the employee performs part of his employment in the Netherlands, but:
  ► physically spends more than 183 days in the Netherlands in a calendar year or any 12 month period
  ► the employee is being paid by, or on behalf of a Dutch employer (this means that his salary costs are charged as such to a Dutch (economic) employer) or
  ► the employee’s salary costs are being charged as such to a permanent establishment of the employer in the Netherlands.

In other words, if a foreign employee would be travelling to the Netherlands to support (the set-up of) a Dutch entity, this person would not automatically become subject to Dutch personal income tax.

Special tax facility expatriates

The Netherlands has a special tax facility for expatriates, the so-called “30%-facility”. This facility enables an employer to pay an employee a tax free allowance of up to 30% of present employment income. The maximum term for the 30%-facility is eight years and the tax free allowance could also be less than 30%.

The tax free allowance is intended to cover “extraterritorial costs”. To qualify for the 30%-facility, the following conditions must be met:

► the employee is recruited or assigned from abroad to work in the Netherlands. The term “abroad” is, however, defined as living outside a 150 km radius from the Dutch border for at least 16 out of the 24 months preceding employment in the Netherlands. Please note that special provisions apply for originally foreign students, who obtained a PhD in the Netherlands less than a year ago

► the employee must be included in a Dutch payroll and

► the employee has specific expert knowledge that is scarce in the Dutch labour market.

This last requirement will be linked to a salary criterion of €52,699 (2016) (before 30% allowance application). After application of the 30% ruling, the taxable salary must be at least €36,889. This salary criterion will be annually indexed (additionally it may, in exceptional cases, still have to be proven that the employee’s expertise is scarce on the Dutch labour market). Please note that, for researchers, no salary criterion is applicable. For employees under the age of 30 who have obtained a masters degree abroad and who earn a salary of at least €40,058 (€28,041 taxable after application of the ruling) it is also possible to obtain the ruling.

Tax exemption for income from most savings and investments

Under the 30%-ruling, an employee who is a resident taxpayer of the Netherlands can elect to be treated as a “partial non-resident”. As a consequence, the employee is subject to Dutch income tax on specific sources of income only. The Dutch taxable income then only includes worldwide employment income, income from substantial interest (more than 5% of the shares) in a Dutch company and Dutch real estate. Passive income, such as interest from saving accounts or dividends, is exempt from Dutch income tax.

Tax-free reimbursement of international school fees

Under the 30%-ruling, in addition to the 30% allowance, it is possible to provide a tax-free allowance for the costs of children attending an international school. It is not possible to claim a deduction of school fees paid by the employee in the individual income tax return.
Dutch social security

The Netherlands distinguish between national insurance (‘volksverzekeringen’) and employee’s insurance (‘werknemersverzekeringen’).

National insurance

An employee is subject to national insurance if he is either a resident of the Netherlands or if he is subject to Dutch wage tax for current employment performed in the Netherlands.

The rates for the three different national insurances are as follows:

- AOW: 17.90% over a capped income of €33,715
- ANW: 0.60% over a capped income of €33,715
- WLZ: 9.65% over a capped income of €33,715.

In addition, all employees subject to national insurance and more specifically to the AWBZ are also subject to the ZVW, the ‘Zorgverzekeringswet’ (Care Insurance Act). This is a mandatory health insurance scheme under which people are legally obliged to take out a so called basic insurance. In addition, on a voluntary basis, it is also possible to take out additional insurance. Part of the premiums for the Care Insurance Act is paid directly by the employer.

Employee’s insurance

According to Dutch national legislation, an employee is subject to Dutch employee’s insurance if he is employed by a Dutch employer. If an employee performs his employment outside the Netherlands, he is still subject to Dutch employee’s insurance if he has a Dutch employer and is a resident of the Netherlands.

The employee’s insurance is fully paid by the employer over a capped income of €52,763. The calculation is quite complicated as the rates consist of a fixed and a variable element. The variable element depends on the kind of activity which is carried out by the employer.

Work permit

For completeness’ sake, we note that, if the Dutch employer attracts employees with, for example, a non-EU nationality, the Dutch employer should obtain a work permit for these employees.

Additionally, such employees must obtain a residence permit for the Netherlands and (prior to arrival) they need to obtain a special entrance visa, a so-called “authorisation for provisional sojourn”. Alternatively, employees may qualify for an authorisation for provisional sojourn and subsequent residence permit under the knowledge migrant scheme. In that case, no separate work permit is required. In order to qualify for the knowledge migrant scheme, the employer must be registered with the IND and the employee must meet a salary criterion of €52,699 when over the age of 30 and €40,058 when under the age of 30.

Corporate income tax and withholding taxes in the Netherlands

A Dutch resident company is taxable on its worldwide income. However, relief from international double taxation on foreign source income is often provided by tax treaties or domestic tax law.

Corporate income tax is levied at the following rates (2016):

<table>
<thead>
<tr>
<th>ANNUAL TAXABLE PROFIT (IN €)</th>
<th>RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 – 200,000</td>
<td>20%</td>
</tr>
<tr>
<td>200,000 or more</td>
<td>25%</td>
</tr>
</tbody>
</table>
In principle, tax losses can be carried forward against taxable profits of other years (up to a maximum of nine years).

The Netherlands does not levy withholding tax on payments of interest, royalties, fees or similar payments by a Dutch company. A withholding tax on dividends is levied against a statutory rate of 15%. This rate, however, is often substantially reduced - even to 0% – under an applicable tax treaty or under Dutch law.

Finally, Dutch companies are normally eligible under EU Directives which may provide for exemptions on withholding taxes on dividends, interest and royalty payments in pan-EU situations.

Participation exemption

General

The participation exemption is an exemption from corporate income tax in respect of profits derived from qualifying shareholdings. Profits, for these purposes, include cash dividends, stock dividends, bonus shares, dividend distributions in kind, hidden profit distributions and capital gains regarding the disposal of a shareholding. If the profit received from a subsidiary is tax-deductible in the country of residence of the subsidiary, the profit cannot, however, be exempt from corporate income tax as of 1 January 2016. Capital losses on qualifying shareholdings are, in general, not tax deductible (with the exception of liquidation losses).

In order to qualify for the participation exemption, the following requirements need to be met:

► the participation of the Dutch entity in the subsidiary company represents at least 5% of the nominal paid-up share capital in this entity and

► the participation is not held as portfolio investment (motive test).

Motive test

A subsidiary is considered to be held as a portfolio investment if the shareholders’ only objective is to obtain a financial return that may be expected from normal asset management. If the taxpayer has a mixed motive, the predominant motive is decisive. According to the explanatory notes to the law, a subsidiary is not held as a passive portfolio investment if the subsidiary is engaged in the same line of business as the shareholder. Subsidiaries of top holding companies with an active management function and subsidiaries (engaged in a business) of intermediate holding companies are not considered to be held as passive portfolio investments.

The motive test is deemed not to be met if more than half of the subsidiary’s consolidated assets consist of shareholding(s) of less than 5% or if the predominant function of the subsidiary – together with the function of lower tier subsidiaries – is to act as a passive group finance company.

Passive portfolio investment

In case a participation is considered to be held as a passive portfolio investment (a subsidiary that does not qualify under the motive test) the participation exemption may, nevertheless, still be applicable provided that the participation is a so-called qualifying portfolio participation.

A qualifying portfolio participation is a participation:

► that is subject to a tax on profits at an effective rate of at least 10% of the taxable profit, calculated in accordance with Dutch tax rules and regulations (subject to tax test) or

► whose assets, directly or indirectly, consist of less than 50% of portfolio investments (free asset test).

The subject-to-tax test

This test is met if the subsidiary is subject to a “realistic levy” according to Dutch tax standards. This requirement is met if the subsidiary is subject to a profits-based tax with a regular statutory rate of at least 10%.

Although the realistic levy should be based on Dutch tax standards, it is not necessary to calculate the effective tax rate of the subsidiary according to Dutch tax standards. Tax base deviations, such as deviations resulting from different depreciation
rules, special investment deductions, loss compensation or tax consolidation rules will not cause a tax to be disqualified as a realistic levy. These are so-called “acceptable tax base deviations”.

However, tax base differences caused by, for example, tax holidays or deductible dividends may cause a levy to be disqualified as a realistic levy. These are so-called “non-acceptable tax base deviations”. This also applies to cases where taxation is deferred until profits are distributed and in situations in which a local participation exemption system applies which has a significant broader scope than the Dutch participation exemption system.

The free asset test
In general, this asset test will be met if the taxpayer demonstrates that less than 50% of the subsidiary’s directly and indirectly held assets consist of free passive portfolio assets. “Free passive portfolio assets” are defined as assets which are not used within the business enterprise of the participation and have a portfolio investment character, such as excess cash (excluding funds held for acquisitions), loans receivable, securities and real estate. A number of categories of assets that qualified under former rules as passive assets no longer qualify as such, e.g. real estate. As a result, assets which are held and used within the business enterprise of the participation are not considered “free passive portfolio assets”.

Innovation box
As of 1 January 2007, the patent box has been added to the Dutch Corporate Income Tax Act 1969. As of 1 January 2010, the patent box has been renamed into “innovation box”. Under this innovation box, income from intangibles developed by the taxpayer is currently taxed at a (corporate) income tax rate of 5%.

The innovation box applies to income derived from intangible fixed assets which have been produced by the company and are patented or for which a so-called R&D statement (in Dutch: ‘S&O-verklaring’) has been issued.

The R&D statement is granted if a company conducts qualifying research and development activities. The R&D statement provides for a reduction of wage withholding tax to be paid to the Dutch tax authority. The reduction of the wage withholding tax (including the national social security contributions) to be paid, is granted as a tax incentive to employers. It does not influence the employee’s individual tax position. The benefit derived by the employer is taxable for corporate income tax purposes (more profits due to lower labour costs, thus a cash flow advantage).

Not only do patented intangible fixed assets qualify for the treatment in the innovation box but also intangible fixed assets for which a R&D statement has been issued; the so-called R&D intangible asset. The Act on the Promotion of Research and Development (ARPD) states which activities qualify. These activities are:

► the development of technically new physical products, physical production processes, software or components thereof

► technical-scientific research seeking to explain phenomena in fields such as physics, chemistry, biotechnology, production technology and information and communication technology

► analysis of the technical feasibility of an R&D project

► technical research aimed at enhancing the physical production process or software.

As a consequence, if the innovation box applies, 5/25 part of the profits from R&D activities will be subject to corporate income tax. Effectively, this will result in a 5% corporate income tax rate.

Positive results are not immediately taxed at 5%. The research/construction costs can be deducted against the regular rate of 25%\(^7\). Consequently, there is a rule that the amount of these (deducted) costs have to be compensated first with profits of the intangible assets which are taxed at 25%, before the lower rate of 5% is applicable. Not only are yearly profits taxed at the special tax rate, the profit which arises as a result of the sale of the intangible fixed asset is taxed at the special tax rate of the innovation box.

\(^7\) For the sake of completeness, we note that on the basis of article 3.30, paragraph 3, Dutch Personal Income Tax Act 2001 (also applicable for companies subject to the Dutch Corporate Income Tax Act 1969), the total amount of research/construction costs of the intangible fixed asset can be taken into account as costs in the year of development/construction.
Losses which are related to the exploitation of the intangible fixed assets are not falling within the scope of the innovation box. Losses can be offset to the normal tax rate of 25% at maximum.

Value added tax

General

VAT is a consumption tax. The standard rate is 21%. It is levied on the remuneration for the supply of a product or a service. In contrary to sales tax, VAT is (in principle) neutral for the supplier, independent of the number of transactions between the supplier and the final customer. VAT is an indirect tax, meaning that tax is collected from entrepreneurs who normally do not bear tax. The VAT system is harmonised within the EU.

An important aspect of the VAT system is that the tax authorities refund VAT to entrepreneurs who incurred a higher amount of input VAT on costs than the VAT that is due on supplies in a taxable period.

In general, a taxpayer must show the VAT due as a separate amount on invoices. A taxpayer must compute the VAT due or reclaimable and file VAT returns at a specified interval: monthly, quarterly or yearly, depending on the amount of VAT due or refundable. VAT due should be paid to the tax authorities when the tax return is filed. A supply of goods or services in the Netherlands where the supplier is located outside the Netherlands may result in the customer instead of the supplier being liable for the tax (reverse charge).

Article 23 license

VAT on import is due at the moment the goods are imported into free circulation of the European Union (EU). In principle, VAT on import has to be paid at the moment of filing the import declaration. However, the Netherlands have implemented (as one of a number of EU-countries) a deferred payment scheme for VAT on import. Under the Dutch VAT system, the actual payment of VAT due on import can be avoided completely. The import-VAT has to be accounted for in the VAT return as VAT due. This VAT-amount can be deducted as input-VAT in the same return. Since the same amount is first accounted for as due and deducted at the same time as input-VAT, there is no actual payment of VAT. This results in a cash flow and interest benefit.

Only Dutch companies or foreign companies with a permanent establishment for VAT in the Netherlands can apply this beneficial Dutch deferment system. However, by appointing a fiscal representative for VAT-purposes, also foreign companies without a permanent establishment in the Netherlands may opt to use the deferred payment scheme with respect to the VAT on imports. In most cases, the fiscal representative will fulfil all VAT formalities.

In the Netherlands two types of representatives of VAT exist: those with a general license and those with a limited license. A fiscal representative with a general license acts on behalf of its principal regarding all supplies of all goods and services in the Netherlands, the intra community transactions and imports. The foreign company needs a VAT-registration in the Netherlands. The limited representative can, in principle, only act on behalf of a foreign customer for the VAT formalities and payments with respect to the import and subsequent supply of goods after the importation and the intra-community acquisition of certain designated goods (e.g. excise goods). The foreign company, itself, does not have to register for VAT in the Netherlands. It depends on the facts and circumstances to whether a company should appoint a fiscal representative with a general or limited license.

Transfer tax

There is no transfer tax due on the transfer of shares, bonds and other securities. However, real estate transfer tax will be imposed on the transfer of the legal or economic ownership and certain rights in immovable property, including buildings, located in the Netherlands. Transfer tax is payable by the transferee, but the notary or transferor may also be liable for paying the tax. Real estate transfer tax may also be imposed on the transfer of shares in real estate companies. The rate of real estate transfer tax is 6%, however residential properties are subject to 2% real estate transfer tax.

Tax treaties

The Netherlands have an extensive tax treaty network. Many of these treaties contain attractive provisions which are often more favourable than the provisions contained in the relevant treaties of other countries. As mentioned before, the Netherlands does not levy withholding tax on payments of interest, royalties, fees or similar payments by a Dutch company. Therefore, in many tax treaties, the Netherlands has negotiated low withholding tax rates with their tax treaty parties.
Dispute resolution

Litigation

The Dutch judicial system is a continental procedural system, as opposed to a common law system. In most legal proceedings in the Netherlands, legal representation by an attorney is mandatory. Legal proceedings are initiated either through a writ of summons to appear before the competent court served by a bailiff or by a petition to the competent court. The Dutch courts consist of professional judges that are civil servants appointed for life. There are no jury trials. Legal proceedings are conducted in writing for the most part. Hearings play a relatively minor role, although parties have the right to at least one oral hearing. Through their written submissions, the parties determine the scope of the legal proceedings. In principle, parties have the right to have their case heard in at least two instances.

There are eleven district courts in the Netherlands that hear civil, criminal and administrative cases in the first instance. Appeals against judgments rendered in civil, criminal and tax cases can be lodged with one of the four courts of appeal. Appeals against judgments rendered in administrative cases (not being tax cases) can be lodged at one of three specialised tribunals (‘Centrale Raad van Beroep’, ‘College van Beroep voor het Bedrijfsleven’, ‘Raad van State’). Appeals in cassation in civil, criminal and tax cases can be lodged at the Supreme Court (‘Hoge Raad’).

Each of the district courts has a cantonal division (‘kanton’, also referred to as sub-district court) dealing with claims not exceeding €25,000 and cases regarding employment agreements, lease agreements or agency agreements, regardless of the amount of the claim.

District courts also have relief judges (‘voorzieningenrechters’) to handle preliminary relief proceedings and requests for prejudgment attachments. In urgent cases requiring an immediate measure, parties may address themselves to the relief judge. The relief judge has a broad jurisdiction and may (under certain circumstances) also be addressed in cases where the court of another country has jurisdiction on the substance of the matter, or in cases where parties agreed on arbitration. Prejudgment attachments on assets of a debtor in the Netherlands require the prior permission of the relief judge, which is usually granted without a hearing. Such attachments may also be made in cases where the court of another country has jurisdiction on the substance of the matter.

The Enterprise Chamber (‘Ondernemingskamer’) of the Amsterdam Court of Appeal has the authority to deal with specific disputes concerning matters of corporate law. It can order an inquiry into a company’s affairs and take appropriate measures in the event of mismanagement or for the duration of the legal proceedings.

Dutch law provides for the possibility to have group settlements, including international settlements, declared universally binding for an undetermined number of injured parties by the Amsterdam Court of Appeal. The petition must be filed by the parties to the settlement agreement.

Alternative dispute resolution

Under Dutch law disputes may also be resolved through arbitration, expert determination (‘bindend advies’) or mediation.

Arbitration

A new arbitration act entered into force on 1 January 2015 which provides a framework for arbitral proceedings in the Netherlands. Arbitration must be agreed upon between the parties in writing, either before or after the dispute has arisen. Most of the provisions of the arbitration act are regulatory law. Arbitrations in the Netherlands are usually administered by arbitration institutes such as the Netherlands Arbitration Institute, which have their own arbitration rules. An appeal against an arbitral award is only possible if agreed upon by the parties. During the arbitral proceedings preliminary relief measures may be requested from the arbitral tribunal. Separate arbitral preliminary relief proceedings can be agreed upon by the parties. Notwithstanding an arbitral clause or agreement, the relief judge of the district court will have jurisdiction if the requested measure cannot be obtained in the arbitration proceedings in a timely manner. The same is true in case of an international arbitration. Enforcement of an arbitral award in the Netherlands requires the consent of the relief judge. The Netherlands is a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Expert determination

Parties may agree to have a dispute settled by an expert (‘bindend adviseur’). The decision of the expert binds the parties. There is no specific Dutch legislation regarding expert determination (‘bindend advies’). The general provisions in the Dutch
Civil Code on contracts for professional services and settlement agreements are applicable. Enforcement of expert decisions (settlement agreements) is more difficult than the enforcement of arbitral awards and can only be done by requesting specific performance from a court. The court can assess the contents of the expert decision and the manner in which the decision was reached. The principles of reasonableness and fairness are applicable to such settlement agreements. The court may annul the expert decision (settlement agreement) and replace it with its own decision. In comparison the grounds for setting aside an arbitral award are more stringent.

Mediation

Mediation allows parties to resolve their dispute with the help of a neutral, independent mediator. The mediator does not make a decision, but assists parties in reaching a settlement. As with expert determination (‘bindend advies’) there is no specific legislation regarding mediation. The general provisions in the Dutch Civil Code on contracts for professional services and settlement agreements are applicable. Mediation is promoted by Dutch courts. Even after legal proceedings have been initiated parties may opt for mediation, either at the suggestion of the judge or at their own instigation. For the duration of the mediation the legal proceedings will be suspended. The mediators are usually members of the independent Netherlands Mediation Institute. If the mediation is successful it will end in a settlement agreement. It is possible to have the settlement incorporated in the verdict, which will make it enforceable. If the mediation is not successful the legal proceedings can be continued.

**Competition law**

**Introduction**

In the Netherlands, both European and Dutch competition law apply. Both areas of law are very similar, since Dutch competition law is based on its European counterpart.

European competition law is applicable to agreements, decisions or concerted practices that restrict competition and affect trade between member states of the European Union. Hence, application of European competition can extend to the territory of the Netherlands (and the companies active there) as well.

Dutch competition law is applicable only within the Dutch territory if competition within the Netherlands is restricted.

The Dutch Competition Authority (‘Autoriteit Consument en Markt’, ACM) enforces the Dutch Competition Act (‘Mededingingswet’), which entered into effect in January 1998. It also has the authority to enforce articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), which affect the Netherlands directly. Dutch courts must apply these articles as well.

**Agreements restrictive of competition**

Article 6 of the Dutch Competition Act (the cartel prohibition) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object (or effect) the prevention, restriction or distortion of competition in the Dutch market. Contractual provisions and/or agreements that are restrictive of competition are null and void. This nullity can be established in civil court proceedings between private parties.

The cartel prohibition does not apply to:

- agreements in accordance with EU block exemption regulations (e.g. the EU block exemption regulation for vertical agreements or the EU block exemption regulation for technology transfer agreements)
- agreements which benefit from a block exemption determined by Dutch governmental decree
- certain agreements or practices concerning public service companies (undertakings entrusted with the supply of services of general economic interest)
- collective employment agreements and collective pension agreements in an industry
- agreements which are of minor importance. This so-called de minimis-exemption applies to agreements restrictive of competition that involve no more than eight companies whose combined annual turnover does not exceed €5.5 million (if the companies concerned are active mainly in the supply of goods), or €1.1 million (in all other cases). This exemption
applies similarly to agreements between competitors whose combined market share does not exceed 10% on any of the relevant markets (if these agreements are not liable to appreciably affect trade between EU member states).

Furthermore, the Minister of Economic Affairs has issued policy guidelines in order to give more guidance to companies on the 'dos and don'ts' under Dutch competition law (e.g. guidelines on combination agreements and guidelines on private initiatives regarding competition and sustainability).

If a restrictive agreement cannot be categorised under one of the above-mentioned arrangements, companies can still resort to a general possibility of exception. Article 6 of the Dutch Competition Act provides a general exemption for agreements or practices whose economic and/or technical benefits outweigh their restrictions on competition and pass on a fair share of those benefits to consumers. An appeal to this exemption involves self-assessment by the companies involved in the restrictive agreement or practice.

Abuse of dominance

Article 24 of the Dutch Competition Act prohibits the abuse of a dominant position. Whereas the TFEU provides a number of examples of abuse of a dominant position (such as the imposition of unfair purchase or selling prices and the application of different conditions to equivalent transactions with other trading parties), the Dutch Competition Act does not set out any specific category of abusive conduct.

The Dutch prohibition of abuse of a dominant position does not provide for any exemptions, but does lay down the possibility of obtaining a specific waiver. Article 25 of the Dutch Competition Act indicates that a waiver may be granted upon request to undertakings entrusted with the supply of services of general economic interest.

Having a dominant position on a certain market is in itself not prohibited. Only the abuse of such a position is prohibited under Dutch competition law.

Merger control

Article 29 of the Dutch Competition Act specifies when a concentration of undertakings requires prior notification to the ACM. A concentration is subject to notification and prior approval where:

► the combined turnover of all parties involved in the proposed concentration in the previous calendar year exceeded €150 million and

► at the same time, at least two parties to the proposed concentration separately achieved a turnover in the Netherlands of €30 million or more in the previous calendar year.

To concentrations in the Dutch healthcare sector, different (lower) turnover thresholds apply:

► the combined turnover of all parties involved in the proposed concentration in the previous calendar year exceeded €55 million and

► at the same time, at least two parties to the proposed concentration separately achieved a turnover in the Netherlands of €10 million or more in the previous calendar year.

A concentration arises where companies merge; where one or more companies acquire control over (part of) another company (take-over); and where two or more companies set up a full function (i.e. independently operating) joint venture.

The notification process has several phases. In phase I, the ACM has four weeks to decide whether the concentration requires a permit (subject to phase II proceedings) or whether it can be cleared right away. In phase II, the ACM has 13 weeks in order to decide whether or not to clear the concentration and issue a permit.

Companies notifying an intended concentration to ACM are obliged to pay €17,450 for such notification (phase I). If a permit is required and companies submit an application accordingly to ACM, they must pay another €34,900 (for phase II).
Public enforcement of competition law in the Netherlands

The ACM may impose an incremental penalty payment or a fine of up to €450,000 or 10% of the annual turnover of the company that violated competition law. The ACM may also impose fines on individuals who gave instructions or exercised de facto leadership in the realisation and conclusion of restrictive agreements between companies.

As of 1 July 2016, legislative changes will presumably take effect, increasing the statutory maxima listed above. These legislative changes will apply only to infringements that have been committed after the legislative changes have entered into force.

The main alterations include an increase of the maximum fine (absolute amount) from €450,000 to €900,000, a multiplication of the maximum fine by the number of years that the cartel infringement has lasted (with a maximum of four years and a minimum of one year), and an additional 100% increase of the maximum fine in case of recidivism.

Private enforcement of competition law in the Netherlands

The Netherlands’ legal landscape regarding the private enforcement of competition law has evolved over recent years. Increasing numbers of civil liability cases on the basis of (alleged) competition law infringements have been brought before the Dutch civil courts.

The Dutch legal framework for cartel damages claims consists of the general rules regarding liability for wrongful conduct (tort). Under the implementation of EU Directive 2014/104/EU on antitrust damages actions, the Dutch government is implementing a number of amendments to the Dutch Code on Civil Procedure and the Civil Code with the aim of further developing and tailoring Dutch civil law to these private damages claims. The implementation deadline of the Directive is set for December 2016.

Intellectual property

The most important rights of intellectual property that can be protected in the Netherlands are trade marks, designs, copyright and patents.

For the purpose of protection of trade marks and designs, the Netherlands, Belgium and Luxemburg (Benelux) form a single territory. Protection of trade marks and designs is laid down in the Benelux Treaty on Intellectual property Rights (BTIP). Protection of patents and copyright is arranged in separate national acts.

Trademarks

The BTIP provides the rules for registration, use and enforcement of trade marks in the Benelux area. Trade mark rights are granted on a first to file basis. Registration can be sought on application to the Benelux Office for Intellectual Property Rights (BOIP). A Benelux trademark is a unitary right and it can only be acquired for the entire Benelux.

The BOIP examines any applications as to the existence of absolute grounds for refusal, i.e. the question as to whether a mark is distinguishing.

The application is open to opposition by interested parties for a period of two months from the date of publication of the trademark application.

Opposition to the application can be filed on the basis of an older trademark right (valid in the Benelux) and is limited to the following cases:

► identical trademarks filed for the same goods or services

► identical or similar trademarks filed for the same or similar goods or services, where there exists a likelihood of confusion on the part of the public

► if the newer trademark can cause confusion with a well-known trademark (as detailed in Article 6b of the Paris Convention).

As a consequence of EU Harmonisation Directive 2015/2436, the grounds for opposition will be extended in the near future.
The refusal or rejection (following successful opposition) of an application by the BOIP is open to appeal.

A granted trademark is valid for a period of ten years (to be counted from the application date) and can be renewed for successive periods of ten years.

Once a trademark is registered (after the expiration of the opposition period), there are no procedures available in the BOIP enabling an interested party to take action against its validity. For such purpose, the third party will need to seek redress at the civil court. The grounds to object in a civil procedure are broader than those in the BOIP (e.g. one can claim that a trademark was registered in bad faith). After five years from the date it was granted, a trademark can be cancelled due to lack of genuine use for more than five consecutive years.

Alternative ways to seek protection in the Benelux are:

► to apply for a European Union Trademark (covering the entire European Union) in which case an application needs to be filed at the European Union Intellectual Property Office (EUIPO) (previously the Office for Harmonisation in the Internal market (OHIM)). The substantive rules for such marks are laid down in the EU regulation on the European Union Trademark or

► by filing an International Registration that designates the Benelux. In the Benelux, such designation is subject to the rules of the BTIP.

Design rights

The BTIP provides for protection of drawings and designs (Designs) in the Benelux area. A Design is the appearance of a product or a part thereof that is new and has an individual character. The appearance results from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product itself or its ornamentation.

A Design can only be protected if it is new and it should have an individual character. There is no examination as to these requirements by the BTIP and the applicant has to assess, by itself, whether these requirements for protection are met.

A Design is new if, on the date of filing (or the priority date), no identical design (that is a design whose features differ only as with respect to immaterial details) has been made available to the public. The exclusive right to a Benelux-Design is acquired by registration with the BOIP. The BOIP does not provide for an opposition or cancellation procedure, in this regard an interested party ought to seek redress at the civil court.

Registering a Design with the BOIP provides an exclusive right in the Benelux area for a period of five years, which can then be extended for four consecutive periods to a maximum of 25 years.

On an EU level, one can apply for so-called Community Designs providing protection throughout the European Union. A Design can be protected as an unregistered Community Design for a period of three years from the date that the Design is made available to the public. An application for a registered Community Design can be filed at the OHIM.

The registration is valid for five years and can be extended for four consecutive periods up to a maximum of 25 years. Similar to the BOIP, the OHIM will not examine whether a Design is new and has an individual character. The OHIM does provide for a procedure where third parties can request for the Design to be declared invalid. This invalidity procedure can only be initiated against a Design once it has been registered and not during the registration process.

Patents


Patents need to be registered at the Dutch Patent Office (‘Octrooicentrum Nederland’) and grant the holder the exclusive right to use and exploit a new product or process. The Dutch Patent Act 1995 sets the following requirement for patentability of inventions, the invention must be:

► new
► inventive

► capable of industrial application and

► not specifically excluded from patent protection (e.g., discoveries).

After the patent is granted by the Dutch Patent Office, protection is obtained for twenty years from the date of filing of the application. As to patents relating to medicines and crops, a supplementary protection certificate can provide an extra 5 years of protection after the patent has expired.

An employer is entitled to the patent rights with respect to any invention made by an employee if this falls within the scope of his employment agreement. However, the employee is entitled to a fair remuneration if his salary is not an adequate compensation for the invention.

In practice, the majority of patent applications are filed under the European Patent Convention at the European Patent Office - resulting in a bundle of national patents subject to the respective national laws. After an European patent is granted, interested parties can file opposition. If successful, all national patents will be revoked.

Copyright

The Dutch Copyright Act protects copyrights in the Netherlands. Copyright is an exclusive right of the author of a literary, scientific, or artistic work or his successors in title to disclose the work to the public and to reproduce it, subject to the exceptions laid down by law.

In order to obtain copyright protection, it is required that the work is original in the sense that it is its author's own intellectual creation. Copyright protection does not require registration, but exists from the moment of creation of the work. Copyright continues for 70 years after death of the author.

In the relationship between a third party author and a client, the third party author will be the proprietor of the copyright unless the parties agree that the copyright is transferred to the client. A simple, signed deed is required to validly transfer copyrights.

In the relationship between an employer and an employee, the employer will normally considered to be the author (unless otherwise agreed). A key condition is that the employee’s task (laid down in the employment agreement) consists of creating works that can be protected with a copyright.

Transfer of copyright does not affect the author's moral rights inter alia, including the right to be named and the right to object to modification of the work. Moral rights cannot be transferred and will remain with the initial author.

Commercial contracts

General remarks

Dutch contract law allows for substantial freedom of contract. Parties are free to deviate from most rules laid down in the Dutch Civil Code. Only in specific situations (for example commercial agency), the Dutch Civil Code provides for mandatory rules. Besides that, one should be aware that all contractual relations governed by Dutch law are subject to the principles of reasonableness and fairness (‘redelijkheid en billijkheid’). These principles give courts significant freedom in determining the consequences of a contract for the parties thereto. Courts may supplement the contract and, in exceptional circumstances, determine that a party cannot invoke a certain contractual clause.

The most important commercial contracts in the Netherlands are commercial agency agreements, distribution agreements and franchise agreements. These agreements do not need to be in the written form. However, for reasons of evidence, this is advisable.

Agency agreements

A commercial agent:

► enters into agreements in the name of and for the account of the principal or
acts as an intermediary with respect to the conclusion of contracts, all in consideration for a commission fee.

The commercial agent is independent from the principal and their relationship is not of an incidental nature.

Dutch agency law is laid down in the DCC, which implements EC Directive 86/653. Those provisions that are aimed at protecting the agent are of a mandatory nature. Parties are free to determine the governing law of their agreement. However, if the agent is based in the Netherlands, the choice for foreign law will not set aside Dutch mandatory provisions of agency law.

An agent located in the Netherlands is entitled to goodwill compensation at the end of the agency agreement if and to the extent:

► the agent has introduced new customers to the principal or intensified the agreements with existing customers and these customer agreements are still beneficial to the principal after termination of the agency agreement

► payment of a goodwill compensation is fair, taking into consideration all circumstances, particularly the loss of commission fees for the agent in connection with such customer contracts and

► the goodwill compensation is not in excess of the average annual commission fee received by the agent in the past five years (or if the agency relationship was less, the actual period).

A non-competition clause is permitted if it is in writing and restricted to the goods and territory of the agent. The clause is valid for up to two years from the termination of the agency agreement. A Dutch court may annul, or mitigate, a non-competition clause if it is unfair or disproportionate towards the agent.

Distribution agreements

A distributor purchases and resells goods. Unlike the commercial agent, a distributor enters into agreements with its suppliers and customers in its own name and for its own account. The Netherlands has no specific legislation on distribution agreements. The general provisions of Dutch contract law apply.

Distribution agreements can be concluded for a fixed term or for an indefinite term. If the agreement is concluded for a fixed term, the agreement cannot be terminated early unless the contract provides for early termination. If the agreement is concluded for an indefinite term, the agreement may, in principle, be terminated upon reasonable notice or upon an offer to pay damages. The length of the notice period depends on all circumstances (e.g. the duration of the relationship, the dependence of the distributor on the principal, what time it takes to recoup recent investments, etc.). Typically, notice periods vary to between three months and two years. As a general rule, a distributor is not entitled to compensation if it was given sufficient notice. This can be different in specific situations, for example when a principal has given the impression that the agreement would not be terminated anytime soon and the distributor has made investments in reliance on that impression which cannot be recouped during the notice period.

Franchise agreements

In a typical franchise agreement, the franchisor grants the franchisee the right to use the brand name, know-how and business formula of the franchisor for its business. As with distribution agreements, Dutch law does not provide for specific regulations on franchise agreements. Hence, franchise agreements are governed by the (default) rules of Dutch contract law. This may change. Recently, the Dutch retail sector has been in turmoil and numerous franchisees have sued their franchisors. This has led the Dutch Minister of Economic Affairs to ask the sector to draw up a franchise code. In February 2016, representatives of both the franchisors and franchisees presented the Dutch Franchise Code (DFC) to the Minister. The Ministry is now investigating whether it should implement the DFC into legislation, so as to make it legally enforceable.

Finally, it should be noted that EU and Dutch competition law have an impact on agency agreements, distribution agreements and franchise agreements. Please see the section entitled “Competition law” above for more information on competition law.

E-commerce

The legal framework with regard to distance contracts / online purchases is part of the Dutch Civil Code (Books 6 and 7), in which the European Consumer Directive (2011/83/EC) is implemented. This directive provides a minimum level of protection
for online consumers in all European member states. One of the most important rights granted to consumers is the right of withdrawal. Online consumers are allowed to cancel the contract within 14 days without giving any reason and without incurring any additional costs, except the costs for returning the goods. In addition, the online reseller is required to provide the consumer adequate information with regard to its identity, payment, delivery and the right of withdrawal. When the consumer is not properly informed about the right of withdrawal, the cancellation period is extended up to 12 months, instead of the routine 14 days.

Distance contracts for financial services do not fall under the scope of the European Consumer Directive. These contracts are regulated by the Dutch Act on Financial Supervision together with the Decree on Conduct of Business Supervision of Financial Undertakings under the Dutch Act on Financial Supervision (‘Besluit Gedragstoezicht financiële ondernemingen Wft’).

Since the European Consumer Directive digital content, such as the download of computer software, is considered a separate category of goods. Part of the information duties and the right of withdrawal may, under certain circumstances, apply to purchase of digital content. The directive does not provide for a legal qualification of “digital content”. Under Dutch law, the mandatory legal provisions regarding consumer sales are applicable to the purchase of individualised online digital content on "which actual power can be exercised". This rule has recently been implemented in the Dutch Civil Code (article 7:5), being a codification of the legal rules that have come about as a result of the so called Beeldbrigade decision of the Dutch Supreme Court in 2012. In this decision, the Court ruled that Book 7 of the Dutch Civil Code applies to software licenses if the licenses are sold for a set amount and are not limited in time.

In The Netherlands rules of the e-Privacy Directive (2002/58/EC) apply to the use of cookies on websites. The cookie rules are enforced by the Authority for Consumers and Markets (ACM). A distinction is made between different types of cookies. In general, consent was required in order to place cookies on the computer of a visitor. However, since 2015, the general rule has been eased: functional and analytical cookies may be placed on the computer of a visitor without informing the public and without asking for consent, as long as:

► the information received relates to the quality or the effectiveness of the provided website service (analytical and functional cookies)

► the cookies do not or only limitedly infringe on the privacy of the visitor.

The ACM has taken the position that, for the storage of all other cookies, website owners must inform visitors in advance, and must ask for their consent.

Data protection

The Dutch Data Protection Act (DPA) implements European Privacy Directive (1995/46/EG) and governs the protection of privacy of personal data. The DPA applies to all processing of personal data wholly or partly by automatic means performed under the responsibility of a controller. Processing of personal data is only allowed on a legal basis, for example:

► with the unambiguous consent of the data subject or

► when this is necessary for the purposes of the legitimate interests pursued by the controller.

Furthermore, it is necessary that the data processing is carried out for a specific and legitimate purpose. At all times, the data processing should fall under the scope of this purpose. The controller is responsible for adequate protection of the personal data. In most cases it also is required to notify the Dutch Privacy Authority (Authority) of the data processing.

Additional rules apply to the processing of sensitive data such as health data or data related to political beliefs. In principle, processors cannot process sensitive data, but exceptions from the prohibition are available.

On 1 January 2016 the DPA has been amended. First of all, a Data Breach Notification obligation entered into force. The DBNL imposes a general obligation on the controller to:

► notify the Authority in the event that a data breach will have ‘serious adverse consequences’ for the protection of personal data and
notify affected data subjects when it is likely that the data breach will have negative consequences for the private lives of the data subjects.

The Authority has provided policy rules on the interpretation of the DBNL.

A second major change is that the Authority has been authorised to impose fines up to €820,000 in the event of a breach of the DPA. Normally, a fine will only be imposed after a notification of the Authority that it is of the opinion that a controller does not comply with the DPA. This can be different in case of intentional breach or negligence.

Previously, it was possible to transfer personal data from European member states to the United States of America based on the Europeans Commission’s Safe Harbor decision. This decision has been invalidated in October 2015 by the ECJ (case C-362/14). In 2016, the EU and USA will conclude a new agreement, the ‘EU-US Privacy Shield’ to provide a new legal basis for transfer of data between the EU and USA.

### Product liability

The EC Directive of 25 July 1985 on product liability was incorporated in the DCC in 1988. Pursuant to the DCC, a manufacturer who has brought onto the market a defective product is liable towards anyone who suffers physical harm or damages to property intended for private use because of the defect. The term “manufacturer” also includes the party who imported the goods into the EEA or the party who presents itself as the manufacturer by labelling the products with its brand name. A product is “defective” if it does not provide the safety that one could expect, taking into consideration all circumstances, in particular:

- the presentation of the product
- the reasonably anticipated use of the product and
- the moment the product is brought onto the market.

Product liability can be mitigated by the use of specific warnings.

Normally, a consumer must return any goods to the seller if the said purchased goods are not in conformity with the sale. However, if the goods are defective and the consumer claims on the basis of product liability, the seller is not liable, unless:

- he was aware of the defect or
- he warranted to the purchaser that the defect was absent.

Claims must be filed within three years of the damage occurring, or when the defect and the identity of manufacturer has become known to the claimant. The burden of proof with respect to the damage, the defect and the causal relationship between the defect and the damage lies with the party claiming damages.

The rules in the DCC on product liability are of a mandatory nature. It is not possible to contractually exclude liability towards the injured party. However, companies (within a distribution chain) are free to distribute the product liability risk amongst themselves.

### Bribery and corporate crime

#### Corporate criminal liability

In the Netherlands, also legal entities can be prosecuted for committing an offence pursuant to the Dutch Criminal Code. In addition to this, the (de facto) director of the company can be prosecuted for a criminal offence. It is not necessary that the (de facto) director be the statutory director or executive director of the company. For example, managers of a department, or other employees with authority as the de facto director(s), can also be held responsible for a criminal offence. The Public Prosecutor is the authority that decides who will be prosecuted. Most of the time, when ‘corporate crimes’ are involved, the

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8 Currently only available in Dutch: [https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/beleidsregels_meldplicht_datalekken.pdf](https://autoriteitpersoonsgegevens.nl/sites/default/files/atoms/files/beleidsregels_meldplicht_datalekken.pdf)

9 At the moment this publication was finalised the text of this Agreement was yet to be published.
Bribery

In the Netherlands a distinction is made between bribery of a government official and bribery of a non-official. Employees of the public service from a foreign state or from an international organisation fall within the definition of bribery of a government official. Bribery of a government official (or judge), as well as bribery of a non-official, is an offence under the Dutch Criminal Code, also bribery of a foreign official (abroad) is an offence since 2002.

There is also a distinction made between active bribery and passive bribery. In concrete terms, active bribery entails the person that gives a gift, makes a promise or grants a service with the purpose to act or to omit. Passive bribery means that an individual takes bribes by accepting or requesting a gift/promises or services. Active bribery as well as passive bribery is a punishable offence pursuant to the Dutch Criminal Code. Smaller facilitation payments also constitute (according to law) a criminal offence, but in the Instructions of the Prosecutor’s Office these payments are (under certain circumstances) exempt from prosecution.

Penalties

The maximum sentence for active bribery of a government official is imprisonment of six years (nine years for bribing a judge) and/or a maximum financial penalty of €82,000. For legal entities the fine can rise to €820,000. The maximum penalty for active and passive bribery of a non-official is four years imprisonment and/or a maximum financial penalty of €82,000. For legal entities the fine can rise to €820,000. Because of the length of the maximum sentence it is possible to keep a suspect in pre-trial detention.

Money laundering

Under Dutch law, laundering of property, property rights or money is punishable as a separate offence. In accordance with the Dutch Criminal Code there is a distinction between intentional money laundering (the maximum penalty for which is six years prison sentence or eight years for habitual money laundering, and a maximum financial penalty of €82,000) and negligent money laundering (maximum two years prison sentence and a maximum financial penalty of €82,000). Although it is not required, prosecution for money laundering is often combined with other offences.

Economic offences

In the Dutch Economic Offences Act (WED) reference is made to a number of social/economic/environmental prohibited acts. Violation of those acts is punishable. For example, violation of some of the provisions of the Anti-Money Laundering and Anti-Terrorist Financing Act constitutes as an economic offence. The purpose of the Anti-Money Laundering and Anti-Terrorist Financing Act is to combat/counter money laundering and terrorist financing. This act imposes obligations on certain persons and institutions, such as banks, lawyers, notaries and accountants. Furthermore, such persons and institutions must, under certain circumstances, report suspicious transactions of their clients to the relevant authority. The report, among other things, should include the identity of their client. Other examples of offences criminalised by the Economic Offences Act are, for example, environmental offences and violation of the Foreign Nationals Employment Act. Tax offences, including serious tax offences like tax evasion, are punishable by the State Taxes Act.

Real estate

Regarding the ownership and transfer of real property in the Netherlands, the Dutch legal system does not make any difference between foreign companies and Dutch companies. No special restrictions exist in that respect for foreign investors. Real property means land as well as buildings.

The rules relating to real property situated in the Netherlands are mainly laid down in the Dutch Civil Code. In addition to the Dutch Civil Code, several separate laws apply (for example, laws relating to environmental issues, zoning and building permits).

All land in the Netherlands is divided into parcels of land that are registered on maps in the Land Registry Office. Each parcel of land has a unique cadastral address. There is:
► one national land registration, which indicates the owners, the kinds of other rights in rem, the existence of rights of first refusal, the size, public address (etc.) and

► one national public register, which register contains the underlying deeds, (registerable) documents and cadastral maps.

The Land Registry Office is publicly accessible.

With regard to real property in the Dutch legal system, the following rights in rem can be distinguished:

**Freehold (’eigendom’):**
Freehold is the most comprehensive right. All other rights in rem are derived from freehold. Dutch land is, as a rule, privately owned. The owner of real property is free to use this property as he deems fit, provided that he observes the restrictions following from private and public laws, statutory regulations, third-party rights, etc.

The ownership of real property in the Netherlands is based on the ownership of the land and encompasses all objects (constructions, water, plants, trees, etc.) that have been erected in, on or above the land. The owner of a parcel of land is therefore, by operation of law, also the owner of everything erected in, on or above that land, regardless of who has erected that construction or (immovable) object.

**Long lease (’erfpacht’):**
A long lease is a limited right in rem that grants the long lessee the right to use the property as if he were the (full) owner, against payment of a periodical ground rent (’canon’). The lessee, however, does not become the owner of the property or of the buildings it erects on the property. The ownership remains with the (bare) owner (often a municipality). A long lease can either be perpetual, for an indefinite period or for a certain period.

**Right of superficies (’opstalrecht’):**
A right of superficies is a limited right in rem to have or acquire the ownership of buildings, works or plants in, on or above, the immovable property of another person, against payment of a periodical requital (’retributie’). A right of superficies often also includes the right to maintain the buildings, works or plants involved. A right of superficies can either be perpetual, for an indefinite period or for a certain period.

The main difference with long lease is that long lease only creates a right of use, whereas a right of superficies includes the ownership of the object it is established on.

**Apartment rights (’appartementsrechten’):**
An apartment right is a right in rem that consists of an undivided share in the ownership of the entire property (co-ownership) that has been divided into apartments, as well as an exclusive right of use of a specific unit (apartment) in that property.

**Right to use joint possessions (’mandeligheid’):**
A right to use joint possessions is a special form of co-ownership. The joint property has to be for the benefit of all co-owners (for example a wall between two parcels of land). This right cannot be separated from the ownership of the properties to which it belongs.

**Usufruct (’vruchtgebruik’):**
Usufruct of real property is a limited right in rem to use and take the profits of property owned by another. The duration of usufruct is either limited in time, dependant on someone’s lifespan, or applicable for a period of thirty years if the usufructuary is a corporation.

**Easements (’erfdienstbaarheden’):**
An easement is a limited right in rem which obliges the owner of a servant property to tolerate, or to refrain from certain action, on behalf of a dominant property. It can be agreed upon that it also contains an obligation for the owner of the servant property to maintain certain buildings and works situated on the servant property.
Mortgage (‘hypotheekrecht’):

A right of mortgage is a limited right in rem to secure a payment obligation. Other obligations than payment obligations cannot be secured with a right of mortgage, unless this other kind of obligation is linked to a penalty (payment) clause. Only real property and registered ships and planes can be mortgaged.

Please note that all rights in rem can be beneficially owned by another party than the legal owner. Beneficial ownership cannot be registered in the Land Registry Office.

In general, transfer of rights in rem and establishment of limited rights in rem with regard to real property occurs in two stages:

► the contractual stage and
► (following the first stage) the actual transfer/establishment stage.

Dutch real property can be transferred either under a general title (for example, inheritance, statutory merger, and marriage) or under a special title (for example, a sale and purchase contract, (capital) contribution into a company, division of property).

For such transfer under special title, and the establishment of limited rights in rem, Dutch law requires a notarial deed, followed by the registration of an official copy thereof in the Land Registry Office. The transfer (or establishment) is complete at the time of registration. Please note that ownership and other rights in rem can also be acquired through prescription (‘verkrijgende verjaring’). Transfer of beneficial ownership is form-free.

If one acquires Dutch real property in principle Dutch real estate transfer tax is due (by the purchaser). Dutch real estate transfer tax is due over the fair market value (‘waarde in het economisch verkeer’) of the property or the consideration, if the latter is higher, at a rate of 6 per cent (non-residential real property) or 2 per cent (residential real property). In case a limited right in rem is acquired, a special method applies to calculate the taxable base, which taxable base will never be higher than the fair market value of the property itself (if it would be freehold).

Several exemptions to Dutch real estate transfer tax exist, for example, if VAT is due at the acquisition of the property. In principle, VAT is due in case of acquisition of a newly developed property (within 2 years after the property was taken into use for the first time) or building land.

Existing law is stated as it applies in March 2016.
### Key contacts at AKD N.V.

<table>
<thead>
<tr>
<th>Specialty</th>
<th>Name</th>
<th>Contact Information</th>
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<tbody>
<tr>
<td><strong>CORPORATE</strong></td>
<td>Erwin Rademakers, Partner</td>
<td>+31 88 253 55 80 <a href="mailto:erademakers@akd.nl">erademakers@akd.nl</a></td>
</tr>
<tr>
<td></td>
<td>Jeroen Pop, Partner</td>
<td>+31 88 253 55 09 <a href="mailto:jpop@akd.nl">jpop@akd.nl</a></td>
</tr>
<tr>
<td><strong>EMPLOYMENT</strong></td>
<td>Paul Klinckhamers, Partner</td>
<td>+31 88 253 51 46 <a href="mailto:pklinckhamers@akd.nl">pklinckhamers@akd.nl</a></td>
</tr>
<tr>
<td></td>
<td>Pascal van Schaik, Senior Associate</td>
<td>+31 88 253 51 40 <a href="mailto:pvanschaik@akd.nl">pvanschaik@akd.nl</a></td>
</tr>
<tr>
<td><strong>TAXATION</strong></td>
<td>Michel Bilars, Partner</td>
<td>+31 88 253 51 24 <a href="mailto:mbilars@akd.nl">mbilars@akd.nl</a></td>
</tr>
<tr>
<td><strong>DISPUTE RESOLUTION</strong></td>
<td>Barend de Roy van Zuidewijn, Partner</td>
<td>+31 88 253 51 05 <a href="mailto:bderoyvanzuidewijn@akd.nl">bderoyvanzuidewijn@akd.nl</a></td>
</tr>
<tr>
<td></td>
<td>Marc Goethals, Counsel</td>
<td>+31 88 253 52 29 <a href="mailto:mgoethals@akd.nl">mgoethals@akd.nl</a></td>
</tr>
<tr>
<td><strong>COMPEITION</strong></td>
<td>Joost Houdijk, Senior Associate</td>
<td>+31 88 253 50 79 <a href="mailto:jhoudijk@akd.nl">jhoudijk@akd.nl</a></td>
</tr>
<tr>
<td><strong>INTELLECTUAL PROPERTY</strong></td>
<td>Huib Berendschot, Partner</td>
<td>+31 88 253 59 15 <a href="mailto:hberendschot@akd.nl">hberendschot@akd.nl</a></td>
</tr>
<tr>
<td><strong>COMMERCIAL CONTRACTS</strong></td>
<td>Bas Maasen, Senior Associate</td>
<td>+31 88 253 57 27 <a href="mailto:bmaasen@akd.nl">bmaasen@akd.nl</a></td>
</tr>
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<td>Jeroen Pop, Partner</td>
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<td>E-COMMERCE</td>
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<td>Martin Hemmer, Partner</td>
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<td>DATA PROTECTION</td>
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<td>Martin Hemmer, Partner</td>
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<td>PRODUCT LIABILITY</td>
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<td>Bas Maasen, Senior Associate</td>
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<tr>
<td>BRIBERY AND CORPORATE CRIME</td>
<td></td>
<td>Robbert-Jan Boswijk, Partner</td>
</tr>
<tr>
<td>REAL ESTATE</td>
<td></td>
<td>Marc Wintgens, Partner</td>
</tr>
</tbody>
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Our offices

<table>
<thead>
<tr>
<th>Office</th>
<th>Address</th>
<th>Phone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>AMSTERDAM</td>
<td>Gustav Mahlerlaan 2970 1081 LA Amsterdam The Netherlands +31 88 253 50 00</td>
<td>+31 88 253 50 00</td>
<td></td>
</tr>
<tr>
<td>ROTTERDAM</td>
<td>Wilhelminakade 1 3072 AP Rotterdam The Netherlands +31 88 253 50 00</td>
<td>+31 88 253 50 00</td>
<td></td>
</tr>
<tr>
<td>EINDHOVEN</td>
<td>Flight Forum 1 5657 DA Eindhoven The Netherlands +31 88 253 50 00</td>
<td>+31 88 253 50 00</td>
<td></td>
</tr>
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Introduction and legal system

Political structure

Northern Ireland is one of the four countries that form the United Kingdom, one of Europe’s most open and flexible business environments. The Northern Ireland Assembly was established in 1998 and is the devolved legislature for the province. The Assembly debates and makes laws on transferred matters, and scrutinises and makes decisions on the work of the Northern Ireland government departments. It is made up of 108 elected Members of the Legislative Assembly (MLAs), and meets in Parliament Buildings at Stormont in Belfast.

The Northern Ireland Executive is the devolved government for Northern Ireland. It is responsible for many issues, including economic and social matters, agriculture and rural development, education, health, culture, arts, social services and public safety. The Executive Committee meets to agree on significant issues, and puts forward proposals for new laws for the Assembly to consider. It is made up of the First Minister and Deputy First Minister, and the ten ministers for the government departments.

Legal system

The UK does not have a constitution; rather it is a common law jurisdiction. Northern Ireland derives its legislation from four sources, namely, common law, European law, legislation from the Northern Ireland Assembly and UK legislation from the Westminster Parliament. Being part of the UK, Northern Ireland is also a part of the EU. EU law is incorporated either directly or through implementing legislation enacted by Parliament in the case of directives.

Economy and government

The Northern Ireland economy is well on its way to recovery following the global downturn; in terms of increased flow of credit to business and falling unemployment, an expanding workforce and improvement in exports. A recent report from the Department of Enterprise Trade and Investment (DETI) in Northern Ireland shows that while growth has not been as strong as hoped the Northern Ireland economy is still estimated to have grown by 1.7% in real terms in 2015 with a similar rate expected in 2016 and 2017. Employment grew by around 12,000 in 2015, taking its total employment rate for those aged 16-64 to 69%.

The public sector remains a central driver of overall economic activity in Northern Ireland, although 2015 saw the loss of over 5,000 public sector jobs which represents a 2.5% decrease. This loss was balanced by the addition of over 17,000 new private sector jobs. Nevertheless, around 30% of Northern Ireland’s workforce is employed by the public sector compared with 17% elsewhere in the UK. DETI therefore remains focused on growing the private sector. As Foreign Direct Investment (FDI) (as discussed further below) is particularly important to the private sector, it is a principal focus of local government and considered key to progression and development of the economy.

Northern Ireland’s operating costs are competitive and significantly lower than the rest of the UK and Europe. A variety of business facilities are relatively inexpensive with prime office rents peaking at £15.50 per sq ft in parts of the greater Belfast area and £8 in other areas.

Salaries are also lower in Northern Ireland, ranging from between 20 per cent. and 40 per cent less than other locations in the rest of the UK and the Republic of Ireland. Telecoms costs also remain among the lowest in Europe.

NB. Facts and figures in this section have been taken from the March 2016 DETI Economic Commentary and Colliers International National Office Rents 2015.

Restrictions/regulations

There are few restrictions on foreign investment in Northern Ireland: however, as with the rest of the UK, some key sectors are subject to regulation, most of which are attributable to the implementation of EU Directives and / or Regulations. Sectors covered include the financial services industry and utilities such as energy, water and telecommunication.

As in the UK and Europe, attention should be given to ensure observance of competition law requirements. UK competition laws apply to Northern Ireland.
As in the UK, the financial services industry is strictly regulated by the Financial Services and Markets Act 2000 and its subsidiary legislation.

**Foreign investment policy**

Foreign Direct Investment (FDI) is a key focus of local government and is considered the key to progression and development of the economy. Northern Ireland has a strong track record in attracting FDI and, outside London, Northern Ireland is now the leading UK region for attracting inward investment. The local regional development agency, Invest Northern Ireland (Invest NI), supported £683 million of FDI during 2014-15, which represents the second highest level of financial support to FDI in Invest NI’s history. Through these offers, over 4,700 new jobs were announced in 2014-15.

Software and IT, business and professional services, and financial services account for a large percentage of new jobs created by FDI in recent years. In software development, Northern Ireland is the most successful region in Europe in attracting FDI and is the top destination globally for financial services technology investment. According to Invest NI figures, investor satisfaction levels are high with 75 per cent. of new investors having reinvested.

As part of DETI, Invest NI’s role is to grow the local economy and provide strong government support for businesses by effectively delivering the Government’s economic development strategies. Northern Ireland offers some of the most attractive incentive packages in Europe, with financial support for start-up, fledgling and growth businesses and comprehensive advice to ease the investment process.

Investors have access to a broad range of funding options as well as a developing venture capital market. Financial incentives offered to organisations who decide to invest in Northern Ireland include:

- revenue grants towards start-up costs, interest relief, factory rental costs, training costs, marketing development costs and R&D expenditure
- pre-employment training grants
- finance investment in the share capital of a company and the provision of government loans at commercial and concessionary rates
- R&D capital spending can be written off against income
- property tax exemptions for manufacturing property
- generous depreciation allowances

In recent years, Invest NI’s ‘Access to Finance’ initiative has created six funds (both equity and debt based) to provide £170 million in finance to support businesses of different sizes and at different stages of growth or development. Each fund is managed by an independent fund manager.

Following a long campaign by business leaders in Northern Ireland corporation tax rate setting powers were finally devolved to the Northern Ireland Executive by the Corporation Tax (Northern Ireland) Act 2015. It is widely believed that a new, lower rate (most likely comparable to the 12.5% rate in the Republic of Ireland) will be implemented as soon as April 2018, subject to cross-party support. Analysis from Invest NI indicates that a lower rate of corporation tax could potentially attract around £1 billion of extra investment and 32,000 additional jobs and boost output by 8.5% over 15 years (see below).

Northern Ireland offers other advantages to investors, including a highly educated workforce. According to a recent major survey, Northern Ireland’s education system is among the best performing in Europe, with 75 per cent. of school leavers going on to further and higher education. It also has an excellent infrastructure with advanced telecoms and transport networks and a competitive cost environment.

**NB.** Facts and figures in this section have been taken from the December 2015 DETI Economic Commentary.
Types of business vehicles

Options available in terms of business vehicles are as for England and Wales, the most common business structures being a private limited company and a partnership. Foreign Companies may also conduct business in Northern Ireland either through a branch or a place of business.

The same or equivalent regulation applies to corporate entities in Northern Ireland as in England and Wales. In particular, the Companies Act 2006 applies directly to Northern Ireland as it does in England & Wales; no Northern Ireland specific issues arise under this legislation, although advice may be required in relation to companies incorporated prior to 1 October 2009 under the Companies (Northern Ireland) Order 1986 (which the 2006 Act replaced) on a fact-specific basis.

Employment

Employee relations climate

In recent years, Northern Ireland has become highly successful in attracting foreign investment, the ability to provide a highly-qualified and skilled workforce being one of the many reasons foreign investors choose to set-up within the country. Northern Ireland’s population of 1.82 million is one of Europe’s youngest and fastest growing with Invest NI estimating that over 40 per cent. are aged 29 or under, and nearly 60 per cent. are under the age of 40. Employee relations are traditionally stable with relatively little strike action.

Main laws regulating employment relationships

In keeping with the rest of the UK, Northern Ireland is exposed to an ever growing amount of legislative intervention within industrial relations. There are a number of differences between the Codes of Practice in Northern Ireland and those in the rest of the UK, in particular, the Northern Irish Codes of Practice relating to discrimination on grounds of religious belief and political opinion and in respect of harassment.

Following the approach in England and Wales, the Employment Act (Northern Ireland) 2011 repealed the Statutory Grievance Procedures in Northern Ireland, replacing them with a Code of Practice produced by the Labour Relations Agency. However, contrary to the position in England and Wales, the Statutory Disciplinary and Dismissal Procedures remain in force in Northern Ireland and care must be taken to ensure that proper procedures are followed to ensure compliance and to guard against a finding of automatic unfair dismissal.

Recent legislative changes in England and Wales have led to some further divergence in practice between England and Wales and Northern Ireland, most notably in respect of the length of service required to bring a claim for unfair dismissal. In England and Wales the period is now two years, whilst in Northern Ireland it remains at one year.

The Transfer of Undertakings (Protection of Employment) Regulations 2006, or TUPE as it is known, was implemented in Northern Ireland along with the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006. The regulations protect employees of a business which is being transferred and, by default, those affected employees will automatically transfer with the business. The entity purchasing the business will, therefore, inherit all rights, obligations and liabilities connected to those employees.

Case law plays a significant role in employment law in Northern Ireland and tribunals are bound by previous decisions from the Industrial Tribunal and Fair Employment Tribunal in Northern Ireland together with the Northern Ireland Court of Appeal. Whilst decisions from the employment tribunals in England and Wales are not legally binding in Northern Ireland, seminal decisions (particularly from the higher courts and tribunals) are often considered to be of persuasive value. An example of this is the recent United Kingdom Employment Appeal Tribunal's decision in Bear Scotland –v- Fulton and Others (and other consolidated claims) which has had a significant effect on how employers are to calculate holiday pay.

Contract of employment

Pursuant to the Employment Rights (Northern Ireland) Order 1996 an employee must receive a written statement of the main particulars of their employment, as a minimum this should include information on hours, rate of pay and place of work. Terms are also implied by statute, such as the Working Time Regulations (Northern Ireland) 1998 which provides workers with a statutory right to paid holidays. Terms are also implied by common law such as an employer’s duty to pay wages and to provide work for employees and the duty to take reasonable care in giving references.
Management representation

Management representation is not an entitlement of employees within Northern Ireland: however, some legislation does give rise to a right of collective consultation in keeping with the UK. The Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006 and Employment Rights (Northern Ireland) Order 1996 require consultation with employee representatives in a limited number of employment scenarios.

Termination of individual employment

This is regulated by the Employment Rights (Northern Ireland) Order 1996. An employer must give an employee at least one week’s notice after one month’s employment and thereafter one additional week’s notice for each completed year of service, rising to a maximum of 12 weeks’ notice. The employer or the employee may be entitled to a longer period of notice than the statutory minimum if this is provided for in the contract of employment.

As is the position in the UK, employees in Northern Ireland have the statutory right not to be unfairly dismissed. However, this statutory right is triggered upon completion of one year of continuous service with the employer, unlike the requirement of two years’ continuous service in England and Wales. The right not to be unfairly dismissed includes constructive dismissal, which occurs where an employer does not dismiss an employee, but commits a serious breach of contract as a result of which the employee resigns.

Discrimination

Employers must take care when recruiting prospective employees not to infringe the provisions of the discrimination legislation applicable in Northern Ireland. It is unlawful in Northern Ireland to discriminate against applicants or workers on the basis of the following protected grounds: sex; race and ethnicity; disability; religious belief and/or political opinion; sexual orientation; and age. It is also unlawful to refuse to offer employment because a person is or is not a member of a trade union. Employers should consider carefully any employee requests to work part-time or to job-share, as a refusal to consider such requests can amount to unlawful discrimination.

Employers in Northern Ireland are required to recruit in compliance with the applicable equality legislation ensuring that both Roman Catholics and Protestants have equal opportunities with regards to recruitment. In this regard, the statutory obligation is to reflect the local demographic and not necessarily to recruit on a 50/50 basis (unless, of course, the demographic of the surrounding area or ‘catchment’ area for the job role is also 50% Roman Catholic and 50% Protestant). Therefore, it is acceptable within the jurisdiction to have a workforce with a majority of either Protestant or Roman Catholic workers, if the demographic of the surrounding location reflects this.

Claims for unfair dismissal and/or discrimination on the basis of one of the protected grounds listed above, must be presented to the Industrial Tribunal in Northern Ireland. One exception to this is in respect of complaints of alleged discrimination on the grounds of religious belief and/or political opinion, which are heard by the Fair Employment Tribunal, an independent judicial body in Northern Ireland which has jurisdiction to hear and determine such complaints.

Redundancies

Redundancies are regulated by Employment Rights (Northern Ireland) Order 1996 and monitored by local government in the form of the Department of Employment, Trade and Investment (DETI). In a redundancy exercise it is important to conduct the process fairly, objectively, and in accordance with recognised procedures. It is necessary under the legislation to develop objective criteria for selection and consult the employees giving them notice of the process. Failure to follow a reasonable process may result in tribunal claims, increasingly common in the present climate. This is another area in which divergence in the law within the UK is apparent; when compared to England and Wales, enhanced periods of consultation are required in a Northern Ireland collective redundancy and must be timetabled accordingly (90 days in Northern Ireland versus 45 in England and Wales) when the issue of collective redundancies arises.

Foreign employees

UK legislation and government policy on foreign employees extends to Northern Ireland. Employees from EU countries do not require work permits to work within Northern Ireland. Northern Ireland is the only part of the UK that borders with a ‘foreign’ country with differing taxation protocols. Employees from Northern Ireland working in the Republic of Ireland do not need a work permit or residency permit. The key restrictions on persons resident in Northern Ireland and wishing to work in the Republic are that they will pay tax directly to the Irish Revenue Commissioner; will be required to submit an annual Self-

Assessment on foreign earnings to HMRC; and will be eligible for credit / tax relief (based on Irish tax paid) due to the Double Taxation Agreement between the UK and Ireland.

Taxation

Taxation overview

The UK taxation regime, for the most part, extends to Northern Ireland. Tax is collected by HM Revenue & Customs (HMRC) and the tax year runs from 6 April to 5 April the following year.

Income tax

Income tax and National Insurance Contributions (NICs) are payable on all earnings and income, subject to some exemptions. Employees pay their tax through the Pay As You Earn (PAYE) system and the amount payable varies with the amount earned. Self-employed persons are responsible for paying their own tax through the self-assessment system.

It is common for people domiciled in Northern Ireland to cross the border and work in the Republic of Ireland and vice versa. Working in the Republic of Ireland is considered ‘Working Overseas’ for tax purposes.

The employee would pay income tax in the country where they earn their income but their tax responsibility lies with the country in which they reside. An employee working in the Republic of Ireland would pay tax directly to the Irish Revenue Commissioner and they would then be required to file an annual Self Assessment on foreign earnings to HMRC. The employee will be eligible for credit / tax relief (based on Irish tax paid) due to the Double Taxation Agreement between the UK and Ireland.

Corporate bodies

Corporation tax is payable by businesses in Northern Ireland as it is in England and Wales.

As noted above, corporation tax rate setting powers have now been devolved to the Northern Ireland Assembly, with the introduction of the Corporation Tax (Northern Ireland) Act 2015. It is anticipated that a new, lower rate will be implemented as soon as April 2018. The decision on the rate of corporation tax in Northern Ireland will, therefore, ultimately rest with the Northern Ireland Assembly and it is thought that the rate will be set considerably lower than the current rate and at a level more comparable to (or lower than) the rate of corporation tax in the Republic of Ireland (12.5%).

It is hoped that, with the devolution of corporation tax issues, Northern Ireland will become an even more attractive location for businesses and, therefore, increase FDI and invigorate the local economy further, helping with DETI’s aim to grow the private sector and reduce Northern Ireland’s reliance on the public sector. Nevertheless, the recent decision by the UK Chancellor in the 2016 Budget to reduce the overall UK rate of corporation tax to 17% will close the gap between the Great Britain and Northern Ireland corporation tax rates once implemented by the Northern Ireland Assembly.

Whilst HMRC collect and administer taxes in Northern Ireland, the Northern Ireland Corporate Tax Office (NirCTO), established in July 2007 as part of HMRC, helps promote corporate inward investment and local business expansion in Northern Ireland. NirCTO liaise with companies and their financial advisors, local government and regional economic development bodies, with the aim of providing potential investors with advice in relation to the tax consequences of commercial transactions that may affect proposed investment or expansion plans in Northern Ireland amongst other issues.

Dispute resolution

Court process

The choice of court in Northern Ireland for civil proceedings largely depends on the value of the claim. Whereas in England and Wales the Civil Procedural Rules (CPR) govern the conduct of civil disputes, in Northern Ireland the Rules of the Court of Judicature (the Rules) apply. The Rules are similar to those in existence in England and Wales prior to the introduction of CPR.

The County Court is a general term covering the Small Claims Court, District Judges Court and County Court. There are seven County Court Divisions in Northern Ireland. In general, the Small Claims Court deals with actions with a value of less than £3,000 and the County Court with those less than £30,000. The County Court also has jurisdiction to consider applications for the grant of liquor licenses. If a party is aggrieved by a judgment of the County Court, there may be a right to
appeal either to the High Court or to the Northern Ireland Court of Appeal on a point of law. The Northern Ireland Court of Appeal is located in Belfast city centre.

The Magistrates’ Court has a limited civil function which includes applications for particular licenses and certain types of debt cases. The seven County Court Divisions in Northern Ireland are in turn divided into 21 petty sessions districts for the organisation of the Magistrates’ Courts.

The High Court in Northern Ireland is also located in Belfast city centre and generally deals with claims with a value of over £30,000 (and no upper limit). It is divided into three divisions: Chancery Division, Queen’s Bench Division and Family Division. The Chancery Division deals with, amongst others, actions concerning partnerships and companies, bankruptcies and enforcement of mortgages and other securities. The Queen’s Bench Division deals with personal injury, breach of contract, defamation and all other business not specifically assigned to another division. A case within the Queen’s Bench Division can also be allocated to the Commercial Court, which is designed to expedite the progression of disputes arising out of business transactions. The Commercial List is an attractive forum for businesses and financial institutions.

Alternative Dispute Resolution

In keeping with England and Wales, alternative dispute resolution (ADR) mechanisms such as mediation, adjudication and arbitration are becoming increasingly popular, especially in the current economic climate. These options are often less expensive than litigation, albeit that ADR is still less prevalent in Northern Ireland than in the UK or, indeed, the Republic of Ireland. Mediation can be attempted at any stage of a dispute and often the courts will direct the parties to consider mediation as opposed to litigation. If a dispute is not resolved through mediation, the parties are free to proceed with litigation. Arbitration is a procedure for resolving disputes privately, in which both sides agree to be bound by the decision of an independent third party, known as an arbitrator. The Arbitration Act 1996 largely extends to Northern Ireland. The law in Northern Ireland is also similar to the law of England and Wales in relation to adjudication. Adjudication is widely-used in the construction industry, with parties to a construction contract enjoying a statutory right to refer disputes to adjudication.

Competition

UK Competition legislation extends to and is applied in Northern Ireland. In April 2014, the Competition and Markets Authority became fully operational as the UK’s competition authority. The new body is a result of the merger of some functions of the Office of Fair Trading and the Competition Commission, as set out in the Enterprise and Regulatory Reform Act 2013. The reform also incorporates tighter timetables, stronger powers of investigation and stronger powers to impose interim measures.

However, power has been delegated to certain bodies in Northern Ireland in respect of some matters, for example, the Northern Ireland Authority for Utility Regulation is responsible for the regulation of the Electricity, Gas and Water and Sewerage industries in Northern Ireland.

Intellectual property

UK Intellectual property legislation extends to, and is applied in, Northern Ireland as it is across the rest of the UK. There are no legal issues specific to Northern Ireland in this regard.

Marketing agreements

Agency relationships within Northern Ireland are governed by the Commercial Agents (Council Directive) Regulations 1993. The principles of agency relationships are as in England and Wales.

Distribution arrangements are less regulated than those of agency, which can be favourable to businesses. Unlike agency arrangements on which determination of the arrangement can result in large compensation actions, there is no requirement for the supplier to pay compensation when a distribution agreement ends.

There is no legislation governing franchising within Northern Ireland; it is self-regulated, as in England and Wales.

E-commerce

The Electronic Commerce (EC Directive) Regulations 2002, the Privacy and Electronic Communications Regulations 2003, the Electronic Communications (EC Directive) (Amendment) Regulations 2011 and the Consumer Protection (Distance
Selling) Regulations 2000 apply throughout the UK, including Northern Ireland. No Northern Ireland specific legal issues arise in relation to e-commerce or distance selling.

Data protection

The Data Protection Act 1998 (the Act) came into force on 1 March, 2000. This UK legislation extends to Northern Ireland giving effect to the 1995 EC Data Protection Directive. The Act establishes a framework of rights and duties which are intended to safeguard personal data. This structure balances the legitimate needs of organisations to collect and use personal data for business and other purposes against respect for an individual's right to privacy of their personal details.

There is on-going discussion at EU level in respect of the proposed introduction of a new Data Protection Regulation which is intended to be a comprehensive reform of the 1995 Data Protection Directive on which the Act is based. The main changes proposed include a single, pan-European law for data protection, one central supervisory authority and stronger enforcement powers. It is expected that the new EU Data Protection Regulation will not enter into force before 2017.

Product liability

Laws relating to product liability mirror those in effect in England and Wales and allow a customer to sue a supplier, without proof of negligence, as required under sale of goods law. The applicable legislation comprises the Consumer Protection (Northern Ireland) Order 1987 as amended by the Product Liability (Amendment) Act (NI) 2001 and the Consumer Protection from Unfair Trading Regulations 2008.

Bribery and corporate crime

The legislative framework with respect to bribery and corporate crime in Northern Ireland is the same as that in England and Wales. Any differences are minor and would be dealt with on a case-by-case basis, for example, for those cases of a historic nature not governed by the new legislation. The main pieces of legislation are the Bribery Act 2010, the Proceeds of Crime Act 2002 and the Fraud Act 2006.

The Bribery Act 2010 introduces the general offences of paying a bribe and accepting a bribe, the specific offence of bribery of a foreign public official and the corporate offence of failing to prevent bribery. The Fraud Act 2006 creates general offences of fraud being by false representation, failing to disclose information and abuse of position.

The Money Laundering Regulations 2007 (MLR) introduce a risk-based approach to anti-money laundering compliance. The Proceeds of Crime Act 2002 (as amended) established a number of money laundering offences including: principal money laundering offences; offences of failing to report suspected money laundering; offences of tipping off about a money laundering investigation and prejudicing money laundering investigations. This greatly increases the vigilance needed by professionals with regard to money laundering.

Businesses should take appropriate measures to ensure compliance with bribery and corporate crime legislation as consequences of a breach can include large fines and imprisonment for relevant individuals.

Real estate

Northern Irish land laws and conveyancing laws derive partly from English and partly from Irish common law and statutes. This has resulted in a distinct and unique set of rules and procedures.

Due to these procedures, fragmentation of property into numerous interests and sub-interests, particularly in urban areas, has resulted in a more complicated system than in England, but with many familiar concepts.

Recent years have seen debate regarding potential reforms to Northern Irish land law, however, it seems unlikely that English and Northern Irish laws will mirror each other in the future.

There are two parallel registers for land in Northern Ireland: The Registry of Deeds for registration of documents dealing with land (primarily used in relation to unregistered land), and the Land Registry which deals with the registration of ownership of land.
As in England and Wales, it is possible to hold a freehold or a leasehold interest in land. Long leasehold of 999 years and over is still the most common form of land ownership in Northern Ireland, but of course leases for shorter terms, 25 years and under, at an open market rent are more common for most commercial occupiers and their day to day business requirements. There are no specific restrictions on a foreign incorporated company owning Real estate in Northern Ireland. The tax requirements on acquisition of an interest in land in Northern Ireland are the same as in England and Wales: Stamp Duty Land Tax may be payable and Land Registry Fees may be due.

Existing law is stated as it applied in April 2016.

USEFUL CONTACTS

<table>
<thead>
<tr>
<th>Invest Northern Ireland</th>
<th>Northern Ireland Corporation Tax Office</th>
<th>Department of Enterprise, Trade &amp; Investment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bedford Square</td>
<td>Custom House</td>
<td>Netherleigh</td>
</tr>
<tr>
<td>Bedford Street</td>
<td>Custom House Square</td>
<td>Massey Avenue</td>
</tr>
<tr>
<td>Belfast, BT2 7ES</td>
<td>Belfast, BT1 3ET</td>
<td>Belfast, BT4 2JP</td>
</tr>
<tr>
<td>+44 28 9098 8000</td>
<td>+44 3000 599 000</td>
<td>+44 28 9052 9900</td>
</tr>
<tr>
<td>Fax: +44 28 9043 6536</td>
<td>Fax: +44 3000 599 001</td>
<td><a href="mailto:eo@investni.com">eo@investni.com</a></td>
</tr>
<tr>
<td><a href="http://www.investni.com">www.investni.com</a></td>
<td>David R <a href="mailto:Stewart@hmrc.gsi.gov.uk">Stewart@hmrc.gsi.gov.uk</a></td>
<td><a href="http://www.investni.com">www.investni.com</a></td>
</tr>
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<tr>
<th>The Law Society of Northern Ireland</th>
<th>Laganside Courts</th>
<th>Office of the Industrial Tribunals and the Fair Employment Tribunal</th>
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<tbody>
<tr>
<td>96 Victoria Street</td>
<td>Oxford Street</td>
<td>Killymeal House</td>
</tr>
<tr>
<td>Belfast, BT1 3GN</td>
<td>Belfast, BT1 3LL</td>
<td>2 Cromac Quay</td>
</tr>
<tr>
<td>+44 28 9023 1614</td>
<td>+44 28 9032 8594</td>
<td>Belfast BT7 2JD</td>
</tr>
<tr>
<td>Fax: +44 28 9023 2606</td>
<td>Fax: +44 9031 0227</td>
<td>+44 28 9032 7666</td>
</tr>
<tr>
<td><a href="http://www.lawsociety.org.uk">www.lawsociety.org.uk</a></td>
<td>DX: 461 NR</td>
<td>Fax: +44 28 9025 0100</td>
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<td><a href="mailto:cmslaganside@courtsni.gov.uk">cmslaganside@courtsni.gov.uk</a></td>
<td><a href="mailto:mail@employmenttribunalsni.org">mail@employmenttribunalsni.org</a></td>
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Further information

Key contacts at A&L Goodbody

OFFICES

<table>
<thead>
<tr>
<th>Dublin, International Financial Services Centre, North Wall Quay, Dublin 1</th>
<th>+353 1 649 2000</th>
</tr>
</thead>
<tbody>
<tr>
<td>Belfast, 6th Floor, 42/46 Fountain Street, Belfast BT1 5EF</td>
<td>+44 28 9031 4466</td>
</tr>
<tr>
<td>London, Augustine House, Austin Friars, London EC2N 2HA</td>
<td>+44 20 7382 0800</td>
</tr>
<tr>
<td>New York, Suite 33D, The Chrysler Building, 405 Lexington Avenue, New York, NY 10174</td>
<td>+1 212 582 4499</td>
</tr>
<tr>
<td>San Francisco, The Shell Building, 100 Bush Street, San Francisco, CA 94104</td>
<td>+1 415 767 5260</td>
</tr>
</tbody>
</table>
## INDIVIDUAL CONTACTS – NORTHERN IRELAND

<table>
<thead>
<tr>
<th>Department</th>
<th>Name</th>
<th>Contact Number</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Banking &amp; Financial Services</td>
<td>Louise Bailey</td>
<td>+44 28 9072 7436</td>
<td><a href="mailto:lbailey@algoodbody.com">lbailey@algoodbody.com</a></td>
</tr>
<tr>
<td>Commercial Contracts, Intellectual Property &amp; Information Technology</td>
<td>Mark Thompson</td>
<td>+44 28 9072 7591</td>
<td><a href="mailto:mthompson@algoodbody.com">mthompson@algoodbody.com</a></td>
</tr>
<tr>
<td>Commercial Property</td>
<td>Mark Blair</td>
<td>+44 28 9072 7598</td>
<td><a href="mailto:mblair@algoodbody.com">mblair@algoodbody.com</a></td>
</tr>
<tr>
<td>Corporate</td>
<td>Peter Stafford</td>
<td>+44 28 9072 7590</td>
<td><a href="mailto:pstafford@algoodbody.com">pstafford@algoodbody.com</a></td>
</tr>
<tr>
<td>Employment</td>
<td>Gareth Walls</td>
<td>+44 28 9072 7402</td>
<td><a href="mailto:gwalls@algoodbody.com">gwalls@algoodbody.com</a></td>
</tr>
<tr>
<td>Energy &amp; Natural Resources</td>
<td>Mark Stockdale</td>
<td>+44 28 9072 7456</td>
<td><a href="mailto:mstockdale@algoodbody.com">mstockdale@algoodbody.com</a></td>
</tr>
<tr>
<td>EU &amp; Competition</td>
<td>Micaela Diver</td>
<td>+44 28 9072 7592</td>
<td><a href="mailto:mbrunton@algoodbody.com">mbrunton@algoodbody.com</a></td>
</tr>
<tr>
<td>Litigation &amp; Dispute Resolution</td>
<td>Brendan Fox</td>
<td>+44 28 9072 7432</td>
<td><a href="mailto:bfox@algoodbody.com">bfox@algoodbody.com</a></td>
</tr>
<tr>
<td>Projects &amp; Construction</td>
<td>Brendan Fox</td>
<td>+44 28 9072 7432</td>
<td><a href="mailto:bfox@algoodbody.com">bfox@algoodbody.com</a></td>
</tr>
<tr>
<td>Restructuring &amp; Insolvency</td>
<td>Michael Neill</td>
<td>+44 28 9072 7433</td>
<td><a href="mailto:mneill@algoodbody.com">mneill@algoodbody.com</a></td>
</tr>
</tbody>
</table>
DOING BUSINESS IN POLAND
Introduction
The freedom of establishment, operation and termination of a business activity, equal treatment of individuals and economic entities, fair competition and consumer protection all encourage foreign investment in Poland.

Poland is the largest country in Central-Eastern Europe and is one of the largest and potentially most attractive markets for investors in Europe. Foreign investors are attracted by the geopolitical location of Poland, access to a highly-trained local personnel at a relatively low cost and special fiscal and organisational arrangements. Poland has 14 Special Economic Zones and numerous technology parks. Such factors are considered critical when relocating manufacturing facilities or global operational support facilities (in particular technical research, IT, call centres and accounting services) to Poland.

The Polish legal system is based on civil law. Civil rights and liberties, as well as economic freedoms are guaranteed by the Constitution of the Republic of Poland of 1997. Since the collapse of communism in 1989, Poland has been a liberal democracy. Successful political transformation, followed by economic and social reform, led to the accession of Poland to the European Union (EU) and the European Economic Area (EEA) in May 2004. Consequently, domestic laws are now in line with European Community law (including banking and insurance law).

Poland is likely to join the European Monetary Union and replace its domestic currency with € in the next few years. Being a member of many international organisations (OECD, WTO, NATO), and a signatory to numerous bilateral and multilateral agreements stimulates economic growth, which has steadily risen in recent years. According to the data published by the National Bank of Poland, foreign direct investment (FDI) inflow in Poland in 2011 exceeded €9.0 billion and was 45.0% higher than it was in the same period of 2010.

The majority of the largest state-owned service providers in the banking, insurance, and telecommunications markets, as well as those in manufacturing sectors (e.g. iron and steel and the shipbuilding industry) have been privatised. The remaining state owned businesses still represent potential for privatisation.

The Polish economy is supported by a modern financial and banking system. The National Bank of Poland and the Polish Financial Supervision Authority have an overall supervisory role over the banking sector. The Warsaw Stock Exchange, which has been active since 1991, positively stimulates the financial market. In addition, commercial services have grown significantly in recent years in Poland.

Given Poland's geographic location, investment also provides easy access to neighbouring markets in Russia and Ukraine. In 2016, Poland retained its top position as the most attractive investment destination in the CEE region in the fifth edition of a survey conducted by the German Polish Chamber of Industry and Commerce. The majority of those surveyed were satisfied with their decision to establish business activity in Poland and 86% of those surveyed would not hesitate to do so again. Additionally, according to Bloomberg Rankings 2013 Poland is the best CEE country for business.

Business vehicles
Foreign persons from the EU and the European Free Trade Agreement zones belonging to the European Economic Area may undertake and run business under the same rules as apply to Polish investors. The same rules apply to foreigners living outside the EEA who:

► have received a permit to settle in Polish territory
► were granted a consent to stay or a status of refugee in Poland
► enjoy temporary protection within Poland

Other foreign persons only have the right to undertake business activity (unless international agreements state otherwise) using the following business vehicles:

► limited partnership (spółka komandytowa)
► limited joint-stock partnership (spółka komandytowa akcyjna)
► limited liability company (spółka z ograniczoną odpowiedzialnością)
This said, other foreign persons also have the right to enter into these types of partnerships or companies and purchase their shares.

Furthermore, all foreign investors may generally run business branch offices and set up representative offices in Poland, unless the undersigned international treaties state otherwise.

All issues related to commercial companies are governed in detail by the Commercial Companies Code.

**Limited partnership (spółka komandytowa)**

Limited partnership is suitable for legal and natural persons. It enables significant limitation of liability for some members of the partnership. At least one of the partners, the general partner, is liable for all obligations of the partnership without any limitations, but the liability of the limited partners does not exceed the amount set by the articles of partnership. However, if a business name of a limited partnership includes the name or a business name of a limited partner, this partner is liable for obligations of a partnership without any limitation.

**Limited joint-stock partnership (spółka komandytowo akcyjna)**

Limited joint-stock partnership (despite being a partnership) requires a minimum contribution of PLN 50,000 (around EUR 12,000). The scope of the liability is similar to the liability of the limited partnership, i.e. at least one of the partners bears unlimited liability for the partnership's obligations, whereas shareholders are only liable for the amount of their respective share capital contributions. However, if a business name of a limited joint-stock partnership includes the name or a business name of a shareholder, this shareholder is liable for obligations of a partnership without any limitation.

**Limited liability company (sp. z o.o.) and joint-stock company (S.A.)**

The most popular forms of business activity, suitable for the largest business undertakings are a limited liability company (LLC) and a joint-stock company (JSC). The fee for registering an LLC or a JSC is PLN 500 (250 if requested online) (around €120 / 60. The Code of Commercial Partnership and Companies attributes legal personality to both of these business forms and limits liability of its members only to the amount of their initial capital contributions. However, it should be stressed that if the execution of a court order against a limited liability company is impossible, members of the management board of such a company can be jointly and severally liable for company's obligations, unless they file a petition for declaration of bankruptcy or institute arrangement proceedings within a prescribed time limit, (or prove that the failure to file a petition for declaration of bankruptcy or the failure to institute the arrangement proceedings in due time, was not their fault), or that a creditor suffered no damage as a result of the failure to file on time.

**Formation and registration**

A company is incorporated by the execution of articles of association (LLC) or statute (JSC) in the form of a notarial deed and when all shares are subscribed (JSC). Both types of companies can be incorporated by an individual or by a legal entity. The only exception is that an LLC cannot incorporate an LLC or a JSC if it remains the sole shareholder.

Once a company has executed its articles of association or statute, the company can:

- start operating under its registered name, with the additional designation 'company in organisation' (spółka w organizacji)
- acquire Real estate and other property rights
- assume rights and obligations and
- sue and be sued

Note that a company acquires the status of a legal entity only upon entry into the Companies Registry at the National Court Register.
Shareholders’ contributions towards share capital can be made in cash or in-kind. In-kind contributions to a JSC should first be valued by a chartered accountant, although in certain cases management boards may be released from the obligation to ensure such valuation takes place.

Contributions to the share capital of an LLC have to be made in full, prior to registration, whereas only 25% of the share capital of a JSC must be paid up before registration. Shares in a JSC taken up in exchange for a contribution in-kind must be fully paid up within one year after the registration of the JSC.

Within six months from executing articles of association or statute, the management board is obliged to file an application to enter the company into the Companies Registrar of the National Court Register, otherwise the company is dissolved.

Corporate bodies
The normal corporate bodies of an LLC or JSC are:
► shareholders meeting
► the supervisory board
► the management board

A shareholders meeting and management board are mandatory in both types of company. A supervisory board is only mandatory for JSCs (see below). LLCs can choose not to establish a supervisory board (with some exceptions described below) or to establish an audit committee in addition or instead.

Shareholders meeting
In any company, the shareholders are generally the ultimate decision-making body.

There may be ordinary and extraordinary meetings of shareholders. The management board convenes an ordinary meeting, which should be held within six months of the end of the company’s financial year, in order to deal with the following:
► approving the annual financial report of the company
► approving the management board report on the company’s activities
► acknowledging the performance of duties delivered by members of the company’s corporate bodies

The shareholders meeting is responsible, in particular, for matters such as amending the articles of association or statute adopting a resolution about making additional payments and repayments (in LLCs), deciding on the merger, division or transformation of the company, increasing or reducing share capital and deciding on the dissolution of the company. As a rule, the resolutions of shareholders in an LLC are adopted in a shareholders meeting. Without holding a shareholders meeting, resolutions may be passed in the event all the shareholders expressing their consent in writing to the decision to be taken, or to a written vote. However, Polish law specifies matters in relation to which a resolution can be adopted only by the shareholders meeting. In a JSC, all shareholders’ resolutions must be adopted by the shareholders meeting.

Management Board
A management board consists of one or more members. As a rule, management board members are appointed and dismissed by a resolution of the shareholders (in LLCs) or by a resolution of the supervisory board (in JSCs). However, this rule can be modified and alternative methods of appointing and dismissing members can be provided for in the articles of association or the statute.

The management board is in charge of the day-to-day management and represents the company. The powers of the management board are similar in both types of companies, except that for LLCs, any individual member may conduct matters within the ordinary course of business.
Supervisory Board and Audit Committee

A supervisory board is mandatory in a JSC, whereas in an LLC it is only required if the share capital exceeds PLN 500,000 (around EUR 117,000) and there are more than 25 shareholders. Otherwise, a supervisory board is optional. As mentioned above, an audit committee may be created in an LLC instead of or in addition to a supervisory board, but in practice that hardly ever happens.

Liability

The shareholders of an LLC and a JSC are not personally liable for the obligations of the company; however, laws concerning civil, tax and criminal liability of members of the management board will apply to any shareholder who is also a management board member.

Increase / reduction in share capital – merger / demerger - transformation

Any increases of a company’s share capital normally require either:

► a resolution of the shareholders modifying the company’s articles of association or statute

► a resolution of the management board, where permitted by the JSC’s statute

However, where the articles of association of an LLC specify an authorised level of share capital, within a set deadline, then an increase of capital within that limit and deadline will not require any amendments of the articles of association.

Any reductions in a company’s share capital normally requires:

► a resolution of the shareholders and

► a notification to the company’s creditors, by way of public notice who then have three months in which they can raise any objections

Moreover, in case of a JSC, certain statutory conditions must also be met.

A merger involves completing a three-stage process:

► a preparatory phase, involving the preparation of a merger plan

► a subsequent phase, in which the corporate bodies of both companies must accept the planned operation by a qualified majority of votes and

► a registration phase, involving the registration and announcement of the merger. The Commercial Companies Code also provides for a demerger of a company. The demerger process involves three stages, just like a merger

Polish law also allows cross-border mergers.

Many forms of company transformation are possible, for instance:

► a partnership may be converted into a commercial company (either an LLC or a JSC) and a commercial company may be converted into a partnership and

► a commercial company of one type may be converted into a different type

Winding up and liquidation of a company

A commercial company can be wound up in the circumstances set out in its articles of association or statute, for any reason approved by the shareholders meeting, where the company’s registered office is moved abroad or where the company is declared insolvent.

Branch office

A branch office, according to the Economic Freedom Act of 2002, is a separate and independent part of an existing business, which is run by an investor outside the company’s seat or its main place of business. Foreign investors can incorporate a
branch office on the basis of reciprocity (article 85 of the 2002 Act). The reciprocity rule states that a foreign person (entity) can initiate and run business activities in Poland under the same rules that a Polish entity would have in the country of that foreign investor’s nationality or incorporation. However, the activity can only be carried on within the scope of foreign investor’s activity. One of the requirements is that information is entered into the National Court Register, e.g. indicating a person representing the foreign investor at the branch office, submitting a copy of the incorporation deed as well as a copy from the appropriate registration office of the foreign investor’s country. Furthermore, the investor is obliged to manage its accounts in Polish and report all legal and other changes to the Ministry of Economy. The Minister is empowered to ban any investor from business activities: in cases of extreme infringement of Polish law or failure to report legal and other changes concerning the branch office in Poland; if the investor’s activity threatens public safety and security; or if it is necessary to protect state secrets or other public interest matters.

Representative office

In contrast with branch offices, the scope of a representative office’s activity is limited to the advertisement and promotion of the foreign investor. It must also be registered with the Foreign Representative Offices Register held by the Minister of Economy. Again, the Economic Freedom Act of 2002 specifies the requirements concerning the content of a proper application form, documents needed and cases in which a ban on running particular business activities of the representative office will be imposed.

Stock Exchange – how to be listed

Poland’s stock exchange market is growing stronger and becomes more international day by day. Its evolution is supported by the active marketing policy of the Warsaw Stock Exchange (WSE) working to promote the entire infrastructure of Poland’s capital market. These efforts have produced tangible results.

Only a JSC may be an issuer of shares listed on the WSE. This does not bar entities operating under any other legal form from listing, but their owners need to transform them into joint stock companies or establish joint stock companies and transfer the entities assets thereto. The General Shareholders Meeting should adopt a resolution approving a public offer of shares, dematerialisation of the shares, and an application for admission of the shares to trading on the regulated market.

Next, the company will need to submit the working draft of the issue prospectus to the Polish Financial Supervision Authority (KNF). The KNF may communicate its comments, and once the company has accommodated those in the final draft of the issue prospectus, the KNF will decide whether to approve the prospectus. Before opening the public offer, the issuer will need to execute an agreement with the National Depository for Securities (KDPW) whereby the securities subject to the public offer will be registered by the Depository.

Once the offer is closed, the company will submit an application for the admission of shares (and possibly also rights to shares) to stock exchange trading on the main or the parallel market. The WSE Management Board will examine the application. The application must include, among others, the final draft of the issue prospectus accommodating all recommendations made by the KNF.

Once all shares introduced to trading are deposited with KDPW, the public offer is closed, and the shares of the new issue registered by the court, the company will file with the WSE Management Board an application for the introduction of shares to trading on the main or the parallel market. The WSE Management Board will indicate the trading system and the date of the first trading session.

Employment

Employment-related issues

The key employment-related issues are regulated by the Polish Labour Code. Polish law also incorporates relevant provisions and standards set down by the conventions of the International Labour Organization (ILO) as well as Community Law, in particular as regards equal treatment.

Contract of employment

All employment contracts must be in writing and may be entered into for a fixed or indefinite period. Each type of employment contract may be preceded by a separate probationary period contract of up to three months. The signing of fourth subsequent fixed-term contract between the same business and individual is, by law, deemed to be an indefinite term contract. The same
applies if, regardless of the number of fixed terms agreements, the total period of time under such timely limited contracts exceeds in total 33 months.

After a recent amendment of the Labour Code, which will come into force from 1 September 2016, an employment contract should be signed before allowing an employee to work. It must specify the type of work to be performed, the place of performance, the length of the working week by hours, the date the employee started work and the remuneration. Remuneration may be negotiated between the parties, although it may not be lower than the minimum Polish national wage which is each year determined by the Polish government. In 2016, the minimum wage amounts to PLN 1,850 (approx. €420) per month. Further, an employer should provide the employee with additional written information concerning certain terms of the employment relationship set out in accordance with statutory provisions.

Employers lay down remuneration rules either individually with each employee or through a collective bargaining agreement concluded with trade unions. Alternatively, remuneration rules may be defined by wage regulations which an employer employing more than 20 employees is required to issue. Furthermore, where trade unions operate in relation to the company, they should also be consulted. Similarly, an employer employing 20 or more employees is required to issue general working regulations defining the work order and duties and responsibilities of the employer and employees.

Cooperation between employer and employees

Employees are entitled to be informed of any significant changes in employment, in particular concerning collective redundancies. Where trade unions, employee councils or employee representatives appointed by the employees for the consultation purposes operate within the company, they must also be consulted. In general, if there are over 50 employees the employer is obliged to inform the employees about this occurrence and establish a workers’ council upon written request of at least 10% of the employees.

Subject to any consultations, the employer is free to implement the planned changes, however if the new conditions are less favourable to the employees, each of them shall be provided with a notice of change. It can lead to the termination of given employment contract if the employee does not accept the proposed conditions.

Termination of employment

An employment contract can be mutually terminated at any time. The dismissal procedure requires that an employee is provided with a written notice giving certain information set out in the Labour Code. A termination notice of an indefinite term contract must specify reasons justifying the termination. Where an employee is dismissed for an unjustified reason, or the employer fails to comply with the dismissal procedure, the employee can either seek to be reinstated or claim damages (which as a rule do not exceed three times the monthly remuneration of the dismissed employee). During the notice period, the employee is entitled to receive his normal remuneration. The termination of a fixed term employment contract is possible without specifying reasons for the termination. The notice period for both types of contracts depends on a given employee’s length of service and varies from two weeks to three months. The termination of an employment contract concluded for indefinite term requires a fair and justified reason. Furthermore, the employer must inform the trade union representing the employee about these circumstances before dismissing the employee. Special protective provisions apply in case of a dismissal on notice of pregnant employees, those on maternity or parental leave, members of trade union governing bodies, members of work councils and employees due to retire within four years.

Collective redundancies

Specific provisions on collective redundancies apply where an employer employing 20 or more individual employees intends to terminate employment contracts for reasons other than those attributable to the employees themselves, by serving a termination notice, or on the basis of mutual consent, where within a period of 30 days:

► 10 employees are to be dismissed (where the employer employs less than 100 employees)

► 10% of employees are to be dismissed (where the employer employs 100 or more employees, but less than 300 employees) or

► 30 employees are to be dismissed (where the employer employs 300 or more employees)
An employee dismissed for reasons attributable to the employer is entitled to a statutory severance payment of between one and three months’ salary, depending on the length of employment relationship with the employer. This severance payment is capped at the amount corresponding to 15 times the minimum wage, hence in 2016 at PLN 27,750 (approx. €6,300).

Costs of employment

Each month an employer is required to withhold personal income tax from each employee’s salary. Income tax is payable on an upward-sliding scale of 18% or 32%, depending on the income earned in a given tax year.

The overall contribution of an employee to the social security system (e.g. health, retirement pension and sickness contributions) is 22.71% of his income, whereas an employer pays approximately 16.26%, depending on the industry sector. In addition to the latter the employer has to pay accident insurance amounting to 0.67 to 3.86%, depending on the industry sector. The employer also pays the contribution for the Labour Fund – 2.45% and 0.10% for the Fund of Guaranteed Employee Benefits.

Tax obligations of foreign nationals

Poland is a party to double taxation treaties signed with over 90 countries, including all EU Member States.

Individuals who are not Polish tax residents are required to pay tax only on income generated from work performed in Poland, regardless of where such remuneration is paid. Tax on income from different sources might also be imposed (e.g. dividend, interest payments) in Poland.

Foreign individuals staying in Poland less than 183 days a tax year, have no tax obligation on their worldwide income in Poland. However, the above rule is not applicable if the foreign individual is domiciled in Poland.

Anyone employed and working in Poland is required, as a rule, to pay social security contributions; however, certain assignments may make foreign individuals exempt (e.g. based on EU provisions and procedures).

Employees of state enterprises

In the course of the privatisation of state enterprises, trade unions may request that an investor agrees on a "social package" for employees. This concerns, in particular, industry sectors that were traditionally state-owned e.g. mining and steel industries. Under the social package, employees would expect to be provided with, among other things, employment guarantees and additional severance payments in the event of early redundancies.

Work permits / visas

The EU/EEA citizens are exercising the right of movement freedom within the entire EU/EEA. Subsequently, they are free to work in Poland on the same rules applying to Polish citizens. Hiring of a non-EU citizen requires submitting an application for a promissory note by the future employer at the regional authorities. Some foreign nationals might be also subject to visa obligations. The cost for a Polish national visa, which allows a foreign national to work, depends on the nationality and amounts from €0 (Ukrainian citizens) to €60, whereas the work permit costs approximately from €12 to €48 depending on its type. The fee for a work permit for a time period of over three months amounts to circa €23.

Economy and government

Polish economy

Sustainable development in Poland has much to do with its solid economic foundations. The Polish economy offers a valuable low-risk and high-profit location in the heart of Europe. It is the only European country which recorded economic growth in 2009 when other economies declined as a result of the financial crisis. The Central Statistic Office (GUS) reports that Poland has been experiencing a relatively constant 3.6% annual economic growth and maintained 46.8% export level in 2014. Moreover, the rapidly growing Polish agricultural sector stands a very good chance of making Poland one of the major food producers in the European Union. Constant growth in industrial production, high level of demand, stable inflation, a strong currency and a secure state of public finance all shape the strengths of the Polish economy. In addition, the size of population (circa 39 million) and constant development of infrastructure (including road and rail systems and 3 seaports) attracts foreign investors.
Governmental influence
Economically liberal legislation and government policies which fully support economic freedom contribute to the improved business climate in Poland. To begin with, the Economic Freedom Act of 2 July 2004 makes setting up a business activity in Poland significantly easier by providing a business-friendly environment and effective protection for investors’ interests. Moreover, pro-business governmental policies are accompanied by the cautious monetary policy of the National Bank of Poland (NBP) aimed at maintaining inflation at -0.9% (deflation) and a relatively high control over the banking sector.

Restrictions on foreign investments
There is no governmental restriction or screening of foreign investments in Poland. In most sectors of the economy, 100% foreign ownership is allowed and it is treated equally with domestic capital. However, in certain sectors (including, amongst others, radio and television broadcasting, air transport and fishing) it is restricted to less than 50%.

As of 1 May 2004 the requirement for a permit from the Minister of Internal Affairs to buy Real estate does not apply to foreign investors who are nationals, reside in or remain established in one of the European Economic Area (EEA) countries. Other foreign investors or entities are required to obtain a permit to conduct such acquisition. The Minister of Internal Affairs and Administration will grant permission for purchase if there is no probability of threat to national security, public safety or public order and if the existence of ties with Poland can be confirmed.

Currency & exchange control regulations
Over the years, the official Polish currency - złoty (PLN) – has achieved and retained relative strength and the current inflation (deflation) rate is slightly over -0.9%. Prior to the economic crisis, the Polish government aimed to join the Eurozone by 2012-2013; however, this target has been postponed as a result of the recession and there are still a number of conditions which Poland needs to meet before its accession to monetary union.

Since the revision of exchange control regulations, parties to contracts concluded in Poland or under Polish law can provide for payments in foreign currency pursuant to the amended Article 358 of the Civil Code and as a result of the deletion of Paragraph 9 Section 15 of the Foreign Exchange Acts. This is an important improvement on the old regulations which allowed for payments in a currency other than Polish złoty only with the approval of the NBP. Poland is still in the middle of a debate over further modifications to its foreign exchange law. Further modifications could be introduced in the course of harmonisation with the EU law and as a result of joining the Eurozone.

Incentives to invest
Poland offers a wide range of investment incentives, mostly regulated by the Financial Support for Investments Act of 2002. Financial grants are available from various EU funds, while eligible expenditure varies according to the type of investment concerned. Special rules apply to projects with a qualifying expenditure of more than EUR 50 million. For the years 2007-2013, over EUR 80 billion has been allocated to Poland from the EU budget. Between 2014 and 2020 this number will increase to EUR 105.8 billion. The Industrial Development Agency may also offer subsidies, loans and other financing facilities.

Special Economic Zones (SEZ) and Technological Parks continue to entice foreign investors to invest in Poland. State aid in the form of tax exemptions available in these areas, depending on the location, may cover 30%, 40% or even 50% of the investment, including both tangible and intangible assets. The borders of SEZs are flexible, in that new investments can be located in an already existing SEZ or the land acquired by the investor can be incorporated to an SEZ, extending its territory. There are however, certain threshold requirements which need to be reached in order to maintain the exemption. Most importantly, declared levels of investment and employment must be achieved. SEZs are set to expire in 2026.

An amendment in 2009 to the public procurement law provided further incentives. It allows for the creation and registration of a special purpose vehicles (SPVs) with the sole purpose of completing complex infrastructure projects if it wins the tender bid. SPVs protect participating investors from joint and several liabilities, which they would encounter had they created a simple unregistered consortium (i.e. an association by agreement, in order to submit a joint bid).

Finally, regional aid provisions allow local municipalities independently to grant tax exemptions from Real estate tax to new investors. The exemption coverage varies from 30% to 50% depending on the size and location of the investment.
Taxation

Taxation overview

Poland generally has well developed, EU harmonised and, in many areas, relatively competitive taxation system.

Businesses, including companies, partnerships and sole traders are generally liable for 19% flat rate income tax (either corporate income tax or personal income tax) on their business profits in Poland. Withholding taxes are collected on outbound dividends, interest and royalties, as well as certain intangible services, subject to double tax treaties and applicable European Union law provisions.

Value Added Tax (VAT), which is a consumption tax, is levied on the supply of goods and services at the standard rate of 23% (since 1 January 2011), save where exemptions and reduced rates (e.g. 8%, 5%, 0%) apply. Certain business transactions are subject to a tax on civil law transactions, which is generally an equivalent of transfer tax (see below).

In addition, businesses that have title to property are subject to a local Real estate tax, imposed by municipalities. Poland is also subject to the Community Customs Code and other EU customs provisions including the customs duty tariff. Polish law also provides for regulations relating to excise duty.

Corporate income tax

Corporate income tax (CIT) is the only tax imposed at the national level on corporate income in Poland. The tax is payable both on company’s corporate income and on corporate dividends paid out by the company. CIT generally applies to all legal entities, including companies and organisational form companies, the so called companies under organisation, as well as a specific category of, so called, organised entities with no corporate status, which conduct business activities such as e.g. partnerships (except limited joint-stock partnerships that have their registered office or management in Poland). Please note, however, that CIT does not apply to partnerships, where the system of taxation of partners instead of partnership is applied (the partnerships are tax transparent).

In 2016, corporate income tax is collected at the flat rate of 19%. As this rate is already quite competitive compared to other European countries (especially Western European ones) and taking into account recent efforts of the Polish government to increase country’s treasury income, it is unlikely that the rate will decrease in the near future.

Taxation of residents

Polish tax residents are subject to CIT on their worldwide income. A company is considered to be a Polish resident for CIT purposes if its registered office or management is located in Poland. Taking the above into account, Polish subsidiaries of foreign companies are regarded as residents of Poland for corporate tax purposes.

Taxation of non-tax resident business vehicles

A non-resident business is subject to CIT only on income generated in Poland. If a non-resident’s home country has concluded a double tax treaty with Poland, the specific rules pertaining to so called ‘permanent establishments’ may be applied. Under double tax treaties’ provisions (which generally follow the OECD rules) business profits earned by foreign entities in Poland (e.g. from the supply of goods or services to Polish customers) are not taxed in Poland, unless the foreign undertaking operates in Poland through a permanent establishment, within the meaning of double tax treaties. Polish tax law does not, however, provide for any separate rules for taxing permanent establishments, which are subject to the same general provisions applicable to incorporated and unincorporated businesses in Poland. Profits attributable to a permanent establishment are, therefore, taxed with CIT at the flat rate of 19%. In addition, the deductibility of costs, exemptions, tax losses carried-forward etc. are regulated by general tax provisions.

Taxable base

The taxable base is the overall income, which is the difference between aggregated taxable revenues and aggregated tax deductible costs. The taxable base generally includes all sources of income, and as a result, there is no special treatment for income such as capital gains or interest.
Tax deductible and non-deductible costs

A tax deductible cost is defined as any expense incurred in order to generate taxable revenues or to protect a source of revenues. However, there is a long list of expenses which cannot be treated as tax deductible (e.g. donations, entertainment expenses, tax penalties and penalty interest and, generally, expenses relating to non-taxable revenue).

Tax year, reporting and payments

The annual CIT return should be submitted to the relevant tax office within three months of the end of the tax year (which, in general, corresponds to a calendar year, but may be changed to another period of twelve months upon the taxpayer’s request). The tax should also be paid within the above term. The taxpayers are obligated to pay monthly advance payments until the 20th day of the following month, so at the end of the tax year only the balance of advance payments and annual tax obligation has to be paid.

Tax depreciation

Capital expenditures over a certain value (generally PLN 3,500) are not tax deductible directly but the relevant fixed and intangible assets are depreciated for tax purposes and the depreciation write-offs are included in tax deductible items.

Tax losses

Tax losses may be carried forward and utilised over five consecutive tax years. A maximum of 50% of a loss incurred in one year may be offset against taxable income reported in a given year of the five-year period.

Thin capitalisation rules

As a general rule, interest paid on debt is generally tax deductible for the borrower when paid or capitalised. However, Poland applies thin capitalisation rules. According to the general rule, the debt-equity ratio amounts to 1:1 if the facility is provided by entities holding directly or indirectly more than 25% of the share capital or by sister companies (the threshold of 25% is also applicable). Debt is defined broadly and includes not only loans but other financing facilities, including securities and bonds, deposits and capital investments in general. Nonetheless, the taxpayer can also opt for an alternative thin capitalisation calculation method that is based on a reference rate of the National Bank of Poland and the tax value of assets. Under this method, interest on qualifying loans granted by related and unrelated parties may be deducted up to an amount not exceeding the tax value of assets, excluding intangible assets, multiplied by the reference rate of the National Bank of Poland on the last day of the preceding tax year, increased by an index of 1.25%. The deduction applies provided that the interest does not exceed 50% of the taxpayer’s operational profit in a given tax year. The interest that was not deducted in the first year (due to limitations) may be deducted in any of the five consecutive tax years.

Taxation of dividends paid to foreign corporate shareholders

Dividends paid out by Polish subsidiaries are in general subject to a withholding tax of 19%. However, foreign shareholders from countries that have signed a double tax treaty with Poland may benefit from reduced tax rates, usually between 5% and 15%.

Dividends paid to companies or individuals from other EU Member States, with at least a 20% shareholding in Polish subsidiaries, will not be subject to a withholding tax in Poland, pursuant to the provisions of the EU Parent-Subsidiary Directive incorporated into Polish tax law.

Taxation of interest and Intellectual property (IP) royalties paid to foreign corporate shareholders

Royalties and interest distributed abroad are subject to a withholding tax in Poland at the rate of 20% which may be mitigated or exempted under the provisions of double tax treaties, where applicable.

Furthermore, royalties paid to foreign corporate shareholders from other EU member states with at least 25% shareholding in Polish subsidiaries will not be subject to withholding tax pursuant to the provision of EU Interest and Royalty Directive, incorporated into the Polish tax law.
CFC Legislation

Poland, like many other countries, has implemented special legislative imposing a 19% corporate income tax on income generated by controlled foreign companies (CFC). Generally, an entity can be qualified as a CFC if: (1) at least 50% of its revenues originates from dividends, disposal of shares, interests, royalties etc. (passive income) and (2) at least one type of this revenue is subject to taxation at a rate that is lower than 14.25% or is tax exempt (excluding exemptions resulting from the Parent-Subsidiary Directive) and (3) the Polish parent company holds directly or indirectly at least 25% of its shares or voting rights in supervisory or management bodies for at least 30 days. Furthermore, CFCs include companies in countries applying harmful tax rules (tax havens) as well as those located in states that do not have tax information exchange with Poland (either according to a double taxation agreement or international agreement concluded by the EU).

Notwithstanding, the Polish tax law provides for some exemptions from the taxation of CFCs.

Several reporting obligations regarding CFCs have been imposed, including for instance keeping a registry of CFCs and keeping separate records of each CFC, which enable inter alia determination of the amount of income, taxable base, and output tax amount.

Avoidance of double taxation, double tax treaties

As mentioned above, Poland has concluded a large number (approximately 90) of double tax treaties with most of the so called “developed countries”. Apart from the rules provided by these treaties, the Polish CIT law also includes stand-alone rules for avoiding double taxation.

These rules provide in brief, that if a Polish resident earns income from sources situated in a country which does not have a double tax treaty with Poland, double taxation is avoided based on a credit method provided in Polish CIT law. It means that a Polish resident is generally liable for income tax calculated on his worldwide income, but this tax may be proportionally reduced by the income tax paid abroad.

The above rules apply to all types of foreign income not covered by a double tax treaty such as dividends, royalties, interest, business profits etc.

Value Added Tax

As in other EU countries, Poland has implemented a system of indirect, harmonised consumption tax (VAT). VAT is generally levied on sale of goods and services. VAT taxpayers need to be registered and the standard reporting period is one month (although taxpayers may apply for a reporting period of three months).

As VAT is an indirect tax where only the ‘value added’ on each level of production of goods (or provision of services) is taxed, so the ultimate taxpayer is the final consumer, a specific model of calculation of this tax is implemented. It generally allows registered VAT taxpayers to recover input VAT included in the price of the goods purchased which are related with VAT taxable activity.

VAT scope

Polish VAT regulations generally apply to the following activities:

- supply of goods and services within the territory of Poland
- export of goods outside the territory of the EU
- import of goods from non-EU countries
- intra-community supply of goods and
- intra-community acquisition of goods

VAT rates

In 2016 (and presumably in 2014) the VAT rates are:
► 23% (standard rate applicable to most goods and services)
► 8% (e.g. food, pharmaceutical products)
► 5% (e.g. food)
► 0% (e.g. exports outside the EU) and
► exemption (e.g. financial services)

**VAT calculation**

The VAT due and payable to the tax office is the difference between the VAT on the output (generally: sale of goods) and the VAT already paid on the inputs (generally: purchase of goods). Such calculation ensures ‘neutrality’ of VAT for business entities. Input VAT can generally be deducted from output VAT when a taxpayer receives an invoice for goods or services purchased.

Apart from the general rule providing that input VAT cannot be deducted unless the purchased supply is linked to activities of the VAT taxpayer which are subject to VAT, the deductibility of input VAT is also restricted when purchasing certain listed goods and services.

**Real estate tax**

Real estate tax rates are fixed by municipalities in accordance with limits set in the Local Taxes and Fees Act. In 2016, land used for business purposes is subject to a rate limit of PLN 0.89 per square metre, while buildings used for business purposes are subject to a rate limit of PLN 22.86 per square metre of usable area.

Selected structures used for business purposes are also subject to Real estate tax (in such case the tax is calculated as 2% of their value).

**Transfer tax (tax on civil law transactions)**

Tax on civil law transactions (TCT) generally applies to various transactions made by entities not being VAT taxpayers and which are not involved in professional trade, including the sale of property or a loan.

The general rule is that transactions which are subject to VAT generally fall outside the scope of TCT (which excludes many transactions performed in a business to business environment from TCT scope), although TCT is also imposed on business entities in certain circumstances.

**Examples of important transactions subject to TCT are:**

► incorporation of a company and the increase of company’s share capital (TCT at a flat rate of 0.5% of the increased / created share capital value)

► so called ‘additional payments’ contributed to a limited liability company’s additional capital (TCT at a flat rate of 0.5%) and

► transfers of shares (TCT at a flat rate of 1%)

**Custom duties and excise duties**

Poland is subject to the Community Customs Code and other EU customs provisions (including a customs duty tariff).

Customs duty is payable on the importation into Poland or other EU country of goods from outside the EU. Based on the EU customs duty tariff, the standard customs duty rates vary and depend on the classification of the imported goods.

Excise duties are generally levied on the production, sale, import and intra-community acquisition of certain ‘excise goods’ which are listed in excise duty laws. Examples of ‘excise goods’ are alcohol, cigarettes, petrol, gas, cars and electricity.
Employee taxes

The most important employee taxes (in a broad sense) include personal income tax (PIT) and social security contributions. PIT is a progressive personal income tax. In 2016 there are two rates: 18 and 32%. Investors (entrepreneurs) may apply, however, for a commonly used 19% flat PIT rate.

Social security contributions

Employers and employees have to pay social security contributions which are calculated on the employee’s gross income. In 2016, social security contributions payments are as shown below:

<table>
<thead>
<tr>
<th>TYPE OF INSURANCE</th>
<th>TOTAL PERCENTAGE RATE</th>
<th>EMPLOYERS’ CONTRIBUTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pension</td>
<td>19.52%</td>
<td>9.76%</td>
</tr>
<tr>
<td>Disability</td>
<td>8.00%</td>
<td>6.50%</td>
</tr>
<tr>
<td>Sickness</td>
<td>2.45%</td>
<td>-</td>
</tr>
<tr>
<td>Accident</td>
<td>from 0.67% to 3.86%</td>
<td>from 0.67% to 3.86%</td>
</tr>
<tr>
<td>Labour fund</td>
<td>2.45%</td>
<td>2.45%</td>
</tr>
<tr>
<td>Employee guaranteed benefits fund</td>
<td>0.10%</td>
<td>0.10%</td>
</tr>
<tr>
<td>Total</td>
<td>from 33.19% to 36.38%</td>
<td>from 19.48% to 22.67%</td>
</tr>
</tbody>
</table>

It is the employer who is obliged to pay its share of the social security contributions as well as to withhold and remit the employee’s share. Payments are made each month to the Social Security Institution (ZUS). Expatriates from EU countries may be entitled to exemptions from social security contributions in Poland under EU regulations (under certain conditions). Employees are also subject to health insurance where the payment is calculated on gross income reduced by social security contributions, amounting in total to 9% of this amount.

Tax residency under PIT

Under PIT, a person is considered as a Polish PIT resident if he: (i) has a centre of personal or business interests in Poland, or (ii) spends more than 183 days in Poland in a calendar year.

Polish tax residents pay Polish personal income tax on their worldwide income, however, the provisions of relevant double tax treaties should also be taken into account. Non-residents are subject to Polish PIT tax on their income earned in Poland.

Tax collection

PIT (including tax on salaries) is ultimately calculated on annual income (and the annual tax return conveying the income received from January to December has to be filed by the taxpayer by 30 April of the following year) but its collection is based on monthly advance payments which are generally withheld by employers.

Transfer Pricing

Polish transfer pricing (TP) provisions generally follow the OECD rules on transfer pricing and comply with international practices in most cases. As a general rule, transactions, including concluding company deeds for a company without legal personality, joint venture agreements or similar agreements, between related parties should be conducted on arm’s-length terms.

Polish regulations require domestic entities to procure and, when requested to do so by tax authorities, provide for special TP documentation. The rules apply also to non-residents conducting economic activity through a foreign establishment located in Poland (in the scope of transactions conducted between this establishment and the taxable person and other transactions.
conducted by this establishment) as well as Polish tax residents having a foreign establishment outside Poland (in the scope of transactions conducted between such an establishment and the taxable person).

In essence, the TP documentation should explain the method used by Polish taxpayers to set prices in transactions with related parties.

Where a Polish taxpayer fails to submit the TP documentation within seven days of the date of request, and tax authorities find that its / his income has been reduced without proper justification when using transfer prices, the assessed difference in the income of the Polish entity is subject to a punitive rate of tax levied at 50% (both for CIT and PIT taxpayers).

Similar rules apply to Polish taxpayers purchasing goods or services from listed jurisdictions (so called tax havens).

Recent developments in the transfer pricing area include the introduction of a system of Advance Pricing Agreements (APAs) which can be negotiated by taxpayers with the Ministry of Finance. As a rule, APAs provide the applicant with a guarantee that the tax authorities will accept the transfer prices applied in accordance with the APA.

Advance tax rulings

A complex set of rules on Advance Tax Rulings (ATR) has evolved under Polish tax legislation and case law. A taxpayer may request an advance tax ruling on any tax issue pertaining to his business or private activities. Furthermore, two or more interested parties are able to submit so called joint requests for ATR, provided that they are involved in the same factual state or future event. ATRs are usually issued within three months of the request and are designed to advise the taxpayer on the interpretation of given tax provisions as adopted by tax authorities.

Dispute resolution

The safeguarding of legal transactions is enshrined in domestic legislation and protected by the relevant European Community provisions. The Polish legal system is based on codified law (in contrast to the common law system), administered by common and administrative courts that determine a range of issues such as civil, employment, commercial and insolvency cases.

Administrative decisions are subject to judicial review by administrative courts, although common courts share such jurisdiction in certain cases (e.g. in antitrust matters). Judgments of administrative courts may – under certain conditions – be reviewed by the ‘Supreme Administrative Court’.

Any judgment issued by a common court of first instance can be appealed. Appeals are heard by common courts of second instance where the judgments are final and not appealable, unless certain conditions are met and, as an extraordinary measure, the judgment might be reviewed by the Supreme Court.

International and foreign law

EU law

Since becoming a member of the European Union in 2004, European Union regulations apply directly in Poland. Therefore, most areas of (business) life are regulated by EU law either directly or via Polish Law implementing EU Directives. Ratified international multi or bilateral treaties supersede Polish law within the scope of their application.

Applicability of foreign law

When dealing with parties from Poland, in most cases it is possible to choose the law to govern the contract. Certain limitations regarding the scope of choice of law provisions might apply if the transaction is concluded between parties both resident in Poland. Currently the conflict of laws rules are governed by the Rome I and Rome II EC Regulations and outside their scope of application Polish Private International Law applies. If applicable, foreign law is applied directly by the court and is treated as law and not as fact. Potential mistakes regarding its application are fully revisable by an appeal court.

Class actions

In 2009, the ability to initiate class actions was introduced into the Polish legal system. Unlike the American opt-out class action model, Polish regulations are based on a strict opt-in basis, which requires the members of the group to expressly consent to participate in the class-action. Two types of class actions exist: either an opt-out or an opt-in model. The opt-in...
model requires the plaintiffs to expressly join the proceedings at an initial stage. The (mostly US-American) opt-out model on the other hand requires a potential member of the group to “opt-out” in order to avoid being bound by a settlement or a future judgment regardless of being a party to the proceedings. Class actions are limited to consumer protection, product liability and tort claims and do not cover employment disputes. Punitive damages are not awarded in respect of any civil claims in Poland. Although the regulations on class actions were hotly debated, the number of class action suits actually filed has been relatively low.

Limitation periods

Depending on the type of claim being brought, the limitation periods are:

► ten years for claims unrelated to business activity and

► three years for claims related to a party’s business-related activity and for the majority of employment-related claims, although the limitation periods may be shorter in case of specific contract types

Competent courts and costs

The competent court is determined on the basis of the defendant’s domicile or seat although an action may also be brought before a court in the place where the contract was or ought to be performed. Regional courts deal with cases over the value of PLN 75,000 (approx. EUR 18,000).

As a rule, court fees in commercial cases are set at 5% of the claim's value or the subject-matter of appeal, but in any event the fee cannot exceed PLN 100,000 (approx. EUR 25,000). Court fees are payable in advance.

Fees are also payable on appeal against judgments of the common and administrative courts, and on appeal against certain decisions of administrative bodies. A party taking legal action should also be prepared to pay, amongst other things, the costs of any legal services, travel and accommodation for witnesses, translation and expert opinions.

As a rule, if a motion for awarding proceeding costs has been lodged in course of the action, the losing party has to bear all proceedings costs.

Fees for legal services can be negotiated, although under the professional ethics code, a lawyer may not undertake work solely on a contingency or a conditional fee basis.

Period of resolving a case in court

Usually, courts of first instance deliver their judgments within 12-24 months after the action was brought; however, the timing depends on the number of cases to be heard and their complexity.

Alternative dispute resolution in Poland

Under Polish law, disputes may be submitted to mediation or arbitration. Polish national arbitration law is based on the most important international rules on that subject i.e. the New York Convention of 1958 and the UNCITRAL model law of 1985.

Mediation

A court, acting ex officio i.e. on its own motion, may submit a case to mediation prior to hearing it or, more often, the parties may agree upon mediation by inserting a mediation clause into their agreement. Any mediation settlement approved by the court is binding and enforceable. Despite the fact that mediation is cheaper and faster than arbitration and gives parties greater influence over the final outcome, it is seldom used in Poland, largely due to a lack of professional mediators.

Arbitration, arbitration agreement

Parties may submit their existing or future disputes to arbitration by a written agreement which excludes the jurisdiction of common courts. An arbitration agreement must be entered into in writing. The requirement for a written form of an arbitration clause is also met if the parties exchanged faxes or e-mails etc. An arbitration agreement might also be validly concluded if the parties’ agreement incorporates a set of standard terms and conditions which include an arbitration clause.
Rules in arbitration procedures

Parties may themselves determine the rules of arbitration. The law does not impose any requirements. Generally, parties themselves appoint an arbitrator, but where they are unable to do so an arbitrator may be appointed by a common court. Where the parties fail to agree on the arbitration rules, the Polish Civil Procedure Code applies. Those provisions are modelled on the UNCITRAL model law as is most of the new national arbitration legislation.

Review of the arbitral award by common courts

The scope of review of an arbitral award by the courts is relatively narrow. An arbitral award may be examined during the recognition stage if a motion for setting aside the award has been filed by either party to the arbitration. The scope of review includes inter alia the existence, validity and the scope of the arbitration agreement and the arbitrability of the dispute. An award is also set aside if it is contrary to Polish ordre public or the arbitration proceedings were contrary to the parties’ agreement.

Investment arbitration

Poland has entered into approximately 60 Bilateral Investment Treaties which provide for the protection of foreign investments. Although Poland is not a party to the ICSID Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States) resolution of an investor-state dispute may be carried out by an independent arbitral tribunal as provided under the respective bilateral treaties.

Securing claims

Parties, whether before a court or an arbitral tribunal, as well as those with a legal interest, can apply to secure their claims. The court may grant interim relief having regard to both the principles of proportionality and equity. The most common forms of security are securing the debtor's bank account or movables, or establishing a compulsory mortgage.

Enforcement of foreign judgments and arbitral awards

Judgments issued by a court of a EU Member State, Switzerland, Norway and Iceland are recognised under the so called Brussels-Lugano Regime. This provides an easy and efficient enforcement process for judgments with rather limited grounds for refusal of recognition.

Recognition of foreign judgments is also subject to numerous bilateral treaties with other Countries which, although not being as enforcement-friendly as the above mentioned system, provide regulations on the enforcement of foreign judgments.

The recognition of foreign judgments from states not part of the Brussels-Lugano Regime or not covered by a bilateral treaty has recently become significantly easier as amended rules were modelled after the Brussels-Lugano system.

Enforcement of foreign arbitral awards is in most cases subject to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC), which is in force in 156 countries. Under this convention grounds for refusal of enforcement are rather limited. Alternatively awards made in non-contracting states of the NYC are subject to the recognition and enforcement rules set by Polish arbitration law. As with the NYC grounds for refusal of recognition are rather limited.

Enforcement proceedings

At a request of the judgment-creditor enforcement proceedings may be instigated on the basis of an enforcement order (i.e. a legally binding order granted by a court or an arbitral tribunal, or provided for in an out-of-court settlement), and after obtaining a writ of enforcement from the court. The competent authorities in the enforcement proceedings are courts and court executive officers.

Competition

The principal objective of competition law is to protect economic freedom by promoting competition in the marketplace. Competition provides businesses with the opportunity to compete on price and quality, in an open market and on a level playing field.
Legal framework

The Act on Competition and Consumer Protection of 16 February 2007 (Competition Law) provides the legal framework for restrictive agreements between undertakings, abuse of dominant position and merger control. The Competition Law sets out the principal objectives of the competition protection in Poland, in particular:

- the prohibition of concerted practices, restrictive agreements between undertakings and decisions by associations of undertakings aimed at prevention, restriction or/and distortion of competition and the prohibition on abuse of a dominant position and

- merger control in order to prevent creating and strengthening of a dominant position

The Competition Law governs the supervision of aid granted by the State (or through State resources in whatsoever form) which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods as well as practices infringing the collective interests of consumers. The Polish competition law also regulates other aspects such as, combating unfair commercial practices in commercial and professional activity as well as combating unfair competition.

Anti-trust regulation in Poland

Under Polish law both the provisions on restrictive agreements and concerted practices (cartels and other forms of vertical restraints) as well as the provisions aimed at prohibition of abuse of a dominant market position shall be considered as anti-trust rules. The most prominent example of such restrictive agreements are vertical restraints on resale price maintenance, where undertakings fix price levels jointly. As a result of such vertical restraints, consumers do not benefit from competition between suppliers in terms of competitive resale prices.

Other types of restrictive agreements have impact on other conditions of the operation on the markets, for example, sharing markets or source of supply, application of dissimilar conditions to equivalent transactions with other trading parties.

Such restrictive agreements are prohibited in Poland under Article 6 of the Competition Law and the Polish anti-trust authorities are entrusted by law with certain responsibilities in respect of enforcement of this prohibition.

The Competition Law also prohibits the abuse of dominant market position, often referred to as "market dominance". Dominant position shall mean a position of the undertaking which allows it to prevent the efficient competition within a relevant market thus enabling undertakings with a dominant position to operate on the market independently of its competitors, its contractors and, ultimately, consumers. An undertaking holds a dominant position if its market share exceeds 40%. However, in some cases, undertakings may not possess dominant position, despite having a market share of over 40% and vice versa an undertaking may be considered as having dominant position when its market share does not exceed 40%. While market dominance in principal is not contrary to competition law, undertakings with such dominant status are subject to certain limitations that are not imposed on non-dominant undertakings.

Merger control in Poland

The control of mergers and acquisitions is an important objective of competition protection in Poland. In general, only mergers which would significantly affect effective competition, in particular through the creating or strengthening of a dominant market position, are prohibited under the Competition Law.

The merger control proceedings is also governed by the Competition Law that imposes on undertakings the obligation to obtain merger clearance in case of large-scale transactions. This obligation applies to all mergers where the combined aggregate worldwide turnover of the parties to the concentration exceeds €1,000,000,000 or €50,000,000 in Poland. Such mergers must be notified to the President of the Office of Competition and Consumer Protection (Urzędu Ochrony Konkurencji i Konsumentów) (UOKiK) and the parties to the concentration shall obtain merger clearance before completion of a transaction. If the President of UOKiK fails to issue a clearance decision, merger may be completed 2 months after the date of notification. Fines may be imposed for failure to notify or the provision of incorrect or misleading information. The Competition Law provides for exemptions where the obligation to notify is excluded due to potentially insignificant impact of the planned concentration on the market. Exemptions apply, inter alia, if the aggregate turnover in Poland of the target undertaking (over which the control is acquired) or the aggregate turnover in Poland of the parties to the concentration did not exceed €10,000,000 in either of the two financial years preceding the notification as well as if the merger involves undertakings belonging to one capital group.
Clearance decisions issued by the President of UOKiK are subject to judicial review by the Polish courts.

State aid in Poland

The EC Treaty prohibits any aid granted by the State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods. As a result of favourable treatment of certain undertakings or products to the detriment of other firms or products, state aid may distort competition.

The forms of state-aid in question may be various, for instance:

► State grants, in particular loans on preferential terms
► capital instruments, for example acquisition of shares finance by state resources
► tax preference, for example tax relief
► State guarantees and
► provision of goods and services on preferential terms by the State

Polish competition policy, however, allows exceptions to the ban on State aid where the proposed aid schemes comply with the conditions set out in the State Aid Law of 30 April 2004 and the relevant EC legislation. By way of example, granting aid having a social benefit to individual consumers and aid aiming to make good the damage caused by natural disasters or other exceptional occurrences is permitted.

Antimonopoly proceedings

The President of UOKiK, as the central administrative authority, ensures that the Competition Law is observed. Administrative decisions issued by the President of UOKiK in antimonopoly proceedings may be appealed to the Court of Competition and Consumer Protection in Warsaw (Sąd Ochrony Konkurencji i Konsumentów, SOKiK) (Court of Competition and Consumer Protection). Appeal applications shall be filed within two weeks after receipt of the relevant decision. The appeal proceeding is governed by the provisions of the Polish Civil Procedure Code. The rulings issued by Court of Competition and Consumer Protection may be further appealed to the Supreme Court. The appeal shall be filed within 14 days after the date of receipt of the ruling issued by the Court of Competition and Consumer Protection.

The Competition Law provides for fines that may be imposed by the President of UOKiK at his sole discretion for failure to comply with competition law. Fines may be as follows:

► maximum fine of 10% of the turnover generated in the financial year preceding the year in which the fine is imposed, if the undertaking has, even if unintentionally infringed, inter alia, the prohibition of concerted practices, restrictive agreements or performance of the concentration without obtaining merger clearance
► €50,000,000 if (for example) undertakings did not provide the information requested by the President of UOKiK or provided the false or misleading information and
► €10,000 for each day of delay in complying with a decision of the President of UOKiK or the ruling of the Court of Competition and Consumer Protection

In addition, the President of UOKiK may impose fines up to a maximum amount of PLN 2,000,000 (approx. €454,545) on individuals being managers or members of managing bodies of entities or groups of entities. Fines imposed by the President of UOKiK may be appealed to the Court of Competition and Consumer Protection.

Intellectual property

Regulation

Polish Intellectual property law implements the relevant European Community provisions. In addition, Poland is a signatory to most international agreements on Intellectual property rights.
Trade in Intellectual property rights

Save for a few exceptions, trading in Intellectual property rights is possible. A licence can also be issued in respect of the majority of protective rights, i.e. an authorisation for a specific entity or person to use a protective right to the extent set out in the licence.

Industrial property rights protection

The following industrial property rights are protected in Poland:

- patents for inventions (where they are of a technical nature which means that they are susceptible of industrial application, novel and comprise an inventive step)
- protective rights to utility designs (new and useful technical solutions affecting the shape, construction or durable assembly of an object)
- rights deriving from the registration of industrial designs
- protective rights for trade marks (verbal, verbal-graphic, graphic, 3-D, sounds / songs)
- geographical designations and
- topographies of integrated circuits

Pursuant to the relevant provisions, community designs, community trade marks, protected geographical indications (PGI) and marks of origin are also protected in Poland. European Community provisions have direct application in this regard.

Obtaining protection

An industrial property right is only protected on registration at the Polish Patent Office (PPO). PPO assesses the characteristics necessary to obtain a protective right in the case of inventions, utility models, topographies of integrated circuits, trade marks, industrial designs and geographical indications.

The verification procedure was highly complicated due to the nature of a given invention or trade mark. Hence, the proceedings could take a considerable amount of time. For example, trade marks proceedings could last up to two years. Due to a recent amendment of Polish law in this respect, the PPO will not undertake ex officio several grounds for refusal of a trade mark application, which should make easier and speed up the registration procedure.

As in other jurisdictions, protective rights are granted for a specific period e.g. 25 years for industrial designs, 20 years for patents, 10 years for trademark, utility models and topographies of integrated circuits and, as a rule, cannot be extended. Only protective rights to trade marks constitute an exception to this rule and may be extended for successive ten year periods, whereas geographic marks are granted indefinitely.

Gain from protective rights

The rights holder has exclusive rights to use the object of the protective rights. Without the consent of the rights holder, no other person can designate goods with a trade mark (or similar trade marks), use a patented invention in production or produce goods that are identical or very similar to the registered industrial design.

Remedies

Any infringement of protective rights is subject to civil liability. However, an infringement of a trade mark may in some cases also result in criminal liability.

A right holder may, in the course of civil proceedings, apply to the court for any of the following orders:

- a cessation of the infringement
- that the effect of infringement be remedied (e.g. the destruction of infringing goods)
the publication of an appropriate statement in the press and

the return of unlawfully acquired benefits

The aggrieved rights holder can also claim damages.

In trade mark protection cases, criminal proceedings are usually highly effective means of enforcing the rights, bearing in mind the length and cost of the proceedings.

**Assistance from customs authorities**

Under the relevant European Community provisions, Polish customs authorities have powers to seize goods that they suspect of infringing Intellectual property rights (including copyright) and to inform the rights holders of this fact. The right holders may then commence civil and / or criminal proceedings against the suspected infringer.

**Copyright**

A work is something fixed in any form, regardless of its value, purpose and means of expression, which has the necessary originality and individuality under the Copyright and Neighbouring Rights Act of 1994 (*Copyright Act*).

A work is not required to be completed. It may be a sketch, plan or outline of a work. It may also be a study (a dependent work), a translation, an alteration or an adaptation of a work made with the knowledge and consent of the author of the main work. Anthologies, collections, selections, databases and computer programs can also be classified as work.

The Polish Copyright Act protects copyright of Polish citizens as well as citizens of the EU member states and members of the European Economic Area (EEA). Also, Poland is party to several bilateral and multilateral conventions and treaties e.g. TRIPS which protect international copyright.

Under Polish law, the following is not treated as ‘work’ capable of probation:

- normative texts and the drafts thereof
- official documents, documentary material, devices and symbols
- descriptions of patents and other protected titles
- mere news items and
- ideas

There are some additional provisions regarding audio-visual works as well as computer programs which are also protected by personal and economic copyrights.

**Protection**

Copyright protection starts as soon as the work is fixed. There is no need to register copyright or mark the work with any symbol e.g. ©, “all rights reserved” etc.

Every individual or other person can be a creator and there is a presumption that the person who has been clearly named on the work is its creator. Where the creator is an employee, copyright is usually owned by the employer, unless a relevant agreement provides otherwise. An animal that by chance “creates” a work cannot be regarded as its creator. The same applies to forces of nature. On the other hand, a person who scientifically defines forces of nature is not a creator, but may be regarded as an inventor under the Industrial Property Rights Act of 2000.

**Rights of creators**

In Poland copyright includes both personal rights and economic rights.

Personal rights are universal and protect the relationship between the creator and the work, which includes the right to:
► claim authorship of the work
► cause the work to appear under the author’s name or pseudonym or to release it anonymously
► defend the inviolability of the work’s form and content, the proper use, and the right to decide on its first public release and
► oversee the use of the work

The personal rights belong only to the author, but he can agree with the purchaser of the work that he will not use them.

Economic rights, on the other hand, are transferable or licensable by agreement setting out in detail the fields in which the work may be exploited and economic rights can also be inherited.

Economic copyright can be the subject of two types of agreement: (i) an agreement for the transfer of copyright and (ii) a license agreement.

The copyright transfer agreement must list the fields of exploitation. The rights are transferred only within the scope of the field of exploitation listed in the agreement and, if any, of the fields of exploitation are missing, the rights are not transferred in respect of that field. The provisions may refer to the following non-exhaustive fields:

► fixing and copying the work, manufacturing copies of the work using a specified technique, including printing and reprographic techniques, magnetic recording and digital techniques
► trade in the original or copies on which the work has been fixed, marketing, use or lease of the original and copies and
► distribution of the work other than specified above such as: public performance, exhibition, display, playback, broadcasting, retransmission and public release of the work in such a way that people have access to it at a place and time of their choosing

Usually, new fields of exploitation are recognised following innovation in new technologies of work exploitation e.g. digitalisation, Internet, DVD, Blu-ray. After transfer of the copyright the former owner has no right to use it within the scope of fields of exploitation listed in agreement. In contrast to a transfer agreement the licensor has the right to use the work during the license and after it, unless the agreement provides otherwise.

The Polish Copyright Act sets out two types of licence agreement: exclusive and non-exclusive. Both types of licence must list the fields of exploitation but only exclusive license agreements must be in writing. Unless a relevant agreement provides otherwise, a licence is granted for five years in Poland.

Generally, all economic copyright expires 70 years after the author’s death but there are some exceptions e.g. for audio works, co-authors’ work or work of an unknown author.

Fair dealing in copyright work

The Polish Copyright Act grants certain people or organisations free access (fair dealing) to works providing that they use it for purpose listed in the provisions e.g. libraries, using work only for personal purposes (not for commercial or public purposes). Fair dealing only attaches to work which was disseminated by an authorised person or with his acceptance.

Enforcement

A creator, whose personal rights are threatened or infringed by the action of a third party may apply to the court to:

► demand the cessation of the conduct
► demand that its effects be remedied or
► request that an appropriate public statement be published
If a court announces a sentence in favour of the creator, he can enforce his rights by using a bailiff or file a petition with a court to grant consent to act on behalf of the debtor who should bear all costs resulting from the creator’s enforcement actions.

Where an infringement is found, the court may award the creator damages for losses sustained or alternatively, at the creator’s request, oblige the infringer to pay an appropriate sum of money to a charity specified by the creator.

A creator whose economic rights have been violated can ask the court to order that the infringer:

► puts an end to the violation
► returns any received income
► pays twice (or, in the event of deliberate violation, three times) the amount of the appropriate remuneration (market-based remuneration paid for relevant rights e.g. for two years licence for similar computer programme) applicable at the time of the assertion of his claim or
► demand compensation for prejudice suffered in the event of deliberate violation

Neighbouring rights

The Polish Copyrights Act sets out copyrights and neighbouring right (related rights). The neighbouring rights grant a special quasi economic copyright protection only for creations listed in the copyrights provisions: artistic performances, rights in phonograms and video programs, rights to programme broadcast, rights to first editions as well as scientific and critical edition.

Collective administration organisations

Collective Administration Organisations (CAOs) such as the Authors Association ZAIKS, STOART and ZASP are mainly responsible for collecting fees due on account of copyright or neighbouring rights and for works used in various fields of exploitation. Note that a work is occasionally used simultaneously in numerous fields of exploitation, in which case the entity making payment may not know which CAO is responsible for collecting the fees due. Usually, they pay few the most probable CAO a lump fee.

Databases

Under Polish law, the protection of databases is granted under the Database Protection Act (DBPA) and if it meets the prescribed requirements, a database may also be subject to protection pursuant to the Polish Copyright Act. The Acts differ in the protection afforded. The DBPA grants protection to the creator of databases who is either domiciled, seated or has a place of habitual residence in a EU or EFTA Member State, conducts commercial activity for creator or other person / entity whom protection is granted by an international treaty in the scope granted thereby. A database under this Act is a collection of data or any other materials and elements collected and classified using a specific method which is rendered individually accessible whilst the manufacturing, verification or presentation thereof requires an investment of, among others, time or money. The protection period granted under this Act is 15 years after the year during which it was manufactured, or if such a database was rendered accessible to the public – after the end of the year of rendering it accessible.

As stated above, such a database may also be subject to the protection granted by copyright law if the database meets the requirements set in order to qualify as a “work” under the Polish Copyright Act.

The owner of a database whose copyright is infringed may file for cessation of infringement, restitution or for damages. Additionally, if a database qualifies to be treated as “work” under the Polish Copyright Act infringement of copyright is subject to criminal prosecution, which, depending on the circumstances, may result in imprisonment.

Internet domains

Polish domains (.pl) and second level polish domains (i.e. com.pl, org.pl etc.) must be registered with a domain name administrator – a partner of NASK (Polish registry). The complete list of registrars is available under http://www.dns.pl/english/Registrar/partner.html. Costs of registration do not exceed EUR 50 per annum. Currently there is no single body of law regulating the use of domain names, rights of owners or the remedies available for infringement. Issues
which might arise on registration are the infringement of personal rights, trade mark infringement and committing an act of unfair competition. Domain name infringements can be heard by either a common court or an arbitral tribunal. Currently there are two arbitral tribunals specialising in resolving disputes related to domain names: (i) the Arbitration Court at the Polish Chamber of Information Technology and Telecommunications; and (ii) the Court of Arbitration at the Polish Chamber of Commerce. The existence of specialised arbitration courts does not prevent the resolution of the dispute before any other arbitral tribunal upon which the parties have agreed, although the first arbitration court mentioned deals specifically with domain name disputes.

A judgment or an arbitral award which declares that an infringement has been committed allows for termination of an existing registration agreement.

**Marketing agreements**

**Franchising**

There are more than 1000 franchise systems operating in Poland.

Each year more people want to start their own businesses and to minimise risk, therefore many of them choose to take a franchise of an existing business because it gives them the comfort that the relevant business has already had a degree of success.

Franchise agreements are the cornerstone document defining the relationship between franchisee and franchisor. It is binding on both parties and lays out the rights and obligations of each.

In Polish law franchise agreements are known as ‘innominate contracts’, which means that they are not regulated by the Civil Code or any other civil law. Franchise agreements are entered into on the basis of the ‘freedom of contract’ principle, whereby the contracting parties may shape their legal relationship at their own discretion (as long as the subject matter does not conflict with state law, the nature of the relationship or the principles of social coexistence).

It is also important to adapt the contract to the business relations typical to each country. This will make the franchise contract more attractive to potential franchisees.

**Distribution agreements**

Distribution agreements are also ‘innominate contracts’, not subject to civil law. Polish contract law allows freedom of contract for distribution agreements and they are enforceable under Polish law. Since distribution law in European countries is based on the same principles, Polish judges may also determine the respective application of agency agreement provisions regulated in the Polish Civil Code in distribution agreements.

**Agency Agreements**

According to the provisions of the Polish Civil Code on agency agreements, an agreement concluded for an indefinite period of time can be terminated by each party without observing the notice period in the event one of the parties does not perform all or part of his obligations, or in case of extraordinary circumstances that are not specifically set forth in the Polish Civil Code. If the agreement is terminated due to breach, the party in breach is obliged to pay damages incurred by the terminating party as a result of the termination.

An agency agreement concluded for an indefinite period of time may be terminated on one month’s notice in the first year, on two months’ in the second year and on three months’ notice in the third and the following years. These periods cannot be shortened. The extension of the notice period in favour of an agent results in the automatic extension of such term for the principal.

An agreement concluded for a definite period of time may be terminated on a contractually agreed period of notice. There are no binding legal requirements with regard to notice periods.

There are no formal requirements regarding the appointment of a distributor under Polish law. Neither a distributor nor a distribution agreement has to be registered at any governmental institution. It does not have to be executed in any particular manner, however, it is common practice for distribution agreements to be executed in writing for evidential purposes.
E-Commerce

The e-commerce market increased from PLN 12 to 23.7 billion in the years 2009-2012, accompanied by a modification of the strategy of shops, particularly in the areas of marketing and promotion.

E-commerce is not subject to a single act. In Poland this type of business activity is regulated inter alia by the following acts:

► the Act of 18 July 2002 on Rendering Electronic Services
► the Act of 30 May 2014 on Consumer Rights
► the Act of 18 September 2001 on Electronic Signatures
► the Personal Data Protection Act of 29 August 1997
► the Telecommunications Law Act of 16 July 2004
► the Act of 5 July 2002 on the Protection of certain electronically provided services based on, or consisting of conditional access
► the Act from 16 February, 2007 on Competition and the Protection of Consumers’ Interests
► the Act from 16 April, 1993 on unfair competition

Contracts formed electronically are executed by means of accepting an offer submitted by the other party. An offer made electronically (e-mail) is deemed to have been made as of its introduction to an electronic communication device in a way that enables the other contracting party to learn of its content. An offer made electronically online is binding for the offer or if the other party confirms its receipt without delay. The above does not apply to contracts concluded offline by means of individual long-distance communication. In business-to-business (B2B) relationships the rule might be excluded by the mutual agreement of the parties. A party entering into a “click wrap” sales contract must be provided with the terms and conditions of the contract. Furthermore, if one of the contracting parties is a business entity, it must provide the other party with further information, including information about technical acts covered by the execution of the agreement, the legal effects of confirmation of the receipt of the offer and the languages in which the agreement may be concluded. A business entity entering into business-to-consumer (B2C) contract must also meet the additional conditions stipulated by Protection of Particular Consumers’ Rights and the Liability for the Damage caused by a Hazardous Product Act of 2 March, 2000. For contracts formed by means of individual electronic long-distance communication apply the general civil law provisions.

The concept of electronic signatures was introduced in the Act of 18 September 2001 - Electronic Signature. According to the Act, an electronic signature is data in electronic form, which, together with other data to which it is attached or with which it is logically related, is used to identify the person submitting an electronic signature. A document which bears an electronic signature can be - complying with additional conditions - equivalent in terms of legal consequences with a handwritten signature. An electronic signature can be considered equivalent to a handwritten signature if it meets the conditions for recognition as a secure electronic signature. According to the Act, a secure electronic signature is an electronic signature which is:

► assigned exclusively to the person placing the signature
► prepared by means of devices for submission electronic signature of secure devices for electronic signature and data for electronic signature
► related to the data to which it is attached in such a way that any subsequent change in the data is recognisable

The legal effects associated with the submission of a declaration of intent bearing a secure electronic signature verified with a valid qualified certificate defines the Civil Code. Under its provisions, a declaration of intent signed by this signature has the same legal effect as a declaration of intent signed by handwritten signature.
The Polish Act on Consumer Rights governs the issues of distance selling and hence distance/remote contracts. According to the mentioned act, a distance contract is an agreement concluded with the consumer under an organised contractual system of contracts at a distance, without the simultaneous physical presence of the parties, with the exclusive use of one or more means of communication at a distance until the contract is concluded. In this case the consumer has i.e. the right to withdraw from this type of contract within 14 days without giving any reason.

Data protection

Polish regulation on personal data protection is based mainly on EU law, which was implemented in Poland primarily within the provisions of the Personal Data Protection Act of 1997. The main authority overseeing data protection is the Inspector General for Personal Data Protection (GIODO). The Inspector and the employees of his bureau are equipped with multiple powers, such as the right to enter premises or to demand access to any electronic technology, in order to supervise personal data processing.

Personal data, in accordance with the Polish law, is any information which allows for the easy identification of an individual. It might be not only the name or the address, but also the national identification number (PESEL). Data on deceased persons or on investors are not regarded as personal data.

Another legally defined term is the processing of personal data, which means any operation or action concerning such data, (usage, sharing), including mere storage of the data. By the removal of personal data, the 1997 Act defines destroying or modifying such data in a way that prevents determining the identity of the data subject. Therefore, removal of personal data includes all the procedures that result in depriving the data controller of the possibility of any further processing of personal data.

An entity (i.e. state authority, investor or a company) with responsibility for determining the purposes and means of data processing is called data controller. The controller has several duties concerning personal data protection, such as the registration of a personal data collection, care of proper protection of the data and its legal proceeding. Currently the liability for infringement of data protection regulations is of a criminal character. The Inspector General is entitled to impose a fine on a data controller only under an administrative enforcement procedure, in case his instructions are not followed by the data controller.

In spring 2018 the Polish 1997 Act, like all other local data protection laws, will be replaced by the provisions of the General Data Protection Regulation.

Product liability

The legal framework for product safety in Poland comprises of public law regulations which set out some duties related to product safety, and provisions of civil law on the ramifications of liability for damages caused by dangerous products.


There are several regulatory bodies responsible for performing product control, including: the Trade Inspectorate, the National Sanitary Inspectorate, the Pharmaceutical Inspectorate and the Office of Competition and Consumer Protection. These regulatory bodies may initiate proceedings after receiving information from consumers. Moreover, manufacturers are obliged to immediately notify the proper regulatory body of any risk posed by their product which makes it unsafe. If a product is found to be dangerous to users’ life or health, specific obligations and penalties may be imposed on the producer or distributor by regulatory.

Civil liability for damages caused by dangerous products is governed by Articles 4491 – 44911 of the Civil Code. Consumers can be awarded damages for personal injury and damage to property. The compensation for the damage to the property does not include defects of the product itself nor benefits the injured person could have obtain in connection with its use. The compensation is not applicable where the damage of the property does not exceed €500. Liability cannot be excluded or limited by any means.

A complaint may be lodged not only against a producer of the dangerous product but also against a manufacturer. If the producer (manufacturer) cannot be identified, then complaints may be lodged against the seller.
The producer (manufacturer) might free himself from liability for damage caused by a dangerous product, but has to prove he is not at fault. The claim for compensation of a damage caused by a dangerous product shall expire with the lapse of three years from the date when the injured person have acquired information about the damage or ten years from putting the product into circulation.

**Bribery and corporate crime**

Polish laws distinguish between two types of bribery in the public and private sectors. Bribery in both sectors may be an offence according to the provisions of Polish criminal law.

It should be noted that it is not only the person who promises to provide a financial benefit, but also but also the 'intermediary' who may be criminally liable. Criminal liability of an intermediary in bribery occurs when a person who, referring to his / her connections to persons working in the public institutions, undertakes to act as an agent to solve the matter in return for financial or personal benefit or promise thereof. Such person may have influence over state institutions, international or domestic organisations or foreign organisational units having public funds. The criminal act of bribery is committed by anyone who provides or promises to provide financial or personal benefit in return for intermediation in solving a matter by causing unlawful influence on decisions, actions or omissions of the person performing public functions and in connection with the performed function. The above mentioned applies to certain institutions, having public funds.

With regard to bribery in the private sector, due to the Polish Criminal Code, one who (while in a managerial position in an organisational unit performing business, or in an employment relationship, a service contract or a contract for a specific task) provides or promises to provide a material or personal benefit is the one who will be penalised.

The Polish Act on Sports regulates, in its penal provisions, criminal liability in relation to sporting events. Generally, the offence connected with the organisation of sports events is committed by a person who provides or promises to provide financial or personal benefit to the organiser of such contest, or anyone who takes part in such contest, in return for unfair behaviour which influences the result of the contest.

Bribery committed outside Poland by a Polish resident or person is punishable pursuant to rules set out in the Polish Criminal Code.

The court may send a person to jail for between 3 months and 8 years as the penalty for a corruption offence. There is no criminal liability under Polish law if the social consequences of the prohibited act are insignificant. It is also possible to obtain immunity from criminal prosecution in some circumstances e.g. by self-reporting.

In 2006 a special administration agency named The Central Anticorruption Bureau (CBA) was established. The CBA is a special service that combats corruption in the public and private sectors, especially within national and municipal institutions, as well as fighting against any activity which may endanger the country’s economic interests. The officers of CBA have similar powers to the Police.

**Real estate**

Poland is one of the largest Real estate markets in Central and Eastern Europe. In 2015 Poland enjoyed enormous popularity among real estate investors, with €4.1 billion of transactions concluded. Their activity was visible mostly in the retail segment where the value of projects amounted to €2.26 billion and in the office segment with projects worth circa €1.27 billion (source: JLL).

**Basis for holding and disposing of Real estate**

In Poland the common legal interests in Real estate are:

- ownership of title – legal title that gives the widest ownership rights to Real estate; as a rule the owner has the right to possess and use real estate for an unlimited period of time as well as to transfer or encumber the real estate

- a perpetual usufruct right – a legal title in a Real estate owned by the State Treasury or a local government; in practice very similar to ownership. Key differences from ownership are: the perpetual usufruct right is established for a limited time (usually 99 years; although, it can be extended multiple times) and a beneficiary pays an annual fee (similar to a rent)
► an easement (e.g. an easement of necessary access) – a right that allows its holder to use Real estate in a specified way, e.g. drive thorough it to a public road

► a mortgage – a security right encumbering a Real estate or a receivable debt secured by mortgage which allows its holder to force a sale of an encumbered real property in order to satisfy its claim

► a lease – a right that allows its holder to use a Real estate in return for a rent

**Restrictions on foreigners purchasing Real estate**

In principle, a foreign investor (including individuals) must receive a permit from the Minister responsible for Internal Affairs in order to buy Real estate or a controlling share in a company that owns Real estate. However, in a number of cases foreign entities from the European Economic Area (EEA) countries and from Switzerland are exempted from that requirement.

**Other restrictions**

In some cases, the State Treasury or local governments have pre-emption rights over the sale of ownership of Real estate or transfers of perpetual usufruct rights.

Every agreement for sale of real estate must be concluded in the form of a notarial deed.

Under Polish law there are two types of land registers: the main purpose of the land and mortgage register (księga wieczysta) is to register titles and encumbrances over real estate while the cadastral register serves for description of physical features and the purpose of the land and buildings.

An entity concluding a contract (e.g. a purchase agreement) with a person entitled as per the entries into the land and mortgage register (i.e. with a person entered into the land and mortgage register as an owner, a usufructuary, etc.) acquires the ownership or another right in rem even if there is a discrepancy between the contents of the register and the actual legal status of the real estate (e.g. another person is the owner) provided that the acquiring person is not aware and reasonably cannot be expected to have been aware of the said discrepancy (good faith). The above exception to the rule that one cannot transfer more rights than one has is the principle of public reliance on the land and mortgage register which allows for great security of real estate acquisition transactions in Poland. Therefore it is crucial for the entity acquiring the real estate to request the entry of its right into the said register.

The acquisition of the real estate must also be registered in the cadastral register. Specific tax payments that have to be made on acquiring an interest in land in Polish jurisdiction are: transfer tax (TCT), real estate tax, VAT and the fee for establishment and entry into land and mortgage register.

**Energy law**

Polish energy regulations are based on the desire to create conditions for sustainable development of the country, ensure energy security, ensure economical and rational use of fuels and energy, develop competition, protect against the negative effects of natural monopolies, integrate environmental protection requirements and balance the interests of energy companies and consumers.

Most commercial activities in the energy sector in Poland require a licence from the President of the Energy Regulatory Office (the central public administration authority charged with overseeing the energy sector); for example, the generation of fuel or energy, storage of gaseous fuels in storage installations, liquefaction of natural gas and re-gasification of liquefied natural gas at LNG installations, the storage of liquid fuels, transmission or distribution of fuels or energy and trade in fuels or energy.

The licence allows its holder to conduct activities in the energy sector for between 10 and 50 years.

There are two main bills in Poland that regulate the energy sector: the Energy Law and the Act on Renewable Energy Sources (RES Act).

The Energy Law sets out the mechanisms allowing the unbundling rule and Third Party Access to be firmly anchored in the Polish energy sector. Third Party Access requires owners of natural monopoly infrastructure facilities to grant access to those facilities to parties other than their own customers, usually competitors in the provision of the relevant services, on commercial
terms comparable to those that would apply in a competitive market. By being granted an unbundled access new entrants of the market (challengers) are offered access to facilities of the incumbent, that, are hard to duplicate (e.g. for technical reasons or business-case wise).

The RES Act that came into force in Poland on 1 January 2016 sets out rules and conditions for the sustainable development of renewable energy sources (RES), incl. the production of energy, bio-gas, bio-fuels and heat from RES. Chapter no. 4 of the RES Act regarding mechanisms and instruments of support for the producers of electric energy from RES, bio-gas and heat in the RES installations is supposed to come into force on 1 July 2016.

Chapter no. 4 introduces an auctioning system that promotes new RES technologies and limits total support value for each RES installation that wins an auction. The current RES energy producers would retain the acquired rights and receive support in form of certificates of origin for the total period of 15 years; those who fulfil the criteria specified in the RES Act would be able to change the support system and participate in auctions.

However, the final shape of the RES Act, especially Chapter no. 4, is still uncertain due to the legislative works in the Polish Lower Chamber of the Parliament on the amendments to this Act.

Mining and geology law

Poland is a country with a diverse resource pool, including large deposits of coal and shale gas. In total, there are over 11,000 identified and documented deposits of over 40 different minerals.

In principle, according to Polish Geological and Mining Law, prospection, exploration, joint prospection and exploration, production of minerals from mineral deposits as well as non-retention storage of substances or retention of waste in orogen, inter alia in excavation require a mining licence issued by the Minister of Environment.

Investors seeking a licence shall meet particular legal requirements specified inter alia in the Geological and Mining Act, the Act on Freedom of Economic Activity and the Act on the Provision of Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments (for example sometimes a decision on environmental conditions of the investment and / or an environmental impact assessment report is required).

A licence for prospection, exploration, joint prospection and exploration or for production of hydrocarbons is as to the rule awarded in an open tender procedure; licences for other minerals are generally granted upon careful examination of the filed applications for their issuance.

The licence allows its holder to conduct mining activities in the designated area and is issued for an estimated period of time between 3 and 50 years (except for licenses for prospection, exploration, joint prospection and exploration or for production of hydrocarbons which are granted for an estimated period of time from 10 to 30 years), unless the entrepreneur files an application for a shorter period of time than 3 years.

The Minister of Environment grants a licence to the winner of a tender / to the applicant and after its granting concludes an agreement on establishment of a mining usufruct. A mining usufruct agreement is concluded for a specified period of time, no longer than 50 years between the investor and the State Treasury and entitles the investor to exclusively prospect, explore or produce minerals in compliance with the mining licence, provisions of this agreement and other legal regulations and does not contain a ‘change of control clause’. The one, who explored the mineral deposit and documented it in a way that allows for elaboration of a deposit development plan as well as obtained a decision approving the geological documentation of this deposit is entitled to demand instituting a mining usufruct upon him, in preference to others. This entitlement expires within five years from the day of obtaining a decision approving geological documentation.

Under the Geological and Mining Act, the transfer of a licence is possible. The transfer of a licence results in the transfer of the mining usufruct.

Mining activities are generally supervised by the Minister of Environment.

The licence may expire or be revoked by the Minister of Environment under certain conditions. The licence expires with the period for which it was granted, if it has become objectless, in case of death of an entrepreneur being a natural person, in case of liquidation of the entrepreneur or in case of waiver of a licence. Revocation of a licence, its expiry or loss of its power,
regardless of the cause, does not relieve the entrepreneur from executing obligations arising from environment protection and mining facility closure.

The State Treasury has right to geological information. In principle, using geological information to which the State Treasury holds the rights is free of charge; also the entrepreneur who incurred the costs of geological works in the result of which the information was acquired is entitled to use it free of charge. Using geological information for purposes of production of minerals, underground non-retention storage of substances and underground storage of waste and activities for which water permit is required is allowed upon concluding an agreement and paying remuneration.

Licence holders pay, amongst other fees, licence and production fees, remuneration for mining usufruct etc.

Existing law is stated as it applied in May 2016.

Useful contacts

### MAJOR COMMERCIAL ORGANISATIONS

- Polish-German Chamber of Commerce – [http://www.ahk.pl/](http://www.ahk.pl/)

### POLISH MINISTRIES, AGENCIES AND SERVICES

- President of the Republic of Poland – [http://www.president.pl](http://www.president.pl)
**POLISH MINISTRIES, AGENCIES AND SERVICES**


**Further information**

Noerr
Sp. z o.o. Spiering Sp. k.
Al. Armii Ludowej 26
00-609 Warsaw
Poland
+48 22 5793060
Fax +48 22 5793070

**Contact Partners**

**MANAGING PARTNER**

Prof. Dr. Jörg K. Menzer  
Partner  
Head of CEE Offices

| + 40 21 3125888 | joerg.menzer@noerr.com |

**COMMERCIAL & REAL ESTATE**

Pawel Żelich  
Radca prawny (PL)

| +48 22 5793062 | pawel.zelich@noerr.com |

**CORPORATE**

Arkadiusz Rumiński, LL.M.  
Associated Partner

| +48 22 5793060 | arkadiusz.ruminski@noerr.com |
### CORPORATE

<table>
<thead>
<tr>
<th>Name</th>
<th>Contact Information</th>
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<tbody>
<tr>
<td>Jakub Lerner</td>
<td>+48 22 5793081</td>
</tr>
<tr>
<td>Associated Partner</td>
<td></td>
</tr>
<tr>
<td>Radca Prawny (PL), Attorney-at-law (NY), Solicitor (England &amp; Wales)</td>
<td></td>
</tr>
<tr>
<td>Agnieszka Posmyk-Kubiak</td>
<td>+48 22 5793066</td>
</tr>
<tr>
<td>Rechtsanwältin (DE)</td>
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### BANKING & FINANCE

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<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Dr. Sławomir Morawski</td>
<td>+48 22 5793088</td>
</tr>
<tr>
<td>Radca prawny (PL)</td>
<td></td>
</tr>
<tr>
<td>Marta Smolarz, LL.M.</td>
<td>+48 22 5793074</td>
</tr>
<tr>
<td>Attorney-at-law (NY)</td>
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### EMPLOYMENT & PENSIONS

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<th>Name</th>
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<tr>
<td>Katarzyna Ziólkowska</td>
<td>+48 22 5793117</td>
</tr>
<tr>
<td>Radca prawny (PL)</td>
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### LITIGATION

<table>
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<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Pawel Żelich</td>
<td>+48 22 5793062</td>
</tr>
<tr>
<td>Radca prawny (PL)</td>
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### MEDIA, IP & IT

<table>
<thead>
<tr>
<th>Name</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Katarzyna Ziólkowska</td>
<td>+48 22 5793117</td>
</tr>
<tr>
<td>Radca prawny (PL)</td>
<td></td>
</tr>
<tr>
<td>Agnieszka Witaszek</td>
<td>+48 22 5793111</td>
</tr>
<tr>
<td>Radca prawny (PL)</td>
<td></td>
</tr>
</tbody>
</table>

### REGULATORY & GOVERNMENTAL AFFAIRS

<table>
<thead>
<tr>
<th>Name</th>
<th>Contact Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dr. Jacek Bąk</td>
<td>+48 22 5793060</td>
</tr>
<tr>
<td>Managing Partner</td>
<td></td>
</tr>
<tr>
<td>Rechtsanwalt (Germany)</td>
<td></td>
</tr>
<tr>
<td>Name</td>
<td>Phone Number</td>
</tr>
<tr>
<td>-----------------------</td>
<td>----------------</td>
</tr>
<tr>
<td>Arkadiusz Rumiński, LL.M.</td>
<td>+48 22 5793060</td>
</tr>
<tr>
<td>Associated Partner</td>
<td></td>
</tr>
<tr>
<td>Rechtsanwalt (DE)</td>
<td></td>
</tr>
<tr>
<td>Paweł Żelich</td>
<td>+48 22 5793062</td>
</tr>
<tr>
<td>Radca prawny (PL)</td>
<td></td>
</tr>
</tbody>
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Introduction and legal system

Portugal, officially the Portuguese Republic, is located in south-western Europe on the Iberian Peninsula and is bordered by the Atlantic Ocean to the west and south and by Spain to the north and east. The Atlantic archipelagos of the Azores and Madeira are also part of Portugal. Its total area is about 92,000 square kilometres and it has a population of approximately 10.5 million people, of which around 5.5 million are working population. Portugal’s official language is Portuguese, although the Mirandese regional language is also officially recognised.

Portugal is a member of the European Union (since 1986) and it is one of the founder members of the Euro area which was established on 1 January 1999.

Political structure

Portugal is a constitutional democratic republic and a semi-presidential system with separation of powers between the legislative, executive and judiciary as laid out in the 1976 Constitution. The four main institutions are the President of the Republic, the Parliament (Assembleia da República), the Government and the Courts.

The President of the Republic is elected every five years and his powers comprise (i) the appointment of the Prime Minister and Ministers (after the election of the members of the Parliament and considering the election results), (ii) dismissing the Prime Minister, (iii) dissolving Parliament, (iv) calling early general elections, (v) vetoing legislation, (vi) declaring a State of War or siege and (vii) a general power of monitoring, arbitration and mediation of the Republic institutions. Parliament is a unicameral chamber, composed of 230 deputies elected by proportional representation every four years, which has the power to make laws - the legislative power. Government, headed by the Prime Minister, has executive power and is responsible for defining policy. Courts have judicial power and are organised into categories including judicial, administrative and fiscal. The Supreme Court is the court of last appeal and the Constitutional Court oversees the constitutionality of the legislation.

Portugal is divided into 18 administrative districts, reporting to the central government, and two autonomous regions, the Azores and Madeira.

Legal system

Portugal’s legal system is based on civil law with comprehensive legal codes and laws rooted in Roman law.

Portuguese market

Since the 1990s, Portugal’s economic development model has been changing from one based on public consumption to one focused on exports, private investment and development of the high-tech sector; moving its economy from high dependence on traditional sectors (such as textiles, clothing, footwear, cork, wood products and beverages) to sectors incorporating a higher level of technology (such as the automotive sector, information and communication technologies sector, plastic mould industry, renewable energy generation and biotechnology). Tourism is an important sector of the economy, as Portugal is among the 20 most visited countries in the world, receiving an average of 13 million foreign tourists each year.

Portugal has a geographically strategic location, ideal for supplying the European market or to expand business to other parts of the world. Portugal grants foreign investors the possibility of operating in third-country markets using Portugal as a base; it belongs to the European Union (EU), it has a transatlantic link with the USA and it is also a gateway to the Portuguese-speaking market with more than 265 million people - the Community of Portuguese Language Countries (Angola, Brazil, Cape Verde, East Timor, Equatorial Guinea, Guinea-Bissau, Mozambique, Portugal and São Tomé and Príncipe), which is responsible for generating an annual GDP of €1.825 billion.

Foreign investment policy

There are no restrictions on foreign investment in Portugal as the Portuguese system is based on non-discrimination with regard to the national origin of investment (thus, no distinctions are made between foreign-owned and Portuguese-owned companies). However, foreign and domestic investment projects are limited in relation to certain economic activities – including the harnessing, treatment and distribution of water for public consumption, postal services, rail transport as a public service and the running of maritime ports – although private sector companies may operate in those areas through a concession contract.

Investment projects also have to comply with special legal requirements if they could, in any way, affect public order, security or public health, involve production of weapons, munitions or other military equipment, or involve the exercise of public
authority. Projects of this nature may only be accepted if they obey legal constraints and comply with the applicable Portuguese law.

Portugal offers numerous incentive programs to investors provided by the government, district governments and the EU; they comprise tax, financial, job-creation and training incentives.

There is a general regime applicable to large investments, which are investments that:

► exceed an amount of €25 million, to be invested in a single transaction or up to three year phases and regardless of the sector in which it will be invested, the size, nature or nationality of the investor

► do not exceed €25 million and belong to a company which has an annual revenue above €75 million or a non-corporate entity with an annual budget greater than €40 million

The investments that may be subject to the Large Investments Regime need to be quantitatively adequate and also need to benefit the Portuguese economy in a qualitative way. The benefits may be one or more of the following: the concession of financial incentives, tax benefits and / or co-financing of the project through public risk capital. On an exceptional basis, the following benefits may also be granted: co-participation in vocational costs, compensation for the costs of having a shortage of qualified professionals, compensation for the costs being at an important distance from the sources of knowledge and innovation or direct investment made by the Portuguese State or other public entities in relevant infrastructures. The granting of a concession of any of the abovementioned benefits is subject to the EU rules applicable to state aid.

Since 2005, there has also been the Potential National Interest (PIN) regime. PIN’s goal is to stimulate entrepreneurial investment related to activities capable of broadening the economic structure, creating skilled employment and presenting innovative features. There are no restrictions on the type of investment or on the nature of the capital provided. In the case of joint ventures there must be some kind of binding legal relationship between the businesses. In order to be classified as PIN projects they need to involve an overall investment equal to or higher than €25 million, the creation of a minimum of 50 direct jobs, represent a sustainable environment and territorial solution and have a positive impact on at least three of the following areas:

► setting up of a production base, with strong national incorporation, able to create gross added value

► production of innovative, tradable goods and services which give them a clear advantage over the competition in markets with potential for growth

► positive spill-over effects (i.e. positive effects indirectly affecting economic activities or sectors that are not directly related with the investment) in upstream and downstream activities, namely in small and medium-sized enterprises

► introduction of innovative technological processes, or collaboration with entities in the scientific and technological industry

► form part of regional development strategies or contributing to the economic growth of interior or less developed regions

► the balance of foreign trade, namely by increasing exports or reducing imports

► energy efficiency or favouring renewable energy sources

Projects may also be classified as PIN projects if they involve an investment lower than €25 million or the creation of less than 50 direct jobs, provided that, the requirements mentioned above are complied with and the projects fulfil at least two of the following requirements:

► strong I&D component, representing at least 10% of the investor’s turnover

► strong applicable innovation component and rooted in a patent developed by the investor

► evident environmental benefit

► strong export drive, with exports representing at least 50% of the investor’s turnover
relevant production of tradable goods and services

Portugal has implemented (since 2012) a Golden Residence Permit Program for third-country nationals investing in Portugal. This program aims at stimulating international demand from foreign investors and provides the normal advantages of a residence permit in Portugal (such as the possibility of working in Portugal and travelling within the Schengen Area) and has generated a total investment of around €1.8 billion in three and a half years. The Golden Resident Permit is granted under one of the following circumstances, which should be maintained for a minimum period of 5 years from the granting of such Golden Resident Permit:

- the transfer of an amount equal to or higher than €1 million (through deposit in a financial institution operating in Portugal, acquisition of public debt securities, or acquisition of shares in a Portuguese company)
- the creation of at least 10 jobs
- the purchase of real estate property for an amount equal to or higher than €500,000
- the purchase of real estate property which was constructed at least 30 years ago or is located in an urban recovery area, and execution of rehabilitation works on the purchased real estate property amount to €350,000 or more
- the transfer of an amount equal to or higher than €350,000 to be applied in research activities developed by public or private institutions for scientific research, integrated in the national scientific and technological system
- the transfer of an amount equal to or higher than €250,000 to be applied in investment or support to artistic production, recovery or maintenance of the national cultural heritage, through services of the central and peripheral direct administration, public institutes, entities integrated in the state corporate sector, public foundations, private foundations with public interest status, networked local entities, entities integrated in the local corporate sector, associative municipal bodies and public cultural associations with attributions in the artistic production area, recovery or maintenance of the national cultural heritage
- the transfer of an amount equal to or higher than €500,000 for the purchase of investment units in investment funds or venture capital funds aimed at capitalising small and medium-sized companies which, for such purposes, present the corresponding capitalisation plan that is demonstrated to be viable

As a way to foster decentralisation of investment from the large urban centres, the amounts or minimum quantitative requirements applicable within the majority of the above indicated investment activities may be reduced by 20%, as long as such investments are made in low density regions (regions with less than 100 inhabitants per km² or with a per capita GDP 75% below the national average).

Types of business vehicles

Forms of business vehicle

The most common types of companies in Portugal are public limited liability companies by shares (sociedade anónima, hereinafter referred to as SA) and private limited liability companies by quotas (sociedade por quotas, hereinafter referred to as LDA).

Alongside these common types there are also two additional types, although they are very rare: general partnership companies (sociedades em nome colectivo) and limited co-partnerships (sociedades em comandita).

Under EU and Portuguese law it is also possible to incorporate a European Public Limited Liability Company (Sociedade Anónima Europeia) with a registered office in Portugal. The European Public Limited Liability Company offers companies operating in multiple EU Member States the option of being incorporated as a single company under certain aspects of EU law and being able to operate throughout the EU where national and EU rules coexist. For companies active in different EU Member States, the European Public Limited Liability Company offers the possibility of reducing their administrative costs with a legal structure adapted to the EU Regulation. It also allows the restructuring of large companies currently operating in various EU Member States.

There is also a specific set of laws which regulate company activity in the business areas of general brokerage and financial brokerage, holding companies, regional development companies, property management and investment companies, venture
capital companies, money and exchange market mediation companies, asset management companies, investment companies, financial leasing companies, sports enterprises, factoring, financial credit, credit purchasing and single shareholder limited liability companies.

As to the corporate forms available in Portugal, the law sets out, in many respects, only minimum standards or general rules, granting the shareholders great flexibility in tailoring the structure of the company to their specific needs through inclusion of certain clauses in the by-laws.

Private limited liability company (LDA)

An LDA company is a limited liability company and is the most common corporate entity in Portugal.

Portuguese Company Law does not directly set out minimum share capital amount for LDA companies (until 2011 the minimum share capital amount was €5,000). However, since (i) an LDA company must be incorporated by at least two investors and (ii) the share capital is represented by quotas, whose value may be no less than €1 each (regardless of having equal value or not), the minimum share capital is €2.

The names of quotaholders are publicly available at the commercial registry office.

The law allows quotaholders to defer payment of the initial contributions to be made in cash for a period of five years. Each quotaholder is responsible for the payment of the total share capital of the company - although a quotaholder is responsible for the payment of his/her quota, all quotaholders may, in some situations, also have to contribute for the payment of other subscribed and not fully paid up quotas proportionally to their participation in the share capital of the company.

The share capital paid in cash must be deposited at a Portuguese commercial bank. The amount of the capital so deposited shall only be released following the incorporation of the company.

Quotaholders may be individuals or companies, Portuguese or foreign.

As a general rule, LDA companies must have at least two quotaholders, although Portuguese Company Law allows the incorporation of an LDA company by a single quotaholder, provided that the company name includes the expression Sociedade Unipessoal (i.e., single quotaholder company). These single quotaholder companies are governed by the same provisions applicable to multi-quotaholder companies, with the exception that the resolutions/decisions of the sole quotaholder may be ordinarily written down in a minute book and signed by the sole quotaholder without need to be previously convened. Decisions can ordinarily be made in writing, provided that the same are written down in this mandatory minutes book.

The by-laws may impose on all, or some, of the quotaholders, an obligation to make additional contributions to the equity further to the initial ones. Those additional contributions, which are accounted as equity, have a specific regulation concerning its nature (in cash or in kind) and are subject to very strict rules concerning its repayment to the quotaholders. In fact, the use of equity amounts is limited by a principle of preservation of the company’s equity setting out several financial ratios that must be strictly complied with.

Even if the by-laws do not require such obligations, the quotaholders may resolve to undertake additional contributions to the equity on a voluntary basis, which are also subject to the aforesaid principle of preservation of the company’s equity. Quotaholders are also free to finance the company’s activity by entering into loan agreements with the company (suprimentos). By doing so, the quotaholder is considered as a common creditor of the company increasing the liabilities of the company. However, there may be some restrictions to its reimbursement in case the company falls insolvent.

The transfer of quotas has to be executed in writing and registered with the commercial registry office. Consent from the company is required, save for transfers to other shareholders or family (spouse, ascendants, descendants), unless the consent requirement is waived by the by-laws of the company or by means of a quotaholders’ agreement.

The quotaholders have a right to receive not less than half of the legally distributable profits, except as otherwise set out in the by-laws or resolved by quotaholders representing 3/4 of the capital.

A minimum amount of 5% of the company’s annual profits must be kept for reserves, until a reserve representing 20% of the company capital is reached (legal reserve). The legal reserve must never be lower than €2,500.
Quotaholders’ resolutions are taken at general meetings, which may be convened or not. In this latter case only universal meetings (those where all quotaholders are present in spite of having not been formally summoned) and unanimous written resolutions (whereby a written resolution is circulated between and signed by all quotaholders) are considered valid. Written voting is allowed, unless the law or by-laws expressly state otherwise.

As a general rule, general meetings may resolve independently of the number of quotaholders that are present. However, there are some particular matters (e.g. amendment of the company by-laws, merger, demerger, conversion, dissolution) requiring a constitutive quorum of at least a 1/3 of the share capital. In case the meeting is inquorate, then the general meeting shall be convened a second time, in which case the aforementioned matters may be resolved disregarding the share capital amount the present quotaholders represent.

The majority of the votes cast may, as a rule, validly pass resolutions. However, there are specific matters for which the law requires more demanding deliberative quorums.

An annual general meeting must be ordinarily held until the end of the first quarter of the financial year of the company in order to at least approve the company’s annual financial statements for the previous financial year and the proposal for the allocation of the company’s year-end net result. If deemed convenient, quotaholders may also freely decide to resolve on any other matters.

Any general meeting may be convened by the directors, and any director may also convene the general meeting whenever so requested by any other corporate body or by any quotaholder.

Each Euro cent of the face value of the quota equals one vote. As a special right, the by-laws may provide two votes for each Euro cent of the face value of the quota, provided that they do not correspond to more than 20% of the share capital.

The management of the company is conducted by one or more directors, who must all be individuals. Directors can be appointed in the by-laws or at a general meeting and may or may not be remunerated for the performance of their offices. If there is no specified term of office the director discharges his duties until he is dismissed or resigns. The quotaholders may at any time freely resolve on the dismissal of directors; however, directors removed before the end of their office without a justifiable cause may be entitled to compensation.

The directors have the power to undertake all acts necessary for the performance of the scope of activities of the company and shall run the company in accordance with the instructions and resolutions taken by the quotaholders.

Directors represent the company vis-à-vis any third entities. Whenever the company appoints more than one director, the powers of the appointed directors shall be exercised jointly. However, the decisions taken and the agreements entered into by the majority of the directors are considered valid and binding. Furthermore, although the company’s by-laws may set out different binding rules, for instance, requiring that all acts are performed jointly by all directors, the company shall be considered validly bound to any agreements entered with third parties by any of its directors, unless it may be evidenced that such third parties were aware or could not ignore the restricted binding powers of the director(s) that has(ve) executed an agreement in violation of the company’s binding rules, as well as in case the agreement has been in the meantime confirmed by the required number of directors. In fact, although the identification of the directors of all companies as well as the companies’ binding rules are public, Portuguese law does not require for third parties to be aware of the binding powers of the directors with whom they negotiate, since directors must always act in compliance with the company’s binding rules.

Notwithstanding the above, directors may always delegate in one or more directors powers to execute specific acts or types of acts.

Directors may resign from office by way of a letter sent to the company. The resignation will be effective eight days after receipt of the same by the company, unless the company accepts the resignation to take effect before such eight-day period.

Although not mandatory, the by-laws may establish that the company has a statutory audit board or a single auditor.

Companies which do not have a statutory audit board or a single auditor must appoint an auditor to audit the company’s accounts when two out of the three following limits are exceeded for two consecutive years:

- total balance sheet: €1.5 million
► net turnover: €3 million

► average number of employees in a year: 50.

Although not mandatory, a company secretary may be appointed by the quotaholders.

Public limited liability company (SA)

SA companies must have a minimum share capital of €50,000; however, 70% of the contributions to be made in cash may be deferred. The payment of the premium, if any, may not be postponed.

The share capital paid in cash must be deposited at a Portuguese commercial bank. The amount of capital so deposited shall only be released following the incorporation of the company.

The capital is divided into shares. An SA company may have shares with or without face value. In any case, shares must have the same face value or issuance value of at least a Euro cent, and may not be split. Shares may be registered in books (book entries) or represented by share certificates (also called certificated securities) depending on whether they are represented by registrations in an account or by paper documents. Shares are nominative or bearer, depending on whether the issuer has the ability to be constantly informed of the identity of the respective holders or not, and may be represented by share certificates or book entries. However, shares must be nominative (i.e. specify the holder’s name) if:

► they are not fully paid up

► there is a restriction on transferability

► shareholders are required to provide additional cash or contributions in kind to the company in certain circumstances

Bearer shares may be converted into nominative shares at any time. Nominative shares may be converted into bearer shares only if the law or the company’s by-laws do not prohibit the conversion.

SA companies cannot accept labour or the provision of services as a means of paying up their share capital.

Shareholders may be individuals or companies, Portuguese or foreign. SA companies must have at least five shareholders (which can be five subsidiaries of a group company) except that it can have only one shareholder, provided such shareholder is a company.

Although SA companies do not have a special regime for supplementary contributions to equity, the by-laws of SA companies may impose on all or some of the shareholders the obligation to contribute further to the capital. The accounting treatment will depend on the profile of the contribution established in the by-laws.

If the by-laws do not set out such obligation the shareholders may resolve to voluntarily undertake further capital contributions to the company.

The procedures for the transfer of nominative shares consist of a written declaration of the holder in the share certificate and an entry in the company's share register or in the financial intermediary where the shares are registered. Bearer shares can be transferred by delivery of the share certificates or by transferring the book entry security from one account to another.

The by-laws may not exclude or limit the transferability of shares otherwise than as permitted by law. The by-laws may:

► require that a transfer of nominative shares has the consent of the company

► establish pre-emption rights for the existing shareholders and the conditions for their exercise in the case of transfer of nominative shares

► subject the transfer of nominative shares to specific requirements

The shareholders have the right to no less than half of the legally distributable annual profits, except as set out in the by-laws or resolved by shareholders representing 3/4 of the share capital.
A minimum amount of 5% of the company’s annual profits must be kept for legal reserves until a reserve representing 20% of the company share capital is reached.

Shareholders’ resolutions are passed in general meetings. Resolutions are passed at universal general meetings (where all shareholders must be present) or at general meetings regularly convened or also by unanimous written vote as for LDA companies.

As a general rule, general meetings may resolve independently of the number of shareholders present. However, there are some particular matters (e.g. amendment of the company’s by-laws, merger, demerger, conversion, dissolution) requiring a constitutive quorum of at least 1/3 of the share capital. On a second convene the general meeting may resolve irrespectively of the number of shareholders present or represented and the abovementioned resolutions regarding the amendment of the company’s by-laws, merger, demerger, conversion or dissolution must be approved by 2/3 of the votes cast or by simple majority of the votes cast if at least half of the share capital is represented at the general meeting.

An annual general meeting must be ordinarily held until the end of the first quarter of the financial year of the company in order to approve the company’s annual financial statements for the previous financial year, the proposal of allocation of the company’s year-end net result, and assess the performance of the management and audit bodies. If deemed as convenient, shareholders may also decide to resolve on any other matters.

A general meeting must be convened by the chairman of the general meeting (or in specific cases established by law by the audit commission, general and supervision counsel, statutory audit board or single auditor), who shall convene a meeting whenever so requested by other corporate bodies (audit commission, general and supervisory counsel, statutory audit board or single auditor, as applicable) or by shareholders representing at least 5% of the company’s share capital.

The shareholders may only resolve on matters considered as management issues if so requested by the board of directors, which may be interested in having shareholder support, e.g. on key management matters.

Each share corresponds to one vote; however, the by-laws may provide that:

- one vote will attach to a certain number of shares, provided that at least one vote is given to each €1,000 of capital
- votes above a certain number are not counted if cast by the same shareholder

Three alternate board structures are possible:

- a statutory audit board or a single auditor and a board of directors
- board of directors including an audit commission and auditor
- executive board of directors, general and supervisory board and auditor

The explanation below focuses on the first structure as it is the most commonly adopted in Portugal.

The board of directors will be composed of the number of directors set out in the by-laws. Generally the board of directors has an odd number of members; however, the by-laws may direct that the board of directors is composed of an even number and that the chairman of the board of directors has casting vote. The board of directors may delegate day-to-day management to a managing director or an executive committee.

The board of directors is appointed for a maximum period of four years. Once such period has expired, directors can be re-appointed or simply replaced (by shareholders’ resolution).

Portuguese Company Law allows SA companies to be managed by a sole director if the share capital does not exceed €200,000.

Directors represent and bind the company vis-à-vis third parties. Approval of the majority of directors is required to bind the company, unless the by-laws establish a specific rule concerning the number of directors required for such purpose.
The law grants the board of directors full powers to manage the company. The board of directors' managing powers are only limited to the shareholders' resolutions on management issues for which the board of directors has requested shareholders to resolve on, or to instructions it may receive from the audit board or the audit commission, as applicable. Such limitations are only those expressly provided by law or the by-laws.

This implies that, in general, no corporate body other than the board of directors (e.g. the general meeting) has management powers.

Portuguese Company Law establishes that directors may be dismissed at any time pursuant to a shareholders' resolution. However, in case a director is dismissed before the end of his term of office without a justifiable cause, the director may ask for compensation for damages caused by the dismissal.

Directors may resign from office by sending a letter to the chairman of the board of directors. If the resigning director is the chairman of the board of directors the resignation letter shall be sent to the statutory audit board/single auditor or audit commission, as applicable. Resignation is only effective at the end of the month following the notice being served, unless a new director is appointed in the meantime.

It must be noted that resignation does not waive the director's liability for the company’s accounts in respect of the period during which he has held office.

In the most commonly used corporate structure (board of directors and statutory audit board or a single auditor) supervision of the activities of the board is conducted by the statutory audit board or a single auditor. In fact, auditors shall ensure that the management of the company is made in accordance with the law and good management practices.

Listed companies and companies that are not 100% owned by a company which adopt this model must have a statutory audit board and appoint an auditor when two of the three following limits are exceeded for two consecutive years:

- total balance sheet: €20 million
- net turnover: €40 million
- average number of employees: 250

A company secretary may be appointed by resolution of the board of directors, and having a company secretary is mandatory in the case of listed companies.

The incorporation procedure of LDA and SA companies is as follows:

- application for an admissibility certificate (approval of a company name, registered office and corporate scope)
- in case of an LDA company and if any future partner is a non-resident corporate person, it should also register with the national registry of legal entities (RNPC), providing documentary evidence of legal existence, duly translated into Portuguese, certified and legalised in accordance with The Hague Convention (apostille)
- the admissibility certificate is also needed so that the share capital of the company to be incorporated can be deposited in a Portuguese commercial bank
- schedule an appointment to sign the deed of incorporation at the notary office, for which the following documents will be needed: admissibility certificate, by-laws, photocopies of the identification documents of the granting parties, statutory auditor’s report for contributions other than in cash, documentary proof of the deposit of the share capital and (if applicable) documentary proof of payment of municipal property transfer tax, when contributions to the capital are made in real property
- sign the deed of incorporation at the notary office
- application by a shareholder/quotaholder, director, lawyer or legal representative of the company for the company registration with the commercial registry office, for which the following documents will be necessary: the appropriate commercial registry office form duly filled, certified copy of the company’s deed of incorporation and the admissibility...
The commercial registry office is responsible for publishing the details on the public website for corporate matters managed by the Ministry of Justice, as well as to inform tax and social security authorities of the company’s existence. This application must be completed within 60 days of signing the deed.

A company may also be incorporated through the execution of a private document of incorporation (i.e. a written document signed by all shareholders whose signature is certified by a notary or a lawyer). In some cases, such as a transfer of real property as a contribution in kind to the share capital of the company to be incorporated, the incorporation document shall have the form which is legally required for the transfer of the assets that are being contributed by the shareholders (e.g. public deed or authenticated document).

As a rule, these procedures take no more than 30 days to be completed. The standard cost of incorporating an LDA or an SA company is €600 by private document of incorporation and €1,000 by public deed of incorporation (notary fees may vary).

There are also faster ways to incorporate a company, as there is a special regime allowing a company to be incorporated “on the spot” or online.

“On the spot” regime

The incorporation procedures of LDA and SA companies (except those whose incorporation requires special approval, those whose start-up capital is paid through contributions in kind and European companies) may be completed in one day with a visit to any commercial registry office or in any business formalities centre (CFE). The partners have only to demonstrate their intent to incorporate a company, choose from one of the available pre-approved company names (which avoid the need of previously applying for an admissibility certificate) and the standard corporate by-laws. The commercial registry office ensures that all the entities which should be notified are informed and all subsequent formalities concluded with them. The cost is approximately €400 without the admissibility certificate and €460 with the admissibility certificate.

Online regime

Another possibility is the web-based incorporation service, which can be used by any interested party, whether an individual or a corporate entity, representing whoever is empowered to legally bind them and using an appropriate electronic certificate. LDA and SA companies (except European companies and those whose capital is paid by means of contributions in the form of assets) may be incorporated online. Like the “on the spot” regime, applicants may choose a pre-approved name from a list of pre-approved names or send an admissibility certificate obtained beforehand with the RNPC. Applicants may choose pre-approved by-laws or submit by-laws previously drafted by them in advance. Company registration is immediate if the applicants choose one of the pre-approved by-laws and takes two days if the applicant(s) decide to submit their own by-laws. The costs are the same as the “on the spot” regime.

Branch office

A branch is a permanent representation of a foreign company that carries out that company’s business in full or in part, having no legal personality under Portuguese law. Registering a branch in Portugal generally involves the following steps:

► execution of a resolution from the competent corporate body of the parent company (board of directors or shareholders’ meeting) creating the branch and appointing the legal representative(s)

► collection of documentation relating to the parent company (updated by-laws and commercial registry certificate) and legal representative(s) to be appointed (passports or ID cards)

► notarisation and legalisation in accordance with The Hague Convention (apostille), followed by translation into Portuguese of all documents issued in the jurisdiction of the parent company

► request of a Portuguese taxpayer number for the legal representatives of the branch (if these are not tax resident in Portugal)

► registration of the branch with the Portuguese commercial registry office

► opening of bank account with a Portuguese commercial bank

► enrolment of branch with the Portuguese tax authorities and social security
Directors’ liability

The company’s directors are liable vis-à-vis the company for any loss the company suffers as a result of any acts or omissions in breach of their legal or contractual duties, except where they can evidence that the breach was made without fault on their part. Should the company or its shareholders not exercise their right to be compensated for that loss (i.e. when the shareholder(s) decide(s) or the company resolves not to exercise their right or if, six months after the resolution of exercising their right, they do not actually file the relevant lawsuit against the director(s)), the company’s creditors have a right to exercise it. Whenever the assets of the company are insufficient to pay up all its debts, its directors are also liable towards the company’s creditors for any negligent or deliberate violation of a legal provision aimed at protecting the creditors’ best interests. The same applies to similarly designed provisions that may be contained in the company’s by-laws.

Directors are also generally liable vis-à-vis third parties for any direct loss suffered as a consequence of the directors’ actions in the performance of their office.

Listing on a Portuguese stock exchange

In order to be listed on a regulated market, securities must comply as to their terms and their form with the requirements of their governing law and be issued in accordance with the law governing the issuer.

In addition, the listing of securities on a regulated market operating in Portugal requires the issuer to comply with the following conditions:

► valid incorporation and existence in accordance with its governing law
► evidence of adequate financial and economic situation with regards to the nature of the securities to be listed and to the market on which listing is sought
► carrying out its business activity for at least three years
► publication, under applicable law, of its annual accounts for three years prior to the year in which it applies for listing
► securities of the same category have identical rights under the issuer’s by-laws and applicable legislation
► securities are freely transferable and negotiable in the market

If the issuer has resulted from a merger or demerger, the requirements for three-year business activity and accounts above are considered fulfilled if they are satisfied by one of the merged companies or the demerger company, as applicable. Furthermore, the Portuguese Securities Market Commission (CMVM) may waive those requirements, if it finds that it is advisable in light of the interest of the issuer and investors and the adequate financial situation requirement referred to above, on its own, allows investors to make a clear assessment of the issuer and the securities.

In addition, Euronext regulations require that adequate clearing and settlement systems in respect of transactions in securities are available.

Upstream guarantees within corporate groups

According to Portuguese Company Law, any suretyship or other guarantee given by a company to secure debts of other entities is deemed contrary to the purpose of the company, unless (i) both companies are in a “group relationship”, or (ii) the guarantor has a justified interest in providing the guarantee. Although the concept of group relationship is set out in Portuguese Company Law, it only applies to companies having registered offices in Portugal, which means that both the Portuguese subsidiary and the other group company would have to be Portuguese companies. There is, however, a growing consensus that a group relationship with foreign companies may also be included in the exemption described under (i) above.

A holding company under Portuguese Company Law is entitled to validly give disadvantageous instructions to the company that it controls, provided that the group as a whole benefits from such instructions. The holding company is liable vis-à-vis the creditors of the controlled company (only after 30 days have lapsed since the maturity date of the unpaid liabilities of the controlled company).
Employment

Employee relations

In May 2014, Portugal exited its economic adjustment programme which followed the signature of the Memorandum of Economic and Financial Policies (MOU) in May 2011.

Although Portuguese Government faced some union resistance to the adoption of the labour measures implemented under the MOU, employee relations are generally peaceful and stable and foreign investments are encouraged. Portuguese employment law specially protects employees in recruitment and individual employment termination matters.

On labour matters, the Portuguese Government’s main current priority is employment growth as the unemployment rate is around 12.5%, as well as to return some purchasing power to the employees as a way of stimulating Portuguese economy.

All employees are guaranteed a minimum monthly wage, annually defined through specific legislation, after consultation with the Standing Committee for Social Dialogue (CPCS). Nevertheless, higher minimum wages may be established in collective bargaining agreements.

In January 2016, the national minimum wage for mainland Portugal (14 months per year) was raised to €530.00 gross per month.

In order to compensate the employers for this raise, the Portuguese government published Decree-Law no. 11/2016, of 8 March. This legislation sets forth an exceptional measure of employment creation (which will be effective between February 2016 and January 2017) consisting in the reduction of the Social Security contribution rate for companies by 0.75%, provided that the following conditions are met: (i) the employee is bound by an employment contract without interruption since December 2015; (ii) the employee was paid a monthly base remuneration of between €505.00 and €530.00 gross (for full time employees) in December 2015; and (iii) Social Security contributions are regularised.

Following other active employment policy measures which entered into force in the last years, the Portuguese Government also published Ordinance no. 149-A/2014, of 24 July, which created the “Medida Estímulo Emprego” (Employment Incentive Measure). Through this measure, employers who enter into employment contracts with unemployed individuals are granted a financial support, provided that net job creation is ensured and professional training is granted whilst the employment contract is in force. The amount of this incentive varies depending on the type of contract executed – in case of contracts without an end date, the incentive may currently reach €5,533.70, i.e. 1.1 x €419.22 (the current Social Support Index amount x 12 months).

Relevant labour and employment laws

The primary source of labour law in Portugal is the Labour Code, approved by Law 7/2009 of 12 February 2009 (as amended). The Labour Code contains key labour principles; duties and rights of employees and employers; and the rules that govern the execution and termination of employment contracts, working conditions (working time, place of work and subsequent modifications), the transfer of undertakings, disciplinary procedures and collective relations.

In recent years, Portuguese employment law has undergone many changes and adjustments (the Labour Code was amended in 2009, 2011, 2012, 2013, 2014 and 2015, mainly further to the requirements that were undertaken by the Portuguese Government within the context of the MOU signed in May 2011). After more than 30 years of legislative reforms, the Portuguese labour system is now more flexible, particularly in terms of organising working time.

Labour relationships between employers and employees are also often governed by collective bargaining arrangements, which result mainly from negotiations at industry level between employers’ associations and the unions. These rules are usually extended by government decision to employers in the same sector and employees in the professional categories set out in the collective bargaining arrangements.

Employment contracts

Employment contracts without an end date do not have to be executed in writing; however, there are several elements that need to be provided in writing to the employee within 60 days following beginning of the employment relationship, such as: identification of the employer, the workplace, the professional category of the employee, the date of the contract, amount of annual leave, notice periods to be observed by the employer and employee for termination, the amount and frequency of remuneration, normal daily and weekly working periods and the applicable collective bargaining agreement (if any), the
identification of the Working Compensation Fund or the Equivalent Mechanism and the Working Compensation Warranty Fund, etc.

Fixed term employment contracts must be made in writing and must be justified to fulfil a temporary need of the employer. If it is not justified, it will become an employment contract of indefinite duration.

Part-time employment contracts, tele-working contracts (which consist in the performance of the labour activity outside the company’s facilities – notably from the employee’s home – by using information and communication technologies), employment contracts executed with nationals of countries not part of the European Economic Area, among others, must also be in writing.

The Working Compensation Fund, the Equivalent Mechanism and the Working Compensation Warranty Fund

The legal framework of the Working Compensation Fund, the Equivalent Mechanism and the Working Compensation Warranty Fund has recently come into force.

Only employment contracts executed after 1 October 2013 are subject to the contents of this law.

Employers are bound to contribute each month to the referred funds a value equal to 1% of the employee’s monthly remuneration.

However, new employment/social security benefits on hiring were also recently laid down. As a result of the same, this new cost with contributions to the funds may be covered through these new benefits, until 30 September 2015, provided certain requirements are met and the relevant application is submitted in due time.

The purpose of these new funds is to guarantee that a certain employee will receive, at least, half of the compensation he/she is entitled to in case of termination of the employment contract.

Employees’ representation

Unions collectively represent employees’ interests. Trade union representatives in the business connect employees to their union and represent them, as well as the union, in negotiations with the employer.

Employees can also elect a workers’ committee, which is independent from unions and represents all the employees. The number of members of the workers’ committee (between two and 11 members) is determined according to the number of employees.

Union representatives are the only employees’ representatives that are entitled to enter into collective labour agreements. Moreover, they are entitled to specific information and consultation rights on the employer’s activity and economic situation, on the probable development of employment (e.g. information on the company’s number of employees and possible changes to such number), on any measures envisaged and on decisions likely to lead to substantial changes on working practices (such as modifications on the working times) or in contractual relations. Unions also have the right to participate in business restructuring processes especially regarding training programmes and modifications of working conditions, although in more limited terms than in comparison to the scope of rights of workers’ committees.

Workers’ committees have the right to receive information necessary to perform their functions, including but not limited to, economic and financial matters, the entry into or termination of fixed term employment contracts, overtime work records and individual and collective dismissals. In addition, workers’ committees have a right of consultation and its written opinion, although not binding, must be taken into account before decisions are taken on internal regulations, changing the basic criteria for the assessment of the employees’ performance and promotion, the creation or modification of work schedules (specifying the time of day when employees begin and finish working), the closure of the establishment and dissolution or insolvency, changing the workplace as a result of moving the business and all measures that substantially reduce the number of employees, that substantially affect their working conditions, or are likely to lead to substantial changes in work organisations or in employment contracts.

There are various employers’ associations that represent employers’ interests.
Termination of employment contracts

An employer cannot terminate an employee’s employment contract other than under certain legally foreseen circumstances.

Any employment contract can be terminated by mutual agreement (which must be recorded in writing) or by the employee’s unilateral decision subject to the notice period. Otherwise, except during a probationary period or collective dismissals, an individual’s employment contract may only be terminated if there is gross misconduct by the employee, if the job itself has effectively disappeared (elimination of job position) due to market, structural or technology reasons (technology reasons meaning any change in the techniques, control or production tools, as well as computerisation or automation of services) or if the employee is unable to adapt to his/her job.

Employment contracts also terminate in the following circumstances: once the respective term elapses in the case of fixed term employment contracts, once the respective transitory need disappears in unfixed term employment contracts, in the event of absolute and definitive supervening inability of the employee to work (e.g. due to death of the employee or health reasons), or of the employer to provide work to employees (e.g. closure of the business) or retirement of the employee due to age or disability.

In cases of dismissal for misconduct, the law lays down a non-exhaustive list of permitted reasons, such as insubordination, conflict with other employees, false justification of absence, absence from work without any justification for five consecutive days or 10 non-consecutive days, etc. These reasons need to show that continuing the employment relationship is impossible. The employer must provide the employee with a written statement with full details of the facts (failure to do so will lead to the dismissal being considered void) and must carry out a formal disciplinary procedure.

Employment contracts may terminate by collective dismissal (redundancy). A collective dismissal occurs when the employer decides, within a three-month period, to terminate at least two employment contracts (or five employment contracts where there are 50 or more employees) for market, structural or technology reasons.

The collective dismissal must be carried out in accordance with a formal procedure established by law, which may take between 45 and 120 days, depending on the duration of the information provision and the negotiation phase and the amount of notice given to employees. The employer must notify the employees’ representatives (and union representatives or workers’ committees, if any) or the affected employees (if unrepresented), as well as the competent Services of the Labour Ministry, giving details of each employee involved and the reasons for the proposed dismissals. The employer and representatives are obliged to negotiate ways of minimising the numbers of affected employees and the Services of the Labour Ministry will intervene in negotiations to ensure that the appropriate formalities are complied with and to act as mediator. Once the negotiations are completed, the employer must give the affected employees notice of between 15 and 75 days (depending on the employees’ seniority) before the dismissals can take effect, and inform each of them in writing of the reason for the dismissal, the date on which it takes effect, the amount of the labour credits - credits accrued on the date of the termination and due to such termination (e.g. vacation days accrued and not taken, vacation and Christmas allowances in proportion to the work rendered in the year of termination) - and of the compensation payable, as well as the date, method of payment (wire transfer, cheque or cash) and place in which the cheque or cash will be made available.

When market, structural or technological reasons justify termination of employment contracts but the employee may not resort to a collective dismissal, namely because the number of employees to dismiss is less than two or five (if the company has more than 50 employees), the dismissal may occur due to elimination of job position provided the following conditions are met:

► The reasons identified for the elimination are not due to the employer or employee’s wilful misconduct
► The employment relationship is practically impossible to sustain (this occurs when the employer does not have another job position compatible with the professional category of the employee)
► The company does not have fixed-term employment contracts for duties related with those carried out by the employee whose job is being eliminated

In case a plurality of jobs with identical functional content exists in the section or equivalent structure, the employer must consider, by reference to the respective job holders, the following order of criteria in order to determine the job position to be extinguished:

► Worst performance evaluation, considering criteria previously known by the employee
Lesser academic or professional qualifications

Higher cost borne with the maintenance of the employment relationship

Lesser experience in the work position

Likewise collective dismissal, elimination of job position has its own formal procedure set out by law, which may take between 45 and 120 days, depending on the duration of the information procedure and the period of notice given to employees (which depends on their seniority).

The employment contracts may also terminate for inability to adapt, when it becomes practically impossible to continue the employment relationship, because one of the following situations occurs:

- Continual reduction of productivity or quality
- Repeated breakdowns in instruments of labour
- Risks to the employee’s health and safety, or to other employees or third parties

An employee’s inability to adapt also occurs when, regarding technical complex job positions or management positions, the objectives previously agreed upon in writing are not met as a consequence of the employee’s job performance, making it practically impossible to continue the employment relationship.

This kind of dismissal depends on certain other requirements, like job changes, adequate professional training given to the employee, adaptation period, etc.

Again, a specific formal procedure to carry out a dismissal for inability to adapt is set out by law. It may take between 65 and 120 days, depending on the duration of the information provision and the period of notice given to employees (which depends on their seniority).

During 90 days following a dismissal due to an inability to adapt, the employer shall ensure the employment level of the company is preserved at the same level as it was during the dismissal process for reasons not attributable to the employer, either by hiring a new employee or by transferring an employee.

An employee dismissed within a collective dismissal, elimination of job position or inability to adapt procedure, or as a result of the forfeiture of a term employment contract, is entitled to compensation. In order to conform the Portuguese formula for calculation of compensation with the average compensation formula applicable in the EU, the Portuguese Labour Code was amended on 1 October 2013 so to adjust the amount of compensation due in case of termination of an employment contract. Under the revised provisions, compensation for termination of an employment contract shall be calculated as follows:

- Collective dismissal, elimination of job position or inability to adapt: 12 days base salary and seniority allowance for each year of service
- Forfeiture of fixed term employment contract: 18 days base salary and seniority allowance for each year of service
- Forfeiture of unfixed term employment contract:
  - 18 days base salary and seniority allowance for each year of service, regarding the first 3 years of the contract
  - 12 days base salary and seniority allowance for each year of service, regarding the following years
- The base salary and the seniority allowance used as a basis to calculate the compensation cannot be higher than €10,600 (20 times the national minimum wage)
- The global amount of compensation cannot be higher than 12 times the monthly salary and seniority allowance or, when the salary basis limit referred to in the previous point applies, €127,200 (240 times the national minimum wage)
- For a partial year, compensation is calculated proportionally
The employer is responsible for the payment of the total amount of the employee’s compensation. However, the employer may recover the sum of the employee’s account in the Working Compensation Fund or in the Equivalent Mechanism.

A transitory regime has also been established regarding employment contracts executed before 1 October 2013. This regime sets out different calculation methods for compensation due in case of termination of employment contracts.

Employment of foreign employees

Non-EU nationals require a residence visa or a temporary residence authorisation in order to enter into an employment contract in Portugal. The procedure to obtain such permits normally takes at least six months. Whether or not a permit is available depends on whether there are any vacancies which have not been filled by Portuguese nationals, nationals of EU Member States, nationals of the European Economic Area, nationals of other countries with which Portugal has signed an agreement and nationals of other countries who are legally resident in Portugal. The Portuguese Government publishes a list of these vacancies every year. Permit Tax is approximately €150 and each renewal costs €52.

EU nationals are not required to obtain any authorisation to work in Portugal due to European legislation on the free movement of workers; however, EU citizens have to register at the relevant Municipal Council at a cost of approximately €15.

Economy and government

Every four years, the Government is appointed by the President of the Republic following the election of members of the Parliament. Traditionally, the leader of the political party electing more deputies to the Parliament is appointed as Prime Minister, although the Portuguese Constitution allows different solutions that should, in any case, be supported by a majority of the members of the Parliament.

The Portuguese economy, as with other economies in Europe, has faced a major problem concerning excessive levels of public debt as a result of internal policies and suffered from the effects of the sovereign debt crisis in the Euro area. This has led to the country implementing several austerity packages since 2009 and seeking financial assistance from the International Monetary Fund, the EU and the European Central Bank (the so-called Troika) in April 2011 (like Greece and the Republic of Ireland before it), before entering into the Memorandum of Economic and Financial Policies (MOU) in May 2011, which has been in force until May 2014.

Under the MOU, Portugal was internationally bound to implement an ambitious reform programme covering almost every sector of the economy between 2011 and 2013, and its progress was monitored through quarterly and continuous quantitative performance criteria and indicative targets. The Portuguese Government has also taken additional measures to those outlined in the MOU with the aim of faster economic recovery.

Among several measures that were put in place to gradually restore the economic and financial levels of the country, a vast privatisation plan of state-owned companies in key business sectors has been implemented, involving energy, transportation, water and waste management, communications, insurance, ship-building and TMT sectors.

Overall, reviews by the Troika have confirmed that the reform programme had progressed well, amid continued strong external support. In fact, Portugal has returned to the debt markets even before the financial assistance programme ended on 17 May 2014 and Portugal has reached a so-called “clean exit” from the financial assistance program.

Restrictions / regulations

There are no general restrictions on foreign investment. However, both foreign and domestic investment cannot be directly made in economic activities such as the collection, treatment and distribution of water for domestic use, postal communications, public rail transport and the operation of seaports. Private operators may have access to these activities, but only through a governamental concession contract.

The takeover, merger or acquisition of a stake, generally above 10%, of a company operating in certain regulated sectors requires the previous authorisation or “non-opposition” declarations from the relevant regulatory bodies (in addition to the authorisation by the Portuguese Competition Authority, as mentioned below, if applicable).
Taxation

Taxation overview

The Portuguese tax system has the following main types of taxes: direct taxes (Personal Income Tax (IRS) and Corporate Income Tax (IRC), including municipal and State surcharges (“Derrama Municipal” and “Derrama Estadual”, respectively)); indirect taxes (Value Added Tax (VAT) and Stamp Tax); special taxes (Special Consumption Taxes); and local taxes (Real estate Municipal Transfer Tax (IMT) and Real estate Municipal Tax (IMI)).

Corporate Income Tax (IRC)

As a rule, a company is considered to be tax resident in Portugal if its head office or effective management is located in Portugal.

Resident companies and permanent establishments (PE) of non-resident companies are liable to IRC on their worldwide annual income at a standard rate of 21%. A reduced 17% rate will apply to the first €15,000 of taxable income for small and medium-sized enterprises (SME), based on the legal definition provided by the Commission Recommendation 2003/361/EC, of 6 May 2003.

Depending on the municipality where the activities are pursued, a municipal surtax (“Derrama Municipal”) will apply to a maximum of 1.5% of the taxable profit. In addition, a State surtax (“Derrama Estadual”) will apply as follows:

- 3% on taxable profits exceeding €1.5 million up to €7.5 million
- 5% on taxable profits exceeding €7.5 million up to €35 million
- 7% on taxable profits exceeding €35 million

Non-resident companies without a Portuguese PE are taxed on income derived from a Portuguese source at a standard rate of 25%, as follows (levied when an exemption or reduced rate of a tax treaty, or even of an internal provision, are not applicable):

- dividends – 25%
- royalties / technical assistance fees and equipment rentals – 25%
- income from bonds and other financial investments – 25%
- interest – 25%
- income from services rendered or used in Portuguese territory, except those related to transport, communication and financial activities or services related to studies, projects, management and technical support, accounting, auditing or consulting, organisation and research and development rendered outside Portugal – 25%
- income from currency swaps, interest rate swaps, currency and interest rate swaps and forward exchange agreements – 25%
- commission on intermediation of contracts (i.e. agency commissions, procurement fees, etc.) – 25%
- rental income – 25%

Generally, costs are tax deductible to the extent that they are incurred by the resident companies or Portuguese PEs in order to obtain or guarantee taxable profits, e.g. expenses for materials, labour, energy and transport.

As from 1 January 2014, losses may be carried forward for twelve years (yearly amount deductible limited to 70% of taxable profits), unless more than 50% of the capital or the majority of the voting rights has been transferred. In these situations the Minister of Finance may grant (upon a request within 30 days following the transfer) an authorisation to the company to deduct and set off all or part of such losses. Conversions of direct shareholdings into indirect shareholdings or vice-versa or even between entities, directly or indirectly subject to the same control relationship, transfers within tax neutral mergers,
Dividends paid to foreign corporate shareholders

In principle, dividends paid to foreign corporate shareholders without a PE in Portugal are subject to a 25% final withholding tax.
As from 1 January 2014, new requirements to qualify for an exemption on outbound dividends (which until 2014 were limited to EU/European Economic Area and Swiss corporate shareholders) are in place.

To qualify for the withholding tax exemption for outbound dividend payments, the main criteria will be:

► a minimum of 5% (directly or directly and indirectly) of the share capital or voting rights of the Portuguese company

► a 24 month holding period before distribution (may be satisfied after the income is distributed allowing then to request the refund of the tax previously retained)

► available for shareholders resident in EU/European Economic Area (excluding any member state of European Economic Area which do not exchange tax information with Portugal) or any jurisdiction with which Portugal has signed a tax treaty, in force, with exchange of information mechanism and

► the company receiving the dividends should be subject either to a tax listed in the EU Parent-Subsidiary Directive, or a tax comparable to the Portuguese IRC, with, in some situations, a nominal rate corresponding to at least 60% of the Portuguese IRC rate (i.e. 12.6%)

Furthermore, if applicable, the withholding tax rate can be reduced if Double Tax Treaties apply.

**Dividends received from Portuguese and foreign companies**

Until 2014, the participation exemption applied to dividends arising from shareholdings of at least 10% in Portuguese or EU/European Economic Area companies held for an uninterrupted period of one year and the participation exemption on capital gains applied only to pure holding companies (so-called SGPS) and venture capital companies (SCR) provided certain holding period requirements were met.

As from 1 January 2014, to qualify for the 100% exemption on dividends received by a Portuguese company the main criteria is:

► 5% (directly or directly and indirectly) of the share capital or voting rights of company distributing dividends

► 2 year holding period (may be satisfied after the income is received)

► Available for all shareholdings, including those in non-EU entities, except when derived from entities domiciled in blacklisted jurisdictions and

► Company distributing the dividends would be subject either to corporate tax, taxes listed in the EU Parent Subsidiary Directive, or a tax comparable to the Portuguese IRC at a nominal rate, corresponding to at least 60% of the Portuguese IRC rate (i.e. 12.68%)

An anti-hybrid clause is applicable for inbound dividends to exclude exemption if the dividend payment was treated as a tax-deductible expense at the level of the foreign distributing entity (this amendment follows the latest suggestions of amendment to the EU Parent-Subsidiary Directive).

As from 1 January 2014, (i) a reset of holding period on (inbound) transfers of residence is also applicable, as well as a (ii) switch-over clause on inbound dividends whereby a credit for the underlying tax is applicable where one or more of the conditions for the participation exemption are not met.

**Capital gains**

Also, as from 1 January 2014, for capital gains derived from the sale of shares obtained by Portuguese-resident entities, an exemption is provided for participations above the 5% threshold held for more than 2 years in the same conditions of inbound dividends. As this regime may be applied by all types of companies, the former specific tax regime applied by SGPS and SCR has been abolished.

A carve-out rule is applicable where the assets of the participation disposed consist in more than 50% of Portuguese Real estate (except for properties assigned to agricultural, industrial or commercial activities not related to property trading). In any case, this rule shall only apply to Real estate property acquired by the entity being disposed on or after 1 January 2014.
In addition, as from 1 January 2014, the participation exemption rules are extended to dividends and capital gains obtained from permanent establishments of foreign entities operating in Portugal.

On the other hand, capital gains arising from the sale of shares in Portuguese companies, held by non-resident companies without their head office or effective place of management in Portuguese territory and without a permanent establishment therein to which the capital gains can be allocated, are exempt from Portuguese corporate tax. This exemption cannot be applied in any of the following situations, where capital gains are subject to corporate tax at 25%:

► The non-resident entity is held, directly or indirectly, more than 25% by resident entities in Portugal

► The non-resident entity is in a “tax-haven jurisdiction” (black-listed in a government order issued by the Ministry of Finance)

► The capital gains derive from the transfer of shares in a company whose assets are composed in more than 50% of Real estate located in Portuguese territory or that holds a controlling stake in companies whose assets are composed in more than 50% of Real estate located in Portuguese territory

Interest paid to foreign corporate shareholders

Interest payments to foreign corporate shareholders without a PE in Portugal are generally subject to a final withholding tax at 25%. This rate can be reduced if Double Tax Treaties apply. If the conditions of the EU Interest and Royalties Directive (2003/49/EC) are met, no withholding tax is applicable.

Intellectual property royalties paid to foreign corporate shareholders

Intellectual property royalties paid to foreign corporate shareholders are subject to a 25% final withholding tax. Such rate can be reduced or waived if Double Tax Treaties and / or the EU Interest and Royalties Directive (2003/49/EC) are applied.

As from 1 January 2014, a “Patent Box” for qualifying Intellectual property (IP) rights is applicable. The Patent Box provides a partial exemption (50%) from IRC for companies exploiting patented inventions and other innovations such as models and industrial designs protected by IP rights registered as of 1 January 2014. In addition, the 50% exemption applies on gross income, so costs incurred in the development of the qualifying IP rights remain fully deductible. The main requirements to apply the Patent Box are:

► Qualifying IP must be self-developed

► Licensee cannot be resident of a blacklisted jurisdiction

► IP must be effectively used for business activities

► If licensee is a related company, the IP cannot be used to create deductible expenses for the taxpayer

The acquisition cost incurred with certain intangible assets with unlimited life (acquired on or after 1 January 2014) may be tax deductible at a 5% rate over 20 years.

This rule will be applicable either to industrial property rights (such as brands) or goodwill acquired in a business combination that is registered or purchased as of 1 January 2014. Goodwill associated with share acquisitions and assets acquired in the framework of tax neutral transactions or from entities domiciled in blacklisted jurisdictions are excluded.

Other specific incentives and special tax regimes that investors may find attractive

► Incentives to significant investment projects in productive units (i.e., industrial investment projects deemed to be of a strategic interest to the domestic economy and which encourage job creation, technological innovation and domestic scientific research) which are implemented until 31 December 2020, with a value equivalent or higher than €3 million (tax credit of 10% or 25% of the relevant applications effectively implemented, Real estate Municipal Tax (IMI), Real estate Municipal Transfer Tax (IMT) and Stamp Tax exemptions and / or reductions). Employment tax incentive: deduction equal to 150% of the costs related to the net increase in permanent employment roles if the individuals are less than 35 years old, or long term unemployed

► Tax incentives for R&D: investment credit against IRC liability
Personal income tax

Tax resident individuals

Resident individuals are subject to Portuguese Personal Income Tax (IRS) on their worldwide income.

An individual is deemed to be a resident of Portugal if (among other situations):

► he / she remains in Portugal for more than 183 days, consecutive or not, in any 12-moth period starting or ending in the relevant tax year

► he / she remains in Portugal for a period shorter than 183 days, but has a place of abode (i.e. habitual residence) available there during any day of the period referred above and, from the circumstances, it can be inferred that it is his / her intention to keep and occupy such abode as his/her habitual residence

The Portuguese Income Tax Reform introduced a partial residence concept, so that there is a direct connection between the period of physical presence in Portuguese territory and the status of the tax resident.

Thus, as a rule, the taxpayer will become resident in Portugal as of the first day of the stay in the Portuguese territory and non-tax resident as of the last day of stay in Portugal, with a few exceptions.

Foreign individuals may be considered as tax residents in Portugal if one of the above tax residency conditions is met.

The IRS is levied on an annual taxable income in the following categories (after deductions and allowances):

► employment income: all types of income paid or made available to the employee derived from employment (salaries, wages, bonuses, commissions, etc.)

► business and professional income: profits from carrying out a commercial, industrial or agricultural activity and from providing independent professional services

► investment income: dividends, interest and royalties

► rental income: rents received or made available to the owners of immovable property, net worth increases: capital gains and other gains not included in the categories above

► pensions: pensions in general, including annuities and alimony payments

Tax rates range from 14.5% to 48% (the latter on income exceeding €80,000). Tax credits and deductions are applicable (namely depending on the number of dependents living with the taxpayer) such as housing, health and education expenses, among others, plus an additional surcharge of 2.5% for income between €80,000 and €250,000, and of 5% for income over €250,000, and a surtax of up to 3.5% over the amounts exceeding the annual minimum wage per taxpayer.

Non-resident individuals

Non-residents individuals are subject to Personal Income Tax on Portuguese-sourced income, according to the different categories, being, in general, subject to final withholding tax rates of 25% or 28% (depending on the specific type of income) or to special rates of 28% (rental income or capital gains from the sale of Real estate located in Portugal and from the disposal of shares). However, certain tax rates may be reduced if a Double Tax Treaty applies.

Tax regime for non-habitual residents

A special tax regime is available to non-habitual resident individuals. This regime, which aims to attract talent in high value added jobs and high net worth individuals (HNWIs), is available to individuals who become Portuguese tax residents, provided they have not been residents of Portugal during the previous five years, and is granted for a period of 10 consecutive years (within this period, the individual may interrupt the Portuguese tax residency and recover his non-habitual residence status for the remaining years).

Non-habitual residents will be subject to a reduced 20% Personal Income Tax rate on salaries and business and professional income derived from “high value added activities of a scientific, artistic or technical nature” (e.g. architects, engineers and
similar technicians, fine artists, actors and musicians, auditors, doctors and dentists, professors, psychologists, investors, directors and managers). Additionally, they may benefit from a Personal Income Tax exemption on salaries, business and professional income, interest, dividends, rental income and pensions, provided certain conditions are met.

Value Added Tax (VAT)

Portuguese VAT legislation is based on the EU VAT Directives, and aims to tax the consumption of goods and services, on each phase of the economic process, from production to the end consumer.

The Portuguese VAT standard rate is 23%. Reduced rates of 13% and 6% apply to certain supplies of goods and services.

Each monthly or quarterly tax period, VAT is assessed by the taxpayer applying the above rates to the taxable base of goods and services supplied (output VAT) and deducting the input VAT incurred (input VAT).

Certain transactions are exempt from VAT (e.g. financial, insurance, medical or educational services). Exports are as zero-rated transactions, allowing the seller to deduct the related input VAT previously incurred.

Taxable persons must register and obtain a Portuguese VAT number, irrespective of their tax residency. Non-resident Portuguese PE are subject to the rules applicable to resident taxpayers.

Real estate Municipal Transfer Tax (IMT)

IMT is generally imposed on the transfer of Real estate and is payable by the transferee. Other transactions are treated as taxable transfers for IMT purposes, such as the contribution of immovable property to the share capital of companies or partnerships, the allocation of Real estate of a company or partnership under liquidation to its shareholders and the long-term rental (over 30 years).

The applicable IMT rates depend on the transaction or taxable value and vary between 0% and 6% on permanent residence property transactions. If the Real estate is not a residence property, the following IMT rates (depending on the nature of the Real estate) apply:

- 6.5% for urban property
- 5% for rural property and
- 10% for any urban or rural property if the purchaser, other than individuals, is a resident of a blacklisted jurisdiction (jurisdictions which are deemed to be tax havens, listed in an Order of the Minister of Finance)

Exemptions from IMT apply, e.g. to purchases of buildings for resale by Real estate dealers registered as such for tax purposes and real estate owned by certain types of Portuguese Real estate Investment Funds.

Stamp Tax

Stamp Tax is levied, at a percentage rate or a lump-sum, on all acts, deeds, documents, securities and other events listed in the General Stamp Tax Table which take place in Portugal and are not subject to VAT, including free acquisition of goods (by reason of gifts or inheritance) located in the Portuguese territory. Stamp Tax is payable by the person who has an economic interest in the act, deed, document or event subject to such tax. Generally, this burden is borne by the acquirer or beneficiary.

Real estate Municipal Tax

Ownership of Real estate located in Portugal is subject to the IMI Code (an annual levy) at the following standard rates according to its taxable value and to the municipality where it is located:

- between 0.3% and 0.5% for urban property
- 0.8% for rural property
Social security

Employees

As a general rule, contributions to Portuguese Social Security are made by both employers and employees where the employment relationship was created in Portugal, regardless of where the employer is based.

Social security contribution rates apply to all salaries paid to employees (without any cap) and the current rates are 23.75% for the employer (or 23% between February 2016 and January 2017 in the conditions mentioned above in the Employment Section) and 11% for the employee.

There are some exceptions to this rule in relation to migrant workers according to social security treaties entered into by Portugal and EEC Regulations on social security. Expatriates who work in Portugal can opt to keep the Social Security rights of their own country if the following conditions are met:

► the employee must be posted to Portugal by an employer based in another country (either an EU country or a country with which Portugal has entered into agreements regarding social security matters, e.g. Brazil)
► the work must be performed on behalf of that employer
► the assignment does not exceed a certain amount of time (normally 12 to 24 months but it varies depending on the applicable treaty) and
► the employee must not be replacing another expatriate worker

Self-employed workers

Self-employed people working in Portugal are subject to the Portuguese Social Security legislation and must contribute to the Social Security on a monthly basis.

The taxable income of a self-employed worker for the purpose of contribution to Social Security is based on 70% of the total value of the supply of services, or 20% of the total value of the production and sale of goods, in the previous calendar year, or, to the self-employed workers who need to have organized accounting, the taxable profit, if lower than the value assessed according to the previous rule. Therefore, the Social Security will determine the monthly taxable amount to which the contribution rate will apply.

When a self-employed worker starts his/her activity, the same is exempt from this contribution, at least, during the first 12 months. However, he/she may opt to waive to that exemption. In that case, the taxable income will be €419.22.

The applicable charges to the taxable income are:

► 29.6% for the general self-employed workers
► 28.3% for farm producers
► 34.75% for individual entrepreneurs

Any entity acquiring services that constitute 80% of a self-employed worker’s income in a given calendar year must also contribute. The contribution of each such entity corresponds to the total value of payments made to the self-employed worker in that year at a rate of 5%.

As a general rule, migrant self-employed people who work in Portugal are subject to the legislation of their Member State of origin, provided that the anticipated duration of the work in Portugal does not exceed a certain amount of time (normally 12 to 24 months but it varies depending on the applicable treaty).
Dispute resolution

Court process

In Portugal, the organisation of state courts is divided between the following jurisdictions:

► Judicial jurisdiction
► Tax and Administrative jurisdiction
► Jurisdiction of the Constitutional Court
► Jurisdiction of the Court of Auditors
► Jurisdiction of the Justices of the Peace

Within the judicial jurisdiction, which is the most usually responsible, among others, for disputes arising out from civil, commercial and labour matters (held in civil, criminal, labour, commerce, family, maritime and, since May 2012, competition courts), the competence of the courts is divided according to hierarchy, matter, amount of the claim, form of the proceedings and territory.

There are three tiers of courts: Courts of First Instance, Appeal Courts and the Supreme Court of Justice.

Each jurisdiction is subject to different legal procedures. A new Code of Civil Procedure came into force in Portugal on 1 September 2013, intending to streamline litigation by simplifying the process and putting greater emphasis on the judges to make litigation faster.

In general, proceedings comprise an initial written phase, in which parties present their pleadings and arguments; and a subsequent stage including hearings, where parties present their arguments, witnesses and other evidence on which they rely.

Court fees are payable by both parties and are calculated according to the amount, nature and complexity of the dispute.

In order to assess the competence of the Portuguese courts when faced with a civil or commercial dispute in connection with an EU Member State, the provisions of Regulation (EC) no. 44/2011 of 22 December 2000, on jurisdiction, recognition and enforcement of judgments in civil and commercial matters, must be taken into account.

Arbitration / alternative dispute resolution

The law on voluntary arbitration (LAV) is strongly based on the Model Law on International Commercial Arbitration (UNCITRAL) of 1985, as amended in 2006. LAV provisions apply to all arbitration taking place in Portuguese territory, whether they are domestic or international arbitrations.

In Portugal, the use of arbitration is increasingly common in complex commercial litigation with high economic value, as an alternative to resorting to courts. Commercial arbitration can be ad hoc or institutionalised. In the field of institutionalised commercial arbitration, there is the Arbitration Centre of the Portuguese Chamber of Commerce and Industry (Commercial Arbitration Centre) which is highly regarded and whose recommended arbitration clauses, rules, list of arbitrators and statutes are available at www.acl.org.pt.

The arbitral tribunals may grant interim measures that can be enacted after the hearing of the defendant and are enforceable by state courts, as well as preliminary orders, which may be granted ex-parte and expire 20 days after their issuance as they are not susceptible to enforcement by courts.

As a general rule, appealing against an arbitration award is not allowed, either in domestic arbitration or international arbitration. However, the right to request the annulment of an arbitration award to a state court jurisdiction cannot be waived.

Portugal is signatory to the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, having expressed a reservation of reciprocity allowed under such Convention, according to which the Convention applies only to recognition and enforcement of arbitral awards rendered in the territory of states bound to its terms and conditions.
Mediation

Several systems of public mediation have been created in Portugal in specific areas. Such systems include labour mediation (2006), family mediation (2007), criminal mediation (2008) and civil and commercial mediation (2009).

On 19 April 2013, Decree-Law no. 29/2013 was enacted, setting out generic principles applicable to mediation procedures carried out in Portugal, as well as the legal regimes of civil and commercial mediation, mediators and public mediation.

Competition

The relevant antitrust legislation is Law no. 19/2012 of 8 May (Competition Law), in force since 7 July 2012, which sets forth the general legal framework regarding anti-competitive practices, abuses of dominant position and merger control.

Prohibition of anti-competitive agreements

The law prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices having the object or effect of the prevention, distortion or restriction of competition in the market.

Examples include the following:

► fixing prices or other conditions under which sales are to take place
► limiting or controlling production, markets, technological development or investment
► sharing markets or sources of supply between competitors
► applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage
► making contracts dependent upon the acceptance of unrelated supplementary obligations

However, a prima facie restrictive agreement may be exempted if it fulfils the following conditions:

► it improves the production or distribution of goods or services, or promotes technical or economic progress
► it allows consumers an equitable part of the resulting benefit
► the restriction of competition is indispensable to achieve the previously mentioned points and
► it must not eliminate competition for a substantial proportion of the products or services

The European Commission’s block exemption regulations specify how these conditions apply to certain categories of agreements and also apply under Portuguese law.

Prohibition of abuses of a dominant position

A company is deemed to be dominant if, among other factors, it holds a large share of the relevant market. Portuguese Competition Law prohibits the abuse of a dominant position and refers to several of the conducts mentioned above as examples of restrictive practices being abusive behaviour if carried out by dominant undertakings.

In addition, the refusal by a dominant undertaking to provide access to a network or to another essential infrastructure without which the applicant cannot operate as a competitor in the upstream or downstream markets also constitutes an abuse, except if the dominant company can provide evidence that such access is not reasonably possible for operational or other reasons.

Merger control

Mergers, acquisitions and joint ventures have to be notified to the Portuguese Competition Authority after the conclusion of the agreement and prior to its implementation if:
► as a consequence of the merger etc., it is acquired, created or reinforced a market share equal or above 50% of the national market of a certain good or service, or in a substantial part of it or

► as a consequence of the merger etc., it is acquired, created or reinforced a market share equal to or above 30% and lower than 50% of the national market of a certain good or service, or in a substantial part of it, provided that the turnover individually generated in Portugal, in the previous year, by at least two of the undertakings involved in the merger etc. is greater than €5 million or

► the aggregate turnover in Portugal of all the undertakings involved in the merger etc. during the previous year is greater than €100 million and provided that the turnover in Portugal of at least two of the undertakings involved in the merger etc. is greater than €5 million

A transaction subject to compulsory notification cannot be implemented before the Portuguese Competition Authority has given its clearance.

Enforcement

Companies that engage in anticompetitive agreements or abuses of dominant position may face (i) fines amounting up to 10% of their annual turnover in the previous year; and / or (ii) actions for damages. Agreements falling foul of Competition Law are void.

The enforcing authority in Portugal is the Portuguese Competition Authority and private enforcement by Portuguese courts of both EU and Portuguese competition rules is so far uncommon.

A cartel leniency program that was introduced along the lines of the European Commission’s model is now also comprised under Competition Law.

Intellectual property

Portugal has implemented the European Directives on Intellectual property concerning copyright, trademarks, patents for inventions, plant varieties, industrial designs and topographies of semiconductor products, etc. Portugal has also ratified the main International Conventions concerning copyrights and related rights.

The protection of copyright arises automatically, whenever a work is exteriorised, that is, as soon as an idea is given physical form, although there are some exceptions to that principle (e.g. the title of a non-published work, which would need to be registered in order to be granted protection). On the other hand, the filing of applications will be necessary to assure the protection of industrial property rights, specifically inventions or signs that distinguish the commercial activity, such as trademarks and logotypes. All of those rights are granted on a first-to-file basis, meaning that the first person to apply for registration will have priority rights; although there are some exceptions to the first-to-file principle, such as the case of free marks and well-known marks. Applicants of patents, designs, utility models, trademarks will be granted protection against third parties’ rights.

Industrial property rights registered in Portugal can be extended to other territories by way of registrations on a Community or International level.

Licensing, assignment, encumbrance of industrial property rights is allowed, subject to legal requirements and registration at the Portuguese Industrial Property Office (INPI).

Proceedings for infringement of intellectual property in Portugal can be brought in Lisbon’s Intellectual Property Court, a specialised court in charge of proceedings that concern the infringement of any intellectual property right.

Trademarks

The registration of a trademark assures the trademark owner the exclusive right over the same. Therefore, the owner of a trademark registration may oppose the use and / or registration, by third parties without their consent, of identical or similar trade marks to cover identical or similar products / services that their trademark is intended to cover, and may bring judicial action against the infringer.
National trademarks

The Portuguese Industrial Property Code provides that a trademark may consist of a mark or set of marks which is capable of being represented graphically – namely words (including personal names), designs, letters, numerals, sounds, the shapes of products or of their packaging – provided that these marks are capable of distinguishing the products or services of one business from those of others. Trademarks must be filed with the INPI and are valid for a period of 10 years from the registration date and can be renewed indefinitely for further 10-year periods. After five years from granting, trademarks are vulnerable to cancellation due to lack of genuine use in commerce.

The Portuguese legal system is generally in harmony with the First Trademarks Directive (89/104/EEC) (now the Trademarks Directive (2008/95/EC)) and the Community Trademark Regulation (40/94). A new Trade Mark Directive of the European Union and a new European Union Trade Mark Regulation were published in the EU Official Journal of 23 December 2015 and 24 December 2015, respectively, and Portugal will now have to adapt its trademark legislation to said EU legislation.

Despite the above, there are some special characteristics of the Portuguese rules.

First, prior use is considered a legitimate way of acquiring a right in priority to another when registering a trademark if specific deadline requirements are complied with. In fact, a person using an unregistered trademark for a period of no more than six months obtains a right of priority to register the mark and may contest applications filed by other parties. However, the applicant cannot claim priority based on first use, if the use started more than six months before the filing date; in this case, the applicant will lose any priority right if another third party, in good faith, decides to apply for the registration of a similar / identical mark. Secondly, the prior existence of a company name constitutes grounds for refusal of registration of a trademark if it is capable of causing confusion between marks and this is stated as the basis of an opposition. Similarly, logotypes can constitute grounds for refusal of a trademark if the scope of activity of the owner is likely to be confused with the services / products covered by the trademark. Specifically, company names registered at the national registry of legal entities (RNPC) may be invoked against confusingly similar trademark applications. Logotypes may also be invoked against confusingly similar trademark applications. In both cases, the scope of activity of the trade name or logo applicant will be compared with the goods and services of the trademark in question.

Logos

A logo is the name given to the distinctive symbol intended to identify a mark or group of marks capable of graphic representation, namely using nominative or figurative elements (or both) adequate to identify the services provided or the products manufactured by its applicant (the scope of protection of the logotype will depend on the services included in the business scope of the applicant). Logos must be filed with the INPI and are valid for 10 years and can be renewed indefinitely for further 10-year periods.

International trademarks

Portugal signed the Madrid Agreement of 1891 and the Protocol to the Madrid Agreement of 1989 administered by the World Intellectual property Organisation (WIPO), and consequently may be designated through International trademark registrations. The international system of trademark registration allows a trademark to be covered in several territories in the contracting states designated for such purpose by means of a single registration, simplifying the procedure and reducing the costs both for trademark registration and maintenance. An international registration may be filed by anyone who is a national of a contracting state, and who is domiciled or has an establishment in any of those countries.

Community trademarks

Portugal is a member of the EU and therefore Community trademarks benefit from protection in Portugal and Portuguese entities may apply for Community trademark registrations.

Following publication of EU Regulation no. 2015/2424 of the European Parliament and the Council amending the Community trade mark regulation, the Office for Harmonisation in the Internal Market (OHIM) will be called the European Union Intellectual Property Office (EUIPO) and the Community trade mark will be renamed as the European Union trade mark as of 23 March 2016.

Protection of inventions in Portugal

Portuguese law protects inventions through patents and utility models, which guarantee the exclusive exploitation by their proprietors or by authorised third parties.
Patents

All new inventions relating to products or processes, in all fields of technology, involving an inventive activity and having an industrial use may be protected by patent. The duration of a patent protection is 20 years from the filing date.

Anyone wishing to ensure the priority of a patent application but who does not have all the relevant elements may file a provisional application and postpone the submission of the remaining elements for a maximum of 12 months. For the purpose of a provisional application, it is only necessary to present to the INPI a document (in Portuguese or English) describing the object of the application in such a way that a person skilled in the relevant field can use the invention.

European patent

A European Patent is a single protection procedure for protection in one or all the 37 contracting States of the European Patent Convention (including Portugal), conferring the exclusive right of exploitation of that patent, in that designated State.

International patent (PCT)

By filing one international patent application under the Patent Cooperation Treaty (PCT), protection for an invention in over 100 countries throughout the world can be simultaneously sought. However, as opposed to the European Patent, no registration is granted, being necessary to proceed with the entry into the national / regional phases in the countries of interest of the inventor / applicant at the 30th or 31st month counted from the priority date / application date, whichever is the earliest. The PCT system allows the filing of a single application that shall produce the effect of a national or regional application on PCT Contracting States or Regional Organisations designated by the applicant. The PCT includes an international phase, which comprises the issuance of a search report and of a written opinion on the patentability. These documents allow the applicant to have an initial assessment of the chances of success of the patent in the contracting states. It also comprises a national or regional phase, in which the competent authorities of the contracting states selected by the opponent will decide on the grant of the patent.

CCPM

The CCPM is a Supplementary Protection Certificate for medicines with a patent protection. The CCPM guarantees to the patent owner the benefit of an exclusive right for a maximum of five years from the date the medicine was permitted to be sold in the EU market.

Utility models

Utility models protect new inventions involving an inventive step and having industrial application, via a simpler and faster procedure in comparison with patents. The main difference between utility models and patents is that the requirement of "inventive step" or "non-obviousness" is much lower in utility models than in patents. On the other hand, inventions relating to biological matter and to chemical or pharmaceutical substances and processes cannot be protected through utility models. Examination of utility models is made based on form and limitations, unless the applicant requests substantive examination at the time of filing the application and pays a specific fee. Therefore, in general, examiners will not examine applications for utility models as to substance prior to registration. A utility model benefits from protection for six years from the application date, and can be renewed for two periods of two years each, up to a maximum of 10 years. A utility model may also be protected by a PCT.

Designs or models

A design or model is the industrial property right that protects the design configuration of the relevant product and designates the total or partial appearance of a product according to its characteristics and features, such as line, profile, colour, shape, texture or the material of the product and its decoration. The main requirements for granting a design or model are novelty and singular character. Designs or models are considered identical if their specific characteristics differ only in insignificant details.

Registered designs or models

A registered design is an exclusive right for the outward appearance of a product or part of it, resulting from the features of, in particular, the lines, contours, colours, shape, texture and / or materials of the product itself and / or its ornamentation. The fact that the right is registered confers on the design great certainty should infringement occur. A registered design or model is protected for five years from the filing date with the INPI, and can be renewed for further five-year periods up to a maximum of 25 years. This type of right is submitted to an examination that confers a higher level of protection and a longer duration than non-registered designs.
Non-Registered community designs

A non-registered Community design is protected for a period of three years from the date as of which the design was first made available to the public within the territory of the EU, and confers on its holder a right to prevent copying. Within the first 12 months following disclosure of a non-registered Community design, its owner may still apply for a registered Community design.

Community design

Through a single application, the design will have full protection in all of the 27 EU Member States after the grant, pursuant to Council Regulation (EC) no. 6/2002 of 12 December 2001 on Community Designs.

Copyright

According to the Copyright and Related Rights Code (CDADC) a copyright is a subjective right that grants its holder the power to exclusively benefit from or use a work. The concept of “work” includes original intellectual creations in the literary, artistic and scientific fields, i.e. creations that have an aesthetic or artistic value that makes them unique in the sense that they differentiate themselves from trivial accomplishments.

The subject matter protected by copyright is not the ideas conveyed or contained in the work, but only the means of expressing these ideas. For example, the copyright for a book relates only to the writing style (word choices and combinations), and not the ideas contained in the book, which may be freely reproduced by third parties, provided that this is done so through a different way of writing (means of expression). As a general rule, copyright protection lasts for the life of the author plus an additional 70 years.

In addition to protecting works through copyrights, the CDADC also provides for the protection of related rights involving the work of performers, audio and video producers and broadcasting organizations. The term of protection for related rights is, as a general rule, 50 years. This term is to be calculated on a case-by-case basis from the date of the performance, the publication or communication of its stipulation. For phonograms the term of protection is 70 years (from the date of the publication or of the broadcasting to the public).

Copyrights are generally acquired regardless of registration, filing or other formalities. However, it is possible to register works, namely software, at the IGAC – Inspecção Geral das Actividades Económicas. The advantage of this registration is that it demonstrates more clearly that the registered right belongs to the person identified as the author of the work.

Note that software is considered an intellectual creation, and therefore may be protected by copyright as long as it is creative in nature.

Marketing agreements

Agency agreements

Under an agency agreement, the agent shall make the necessary efforts to negotiate and, where appropriate, conclude contracts on behalf of the principal, in an autonomous\(^{10}\) and stable manner\(^{11}\), against payment. The agent bears no risks in relation to the contracts concluded and / or negotiated on behalf of the principal. These agreements are governed by Decree-law no. 178/86, of 3 July (Agency Law).

In the event that the agency agreement is exclusively or mainly performed in Portugal, the Agency Law establishes that its provisions on termination are mandatory and apply irrespectively of the law chosen by the parties, except where such law is more favourable to the agent. A case-by-case analysis of the applicable law will be required in order to determine the more favourable law.

In particular, under the Agency Law, the agent is entitled upon termination to certain compensation, provided that the following conditions are met:

\(^{10}\) The requirement of the agent’s autonomy means that, despite the agent being integrated in the distribution network of the principal, the agent has the possibility to freely organise its activity and its own work;

\(^{11}\) The requirement of stability refers to the contractual relationship between the parties – the agency contract is a usually a long term contract with a business purpose.
► the agent has brought the principal new customers or has substantially increased the principal's turnover with existing customers

► after the agreement is terminated, the principal continues to benefit considerably from the activities undertaken by the agent and

► the agent ceases to receive any compensation for contracts negotiated or closed with customers referred in the first bullet above after the agency agreement terminates

The amount of compensation is determined in equitable terms, i.e., in accordance with the circumstances of the case, but it shall not exceed the amount equivalent to one year calculated from the agent's average annual remuneration over the preceding five years. If the contract goes back less than five years the compensation shall be calculated on the average of the period in question.

Distribution and franchising agreements

Distribution agreements differ from agency agreements as the distributor acts on his own behalf and risk, in particular in relation to financing the stock.

In franchising agreements, the franchisee also acts on his own behalf and risk, although the producer of the goods or services grants it the right to market them, using its brand(s) and in accordance with its plans, methods and guidelines.

There is no specific law that applies to distribution or franchising agreements, however, according to Portuguese legal authors and case law, the Agency Law can be applied by analogy to those contracts - whenever the requirements for analogy are met, notably when the similarity between the distribution or franchising agreement in question and the agency agreement are evidenced.

In this regard, the provisions included in the Agency Law, notably those regarding termination and compensation for termination can, in certain circumstances, be regarded as mandatory even for distribution or franchising agreements.

E-commerce

The E-Commerce regime is mainly found in Law no. 7/2004, of 7 January, which is the statutory instrument that implements Directive 2000/31/EC, relating to certain legal aspects of the Information Society Services - any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

E-commerce law governs the transactions and contracts performed / entered into by electronic means, as well as electronic marketing. One of the main purposes is to determine the liability of intermediary service providers, specifically determining that they do not have a general obligation to monitor the information they transmit or store or a general obligation to actively seek facts or circumstances indicating illegal activity, as well as to define the conditions for such provider being exempt of liability for the information transmitted.

Law no. 7/2004, of 7 January, specifically determines that direct marketing is only permitted to recipients who have given their prior consent and establishes out-of-court schemes for settlement in case of disagreement between a service provider and the recipient of services with regards the removal of contents or access to information, by recourse to the supervisory entity (ANACOM). ANACOM shall provide for a provisional decision in 48 hours and communicate it electronically to the parties; such decision shall stand provisional pending the rendering of a judicial decision on the subject matter.

In addition to the above, it is also important to point out the regime defined by Decree-Law no. 24/2014 of 14 February, on consumer rights, and Decree-Law no. 95/2006, of 29 May, on distance contracts related to financial services executed with consumers. Both laws stipulate the information to be provided to consumers prior to the conclusion of distance contracts, procedural steps to be taken, rights of withdrawal and their exercise, time for performance and methods of payment. Decree-Law no. 24/2014, of 14 February defines, in particular, the legal framework for the execution of contracts between consumers

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12 For the purposes of this definition: “at a distance” means that the service is provided without the parties being simultaneously present, “by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means, “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.
and suppliers through the exclusive use of one or more means of distance communications. This piece of legislation also covers the legal regime applicable to contracts concluded off-premises (including contracts concluded at the consumer’s domicile) and contracts concluded by means of automatic vending machines. On the other hand, Decree-Law no. 95/2006 of 29 May defines the legal framework for the execution of contracts regarding financial services – any service of a banking, credit, insurance, personal pension, investment or payment nature – between consumers and suppliers through the exclusive use of one or more means of distance communications.

Data protection

Law no. 67/98 of 26 October (Data Protection Law), implementing the relevant European Directive, sets forth the rights and obligations of data holders and of the entities that collect and process personal data.

The data controller (the entity which determines the purposes and means of the data processing), has several obligations such as those of informing data subjects of the processing of their data, implementing the processing of data with the Data Protection Authority (DPA), whenever none of the registration exemptions is applicable (e.g. data processing for payroll purposes, recruitment, client and supplier databases, etc.). It is the case of the communication of data to processors or any third parties, in which cases the data processing has to be notified or authorised depending on the type of data being processed. Non-compliance with the legal obligations imposed by the Data Protection Law may result on the perpetration of an administrative offence punishable with a fine ranging from €1,496.39 up to €29,927.88.

Data Protection Law defines personal data as any information, of any nature, concerning an identified or capable of being identified (in connection with other related information) natural person, irrespective of the collection process involved. Personal data processing is, therefore, any manual or automatic operation (including sound and image) involving personal data, regarding an identifiable person (whether identified directly or indirectly).

Processing of personal data may occur in any business (e.g. information about employees, clients, suppliers or surveillance cameras).

Among other guidelines, Data Protection Law has also set out specific rules regarding particular forms of data processing, such as the use of company’s property by employees (internet, e-mails and telephone). Such rules require that employers inform their employees of the conditions under which company means may be used for private purposes or the level of tolerance admitted, and that employers must privilege generic monitoring methods, thus avoiding the individual consultation of personal data.

Product liability

Any manufacturer is generally liable (regardless of fault) for damages caused by defective products that it manufactures and makes available on the market according to Decree-Law no. 383/89 of 6 November, which implemented Council Directive 85/374/EEC, of 25 July 1985.

The manufacturer will only be liable if: (i) the product is defective; (ii) there is damage; and (iii) there is a causal link between the product’s defect and the damage. Therefore, the strict liability system does not require the claimant to prove any breach of contract, negligence or fault on the part of the manufacturer. However, the manufacturer shall not be held liable if, for instance, given the circumstances it can be reasonably assumed that there was no defect in the product at the time it was made available on the market.

Decree-Law no. 67/2003 of 11 April, which implemented Directive 1999/44/EC of the European Parliament and of the Council, of 25 May 1999, on certain aspects of the sale of consumer goods and associated guarantees, applies to the condition of the product itself. According to this Decree-Law, the seller must deliver goods to the consumers which are required to be in conformity with the contract of sale. The seller is liable vis-à-vis the consumer for any lack of conformity which exists at the time that the goods were delivered, in case such lack of conformity becomes apparent within two or, in the case of immovable goods, five years and are assumed to be already existing on that date, unless this is incompatible with the nature of the good or the characteristics of the defect.

In the case of a lack of conformity, the consumer shall be entitled to have the goods brought into conformity free of charge, by repair or replacement, or to have an appropriate reduction made in the price or the contract terminated with regard to those goods.
Decree-Law no. 67/2003, of 8 April, which envisages the protection of consumer rights with regards to defective products, specifically states that the consumer of a defective product may opt, without prejudice to rights granted towards the seller, to request the repair or replacement of the defective product directly from the manufacturer.

**Bribery and corporate crime**

Active bribery of public officials and passive bribery by public officials, as well as influence peddling, are criminal offences. “Active bribery” is the promising or giving of a financial or any other advantage, as contrasted with “passive bribery”, which is the request or acceptance of a financial or any other advantage. Influence peddling is the illegal practice of using one’s influence or connections with public authorities to obtain favours or preferential treatment.

Active and passive bribery of “political office holders”, i.e. members of domestic public assemblies (Parliament and local government bodies) or of senior public officials is also a criminal offence.

Law no. 20/2008 of 21 April, establishes the criminal regime to combat corruption in international trade and in the private sector, in compliance with EU Council Framework Decision no. 2003/568/JHA, of 22 July. This piece of legislation establishes the criminal liability framework for crimes of corruption committed in the specific context of international trade and private activity.

**Laws against money laundering**

Money laundering is prohibited in Portugal.


Anti-Money Laundering Law applies to, amongst others, credit and financial institutions, insurers and insurance mediation companies, accountants, legal advisors, public notaries and public registrars. These businesses must create internal procedures for control and risk management in order to comply with the duties of customer due diligence, reporting and record keeping as established by law. In addition, they must promptly inform the Attorney General of the Republic and the Financial Intelligence Unit, where they know, suspect or have reasonable grounds to suspect that an act that is likely to incorporate a money laundering or terrorism financing offence is being or has been committed or attempted, being obliged not to disclose either to the suspected customer or to third parties that such information has been transmitted or that a criminal investigation is taking place.

**Prevention of corporate crime**

Legal persons and equivalent entities may be held criminally liable in two different ways: (i) when the crime is committed on behalf and for the collective benefit of the corporate entity by people who occupy a leadership / management position (i.e. those people who have authority to exercise control over its business); or (ii) when the crime is committed by someone acting under the authority of the persons referred to in (i) due to the lack of the manager’s compliance with their duties of supervision or control.

A legal person shall not be held liable for the relevant crime if the individual (such as director, manager or employee) has acted against an order or instruction given by a competent director of the corporate entity. The criminal liability of legal persons and similar entities does not exclude the criminal liability of the individuals, nor does it depend from the liability of those. Notwithstanding the right to demand payment to the legal persons or to equivalent entities, persons occupying a leadership position are responsible on a subsidiary basis for the payment of fines and compensation in which the legal persons or equivalent entity are sanctioned, regarding crimes: (i) committed during the time such persons were in office, without their express opposition; (ii) previously committed, when due to their fault, the property of the legal person or equivalent entity has become insufficient for the respective payment, or; (iii) previously committed, when the final decision to apply fines and determine compensation has been notified during the time such persons were in office and the absence of payment of fines and compensation is attributable to them.

Whenever several persons are liable according to the previous paragraph, they are jointly and severally liable.

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13 For purposes of the Portuguese Criminal Law, civil societies and de facto associations are considered equivalent entities to legal persons.
If the fines and compensation are applied to an entity without legal personality, the relevant payment shall be made out of the common property; in the absence or insufficiency of such common property, the relevant or remaining payment shall be made out of the property of the partners, who will be joint and severally liable for such payment.

**Real estate**

There are no specific restrictions on foreign persons owning Real estate in Portugal.

Notwithstanding the above, the acquisition of Real estate by a foreign incorporated company is subject to certain requirements, such as: (i) its registration with the national register of legal entities (RNPC) and (ii) the successful application for a Portuguese tax number.

Usually, besides companies, the acquisition of Real estate in Portugal is also carried out by Real estate funds (national or foreign funds).

**Types of interest in land**

According to Portuguese law, there is only one type of ownership of land. The vast majority of Portuguese authors and jurisprudence are of the opinion that a lease is not a Real estate right, but a contractual right. However, the lease right benefits from certain legal protections. For example, in case of transmission of the leased property, the lease right maintains its validity and should be respected by the new owner of the property. Please note that lease agreements for periods longer than 6 years should be registered with the Land Registry, so that they may benefit from this protection.

Such ownership could be subject to certain restrictions, however, by the existence of rights in rem (for example, rights to use and benefit from the land, surface rights or by the existence of contractual rights granted by the owner to a third party (for example, leases)).

Also, ownership of land can be restricted by other types of rights such as mortgages and insolvency procedures, etc.

**Registration requirements upon acquisition of Real estate**

Real estate can be acquired by a public deed executed before a Notary (the most common method) or under a certified private deed executed, for example, before a registrar, a lawyer or a chamber of commerce. The relevant taxes referred to below must be paid prior to the execution of the deed.

After the execution of the deed, the acquisition of Real estate has to be registered with the land registry office in order to become effective and enforceable vis-à-vis third parties although non-registration does not affect the validity of the purchase.

**Tax payments on acquisition of Real estate**

The acquisition of Real estate by a company or individuals (Portuguese or foreign) is subject to IMT and Stamp Tax, both of which are due prior to the execution of the transfer deed.

Please note that in Portugal, it is common to execute, prior to the acquisition deed, a promissory purchase and sale agreement in which the conditions precedent to the acquisition are agreed. In this case, the transfer deed is not conditional. However, it is also possible to execute a transfer deed subject to conditions or in which the transfer of the property is delayed until the moment in which certain fact occurs. Regardless of the situation, these two taxes (IMT and stamp tax) are always due at the transfer deed, even if such deed is conditional.

In these situations, if the transfer is not completed, it is possible to request (totally or partially) the refund of the taxes. The same regime is applicable to individuals, and both companies and individuals may also benefit from certain IMT and stamp tax exemptions.

As a general rule, the purchase of Real estate is exempted from VAT.

In addition to the above, owning Real estate triggers Real estate Municipal Tax (IMI) according to the taxable value of the property and the tax rates applicable by the relevant Town Hall [(please refer to point 6, heading Real estate Municipal Tax)]. The sale of Real estate triggers capital gains tax levied on the positive difference between the acquisition price paid by the seller (or the relevant taxable values, if higher).
Existing law is stated as it applied in March 2016.

### Useful contacts

<table>
<thead>
<tr>
<th>Agency</th>
<th>Address</th>
<th>Phone</th>
<th>Fax</th>
<th>Website</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>AICEP - PORTUGAL GLOBAL BUSINESS DEVELOPMENT AGENCY</strong></td>
<td>Rua de Júlio Dinis, 748, 9.ª, 4050-012 Porto</td>
<td>+351 226 055 300</td>
<td>+351 226 055 399</td>
<td><a href="http://www.portugalglobal.pt">www.portugalglobal.pt</a></td>
</tr>
<tr>
<td><strong>BANK OF PORTUGAL</strong></td>
<td>R. Francisco Ribeiro, 2, 1150-165 Lisboa</td>
<td>+351 213 130 000</td>
<td>+351 213 128 115</td>
<td><a href="http://www.bportugal.pt">www.bportugal.pt</a></td>
</tr>
<tr>
<td><strong>AT – PORTUGUESE TAX &amp; CUSTOMS AUTHORITY</strong></td>
<td>Rua do Comércio, 49, 1149-017 Lisboa</td>
<td>Tel:+351 218 812 600</td>
<td>Fax: +351 218 812 938</td>
<td><a href="http://www.portaldasfinancas.gov.pt">www.portaldasfinancas.gov.pt</a></td>
</tr>
<tr>
<td><strong>IAPMEI - INSTITUTE FOR THE SUPPORT OF SME AND INNOVATION</strong></td>
<td>Estrada do Paço do Lumiar, Campus do Lumiar – Edifício A, 1649-038 Lisboa</td>
<td>Tel:+351 213 836 000</td>
<td>Fax: +351 213 836 283</td>
<td><a href="http://www.iapmei.pt">www.iapmei.pt</a></td>
</tr>
<tr>
<td><strong>LAND REGISTRY OFFICE OF LISBON</strong></td>
<td>Av. D. João II, 1.08.01 Edifício J, Campus da Justiça, 1990-097 Lisboa</td>
<td><a href="mailto:crp.lisboa@dgrn.mi.pt">crp.lisboa@dgrn.mi.pt</a></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>MINISTRY FOR ECONOMY</strong></td>
<td>Rua da Horta Seca, 1200-221 Lisboa</td>
<td>+351 213 245 400</td>
<td>+351 213 245 440</td>
<td><a href="http://www.portugal.gov.pt">www.portugal.gov.pt</a></td>
</tr>
</tbody>
</table>
### MINISTRY FOR FINANCE

Avenida Infante D. Henrique, 1, 1149-009 Lisboa  
+351 218 816 800  
Fax: +351 218 816 862  
www.portugal.gov.pt

### MINISTRY FOR FOREIGN AFFAIRS

Palácio das Necessidades, Largo Rilvas, 1399-030 Lisboa  
+351 213 946 000  
Fax: +351 213 946 070  
www.portugal.gov.pt

### PORTUGUESE SECURITIES MARKET COMMISSION (CMVM)

Rua Laura Alves, 4, Apartado 14258 1064-003 Lisboa  
+351 213 177 000  
Fax: +351 213 537 077

### RNPC – NATIONAL REGISTRY OF LEGAL ENTITIES

Praça Silvestre Pinheiro Ferreira, 1 C, Apartado 4064, 1501-803 Lisboa  
Tel: +351 217 714 300  
Fax: rnpc@dgrn.mj.pt  
www.irn.mj.pt/sections/irn/a_registral/rnpc

### STATISTICS PORTUGAL (INE)

Av. António José de Almeida, 1000-043 Lisboa  
+351 218 426 100  
Fax: +351 218 426 380  
www.ine.pt

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**Further information**

**Key contacts at Garrigues**

<table>
<thead>
<tr>
<th>Role</th>
<th>Name</th>
<th>Phone Number</th>
<th>Email</th>
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<tbody>
<tr>
<td>MANAGING PARTNER</td>
<td>João Miranda de Sousa</td>
<td>+351 213 821 200</td>
<td><a href="mailto:joao.miranda@garrigues.com">joao.miranda@garrigues.com</a></td>
</tr>
<tr>
<td>BANKING &amp; FINANCE</td>
<td>Diogo Leónidas Rocha</td>
<td>+351 213 821 200</td>
<td><a href="mailto:diogo.leonidas.rocha@garrigues.com">diogo.leonidas.rocha@garrigues.com</a></td>
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### CORPORATE LAW

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<th>Name</th>
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<tbody>
<tr>
<td>Diogo Leónidas Rocha</td>
<td>+351 213 821 200</td>
<td><a href="mailto:diogo.leonidas.rocha@garrigues.com">diogo.leonidas.rocha@garrigues.com</a></td>
</tr>
<tr>
<td>Mário Lino Dias</td>
<td>+351 213 821 200</td>
<td><a href="mailto:mario.lino.dias@garrigues.com">mario.lino.dias@garrigues.com</a></td>
</tr>
<tr>
<td>Susana Pimenta de Sousa</td>
<td>+351 213 821 200</td>
<td><a href="mailto:susana.pimenta.sousa@garrigues.com">susana.pimenta.sousa@garrigues.com</a></td>
</tr>
<tr>
<td>Marta Graça Rodrigues</td>
<td>+351 213 821 200</td>
<td><a href="mailto:marta.graca.rodrigues@garrigues.com">marta.graca.rodrigues@garrigues.com</a></td>
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### TAX

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<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Fernando Castro Silva</td>
<td>+351 213 821 200</td>
<td><a href="mailto:fernando.casto.silva@garrigues.com">fernando.casto.silva@garrigues.com</a></td>
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### COMMERCIAL CONTRACTS

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<tr>
<th>Name</th>
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<tr>
<td>João Paulo Teixeira de Matos</td>
<td>+351 213 821 200</td>
<td><a href="mailto:joao.teixeira.matos@garrigues.com">joao.teixeira.matos@garrigues.com</a></td>
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### E.U. & ANTITRUST

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<tr>
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### INSURANCE

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### EMPLOYMENT

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<td><a href="mailto:joao.teixeira.matos@garrigues.com">joao.teixeira.matos@garrigues.com</a></td>
</tr>
<tr>
<td>Rui Valente</td>
<td>+351 226 158 860</td>
<td><a href="mailto:rui.valente@garrigues.com">rui.valente@garrigues.com</a></td>
</tr>
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### MERGERS & ACQUISITIONS

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<td>Diogo Leónidas Rocha</td>
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<td>Mário Lino Dias</td>
<td>+351 213 821 200</td>
<td><a href="mailto:mario.lino.dias@garrigues.com">mario.lino.dias@garrigues.com</a></td>
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<td>Susana Pimenta de Sousa</td>
<td>+351 213 821 200</td>
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<td>Marta Graça Rodrigues</td>
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### PHARMACEUTICAL AND BIOTECHNOLOGY

<table>
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<tr>
<th>Name</th>
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### REAL ESTATE

<table>
<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Miguel Marques dos Santos</td>
<td>+351 213 821 200</td>
<td><a href="mailto:miguel.marques.santos@garrigues.com">miguel.marques.santos@garrigues.com</a></td>
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### DISPUTE RESOLUTION

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<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>João Duarte de Sousa</td>
<td>+351 213 821 200</td>
<td><a href="mailto:joao.duarte.sousa@garrigues.com">joao.duarte.sousa@garrigues.com</a></td>
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### Garrigues offices

#### PORTUGAL (LISBOA)

<table>
<thead>
<tr>
<th>Address</th>
<th>Phone</th>
<th>Fax:</th>
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<tbody>
<tr>
<td>Avenida da República, 25 – 1.º</td>
<td>+351 213 821 200</td>
<td>+351 213 821 290</td>
</tr>
<tr>
<td>1050-186 Lisbon</td>
<td></td>
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#### PORTUGAL (PORTO)

<table>
<thead>
<tr>
<th>Address</th>
<th>Phone</th>
<th>Fax:</th>
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<tbody>
<tr>
<td>Av. da Boavista, 3523 - Edifício Aviz</td>
<td>+351 226 158 860</td>
<td>+351 226 158 888</td>
</tr>
<tr>
<td>4100-139 Oporto</td>
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Introduction and legal system

The Romanian legal system is a civil law system similar to the Civil Code of Quebec, but has also been influenced by Italian, French and Swiss laws. The New Civil Code was enacted by Law 71/2011 (New Civil Code), and became part of the Romanian Legal system on 1 October 2011. The judicial system is based upon the interpretation and implementation of legal norms, therefore, the Romanian legal system does not acknowledge legal precedents as a formal legal source. Romanian judges settle cases based on the applicable laws and their own opinion, rather than previous court decisions. The main acts which regulate the organisation of the Romanian judicial system are the Romanian Constitution and Law no. 304/2004 regarding judicial organisation as subsequently amended.

Like other countries affected by the global economic downturn, Romania set various objectives to encourage investment and economic development. These objectives were in line with the expectations of major international organisations like the European Commission, the International Monetary Fund and the World Bank. The main objectives of the Romanian Government can be summarised as follows:

► Maintain employment in the private sector
► Reduce unemployment by creating new business opportunities and, consequently, new jobs
► Increase public and private investment
► Improve the use of European Union (EU) funds (i.e. the Government set up the Ministry of European Funds) to be focused on the coordination and organisation of projects financed by EU funds
► Make the fiscal system more flexible through the reduction of bureaucracy and other measures

Based on the statistics available on the Ministry of Finance site, between 2007 to June 2014 the Romanian Government subsidised private investment projects valued at approximately €800 million based in various production fields such as (amongst others) Automotive, Information Technology and Communications (IT&C), shared service centres and Research and Development (R&D). These projects created over 25,400 employment positions and are expected to contribute over €1.7 billion as taxes paid to the state budget.

The main impact of government policy on the legal system can be seen in various changes to fiscal regulation, especially in respect of collection of taxes by the tax authorities. The legislative changes have not been fully embraced by investors who look for legislative and fiscal stability with low risk.

Many foreign companies have decided to invest or relocate to Romania because of the skilled, qualified and cheap workforce; EU membership; and low transportation costs (compared to countries outside the EU).

Romania’s main tax advantage is the flat rate tax at 16%, which is applicable to the profits of Romanian companies and resident individuals. On 1 January 2016, the standard VAT rate was reduced from 24% to 20% and is set to be reduced to 19 on 1 January 2017. In addition, Romania does not have controlled foreign company rules and VAT is not applicable to the transfer of going concerns.

The most welcomed investments are those made in less developed regions of Romania and/or the investments focused on advanced technology sectors like aviation, robotics, automotive, IT&C, R&D activities and innovative products and processes. Government policy is focused on encouraging investment in poorer regions and industries where any added value would have a significant impact. The Romanian Government also encourages industries that have an impact upon pollution, reduce unemployment, increase levels of training/specialisation and provide higher contributions to the state budget. It is important to note that the Romanian Authorities developed a new state aid programme in October 2014 which prolongs the financing sources until 2020.

Greenfield developments and extension/improvement of existing businesses are eligible for EU/State Aid. Further information can be obtained from the Romanian State Aid Network (www.stateaid.ro), an initiative of the Competition Council (www.competition.ro), which is an autonomous administrative body aimed at protecting and stimulating fair competition in the Romanian market.
Foreign investment policy

Investment possibilities

The Romanian Government, the EU and local authorities offer incentives to investors. Incentives include non-reimbursable funds for implementing new investments or improving a current activity; public guarantees; and labour-related incentives. Some programmes specifically target Small and Medium Enterprises (SMEs) and those that provide opportunities to young people.

The main aims of incentivising investment are to ensure the development of the main sectors of activity as referred to in the government’s economic and social policies, and to contribute to the achievement of one of the following objectives:

► Regional development and cohesion
► Environment protection and rehabilitation
► Energy efficiency and/or production and use of energy from renewable sources
► R&D
► Creating employment
► Implementation of innovative technologies and research results in the national production system
► Development of tourism

Incentives are provided for investments in the following sectors:

► Agro-industrial processing
► Manufacturing industry
► Electric and thermal energy production and delivery - the production of equipment for increasing energy efficiency and the use of renewable energy resources
► Environmental protection and improvement
► Water distribution and waste management
► IT&C
► Research, development and innovation activities or new products development
► Provision of business services

The exchange and currency control system requires businesses and individuals to report certain types of transactions (for instance, the incoming/outgoing of foreign currency between a Romanian resident and a non-resident) to the National Bank of Romania (NBR), with the aim of generating statistics and observing anti-money laundering regulations.

Private companies can obtain better finance terms from financial institutions with the support of the National Fund for Credit Guaranteeing for SMEs (www.fngcimm.ro) and the Romanian Fund for Counter-guaranteeing (www.frcg.ro).

The Romanian Centre for Promoting Trade and Foreign Investments (the former Romanian Agency for Foreign Investment), promotes trade on an international, regional and national basis. The organisation attracts foreign investment and promotes Romania’s business environment.

Successful programmes have been introduced, aiming to assist young people with the purchase of a first home (First House programme), first car (First Car programme), the replacement of old vehicles (Junk Car programme) and the purchase of
energy efficiency equipment for use within private dwellings. These programmes have had a positive impact to the Romanian economy by increasing employment and GDP.

In recent years foreign investment has played a key role in the Romanian economy.

The level of foreign investment within Romania is dependent upon the privatisation strategy adopted by the Government. By the end of 2005, the Romanian Government had privatised most sectors of the economy. Romania has received record levels of investment, compared to the other South East European countries, as a result of successful privatisations. Investment was also important in Greenfield projects from industry branches (e.g. automotive, renewable energy, real estate).

The privatisation of the largest Romanian bank, BCR (sold to Erste Bank), which was finalised at the end of 2005, is by far the largest privatisation which has taken place in Romania. The Romanian state raised approximately €3.75 billion for 61.88% of shares.

With over 23% of the total foreign investment in Romania, the Netherlands ranks first for foreign investors. More than 3,400 companies operating within the Romanian market have Dutch capital. Large investments have been made by Unilever, ING, Aegon, Philips, TNT etc. Austria and Germany are also among the top foreign investors in Romania with over €9.5 billion, respectively, over €7.4 billion of foreign direct investments. The main sectors for investment by Austrian and German companies are the automotive industry, construction materials, wholesale trade, retail, IT&C and shared service centres.

Types of business vehicles

Forms of business vehicle

The most common and flexible form of company provided for by Romanian law is the limited liability company. Its advantages are a limitation of shareholders’ liability; reduced minimum share capital contribution and a simplified shareholder/management structure.

Limited liability company

Regardless of the legal form of a company, for the purpose of incorporation, the following steps must be carried out:

► Checking the availability of the company name with the Trade Registry database and registering the name with the local Trade Registry

► Drafting and signing corporate documents required under Romanian Company Law (e.g. Articles of Incorporation, resolution of the competent corporate body of the legal entity which intends to set up the company; certain affidavits given by the founders individual/legal entities; signature specimens of the directors etc.)

► Opening of a bank account in view of subscribing by the founders the initial share capital of the company

► Conclusion of a lease agreement/other deeds attesting the right to use the headquarters where the company will be located

► Completing documentation with the local Trade Registry where the company will locate its premises

Generally, the registration formalities with the Trade Registry take five (5) working days from the date of submission of full and complete documentation.

The registered capital of a limited company must be at least RON 200 (approx €45 at the exchange rate of €1/RON 4.5), divided into shares with a minimum nominal value of RON 10 per share. A limited company can be formed with a minimum of one shareholder and up to a maximum of 50 shareholders.

Cash consideration is mandatory for the setting up of all forms of company. Shareholders may subscribe for share capital in cash or in kind. However, the contribution of services, labour or receivables is prohibited by law.

Each share gives the right to one vote. Dividends will be paid to shareholders pro rata to their share capital contribution unless the Articles of Incorporation set forth other mechanisms for the distribution of the dividends.
A minimum amount of 5% of the company’s annual profits must be kept for legal reserves until a reserve representing a minimum of 20% of the company share capital is reached.

Foreign shareholders benefit from the same legal regime as local shareholders, there are no restrictions applicable.

The General Meeting of Shareholders is the highest managing and decision-making body of a company, deciding upon the important matters in its daily business.

A General Meeting of Shareholders must be meet at least once a year or pursuant to the instigation of a director or upon the request of shareholders representing at least one quarter of the registered capital. In order for a meeting to take place, a letter must be sent to all shareholders at least ten (10) days prior to its commencement, unless the company’s Articles of Incorporation stipulate otherwise.

The shareholders representing the entire share capital may hold an ad hoc meeting at the company’s headquarters or in any other location, without any summoning formality, and may make valid resolutions provided that all shareholders agree upon such procedure.

Shareholders may participate personally in meetings or may delegate this right to a representative, who can be either a shareholder or third person, by virtue of a special power of attorney. The shareholders who are not present at a meeting may express their votes by fax or by other form of correspondence as set forth by the Articles of Incorporation.

A limited liability company can be managed by one or more directors who may have full or limited capacity to act on behalf of the company upon the shareholders’ decision. The director may be a shareholder/or a third party, a Romanian or foreign individual/entity, appointed via the company’s Articles of Incorporation or by means of a shareholder’s resolution.

The company may have one or more directors, who may be of any nationality or residence. A director represents the company with regard to third parties and manages its day-to-day business. Under Romanian Company Law a director may make any decision regarding the company’s activity. However, the director’s powers may be limited by virtue of the provisions of the Articles of Incorporation of the company and/or limitations imposed by the shareholders.

If two or more directors are appointed, they form a Board of Directors. In such case, the Articles of Incorporation must expressly stipulate their powers of representation (e.g. if they can represent the company individually, or if joint signatures are required, etc.).

Directors can enter into management agreements with the company while their remuneration is determined by the company’s shareholders.

As regards to the liability of the directors, they should be generally liable for the failure to adequately fulfil their obligations.

Two types of liability might arise: Civil liability or Criminal liability, depending on the specific breach of the director’s duty.

They are mainly liable for:

► the reality of the payments made by the shareholders

► the payment of the dividends

► the existence and the correct keeping of the legally required registers and books

► the correct performance of the general meeting of shareholders decisions

► the strict fulfilment of his obligations arising from the law and from the incorporation documents

► acts performed by the personnel, when the damage would not have occurred had the directors adequately exercised the surveillance imposed by their duties.

The liability is not entailed with regard to the director who expresses his dissenting opinion in relation to a certain decision, provided he has it recorded in the minutes of the meeting and informs the internal auditors/financial auditors in writing.
According to the express provisions of Company Law, the directors’ liability is governed by the general rules of the mandate as provided under the Romanian Civil Code and under the special provisions of the Company Law.

A director is jointly liable with its immediate predecessor if, being aware of the irregularities thereof, does not communicate them to the internal auditors or to the financial auditors.

In case it is prejudiced by one of its directors, the Company may decide to file a claim against him based on a decision of the general meeting of shareholders made with simple majority. If the general meeting of shareholders decides against filing a claim against the director, the shareholders holding individually, or together, 5% of the Company’s shares are entitled to file such claim in their own name but on the Company’s behalf. The director’s mandate terminates de jure if the general meeting of shareholders decides to sue him.

The creditors of the Company may also sue the director for breach of his obligations, but only upon and subject to the commencement of insolvency proceedings.

**Joint stock company**

The procedure for the creation of a joint stock company is the same as those above.

The minimum statutory capital of a joint stock company should be the equivalent in RON of the amount of €25,000. Shares must be held by a minimum of two shareholders (there is no maximum limit). Shareholders can be individuals and/or legal entities and can be open to either public or private participation. The minimum nominal value of one share shall be of RON 0.1.

The shareholders may subscribe for share capital with cash or in kind contributions. The contribution of services, labour or receivables is prohibited by law.

Preference shares benefiting from preferential dividends without voting rights may be issued by a joint stock company. These shares grant inter alia the right to a dividend over the distributable profits obtained at the end of the financial year, before any other payments.

The shares are indivisible and represent negotiable instruments which can be traded on a regulated market. Each shareholder shall hold a number of shares, proportionate to its contribution to the share capital. Each share gives the right to one vote in the General Meeting of Shareholders, unless the shares are preference shares and, therefore, do not carry voting rights.

A joint stock company is governed by an Ordinary General Meeting of Shareholders and an Extraordinary General Meeting of Shareholders, while each of the respective shareholders’ meetings has specific duties stipulated by law.

An Ordinary General Meeting must gather at least once per year and no later than five months from the end of the financial year. The shareholders’ meeting must approve or amend the annual financial statement based on the directors’/auditors’ reports; decide upon the distribution of dividends; appoint and remove directors, censors and auditors and establish their remuneration rights; approve the budget and work scheduled for the next year; and approve the granting of guarantees, leases or closing of the company’s working units.

An Extraordinary General Meeting of Shareholders is gathered whenever it is necessary to make a decision in respect of the following matters:

- **Change of the company’s legal form**
- **Change of the company’s headquarters**
- **Amendment of the company’s object of activity**
- **Set-up or closing of branches, agencies, representatives or any other such units**
- **Extension of the company existence/duration**
- **Capital increase/decrease**
Merger or spin-off of the company

Company’s winding-up

Any other amendments of the company’s Articles of Incorporation

A General Meeting of Shareholders (ordinary or extraordinary) must be initiated by the board of directors whenever it is necessary but upon giving at least 30 days’ notice before the date scheduled for the meeting. The calling notice must be published in the Official Gazette of Romania and in one widely circulated newspaper.

**Ordinary General Meeting of Shareholders**

First convening

For the meeting to be validly called, it is necessary to achieve the attendance of those shareholders representing at least one quarter of the voting rights. To pass a resolution, the approval of the majority of those voting must be received. The company’s Articles of Incorporation may stipulate a higher majority of votes/presence.

Second convening

The meeting gathered after the second convening may proceed, with the achieved attendance, and may pass the resolution with the majority of votes. In this case, the law does not allow a company to vary the requirement for quorum or the number of votes required to pass a resolution.

**Extraordinary General Meeting of Shareholders**

First convening

For an extraordinary meeting to be validly called, it is necessary to achieve the attendance of shareholders representing at least one quarter of the voting rights. To pass a resolution, approval by the majority of those voting must be received.

Second convening

For the validity of the proceedings, it is necessary to achieve attendance of shareholders representing at least one fifth of the voting rights. To pass a resolution, approval by the majority of those voting must be received.

The shareholders decisions for amending the main company’s activity, the approval of the capital increase/decrease, the change of the company legal form, merger, spin-off or company’s dissolution are made with a majority of at least two thirds of the voting rights of the gathered/represented shareholders. The company’s Articles of Incorporation may stipulate a larger majority/attendance.

For the administration of joint stock companies, two alternative management systems may be elected: the unitary system and the dualist one.

Pursuant to the unitary system, the company is managed by one or more managing directors, organised as a board. The board can assign management of the company to one or several directors.

Pursuant to the dual (two-tier) system, the management of the company comprises a directorate and a supervisory board. The directorate carries out the activities and management of the company and reports to the supervisory board. The supervisory board permanently monitors/controls the directorate and reports to the General Shareholders Meeting.

The administrators, members of the directorate or of the supervisory board cannot conclude labour agreements with the company, but can enter into management agreements.

Irrespective of the legal form, a parent company is generally liable for actions undertaken by its branch (which does not enjoy legal personality), whereas it will be liable for the actions taken by its subsidiary to the extent of its participation in the share capital.

During their existence, companies must fulfil certain publicity/reporting requirements with the Trade Registry. Examples of such requirements (among others) are: the transfer of shares of a limited liability company; any amendments to the Articles of Incorporation; identification data of the directors (applicable to one-tier management system), members of the directorate and
supervisory board (in case of a two-tier management system); change of the legal form of the company; and merger, split-up or dissolution of the company. In addition, the board of directors/directorate has to submit annual financial statements along with the auditors’ report and the directors’ report with the competent Tax Authority.

Representative Office

Foreign legal entities can set up representative offices in Romania. For this purpose, the following documents must be submitted to the Ministry of Economy Trade and Tourism, which is the relevant local authority.

- Trade Registry Excerpt of the foreign company attesting its valid existence, the business activities performed by the foreign company, the legal representatives and the share capital
- letter of good standing issued by a foreign bank operating with the company
- Articles of Incorporation of the foreign company
- authenticated power of attorney granted to the manager of the representative office
- proof of the representative office premises
- application for the approval of the representative office by the relevant authority.

The documents drafted in a foreign language must be translated in Romanian and their translation legalised in front of a notary public in Romania. The authorisation process is quite simple and takes 30 days from the date when the complete documentation is submitted to the Ministry of Economy Trade and Tourism.

The representative office is subject to an annual flat rate tax representing the equivalent in RON of the amount of €4,000 (at the exchange rate published by the National Bank of Romania and valid on the day when the tax is paid). The annual tax is calculated from the first month the representative office is set-up. The annual tax is due in two equal instalments, 25 June and 25 December in each year. An annual tax return must be submitted by the last day of February of the year when the tax is due.

The representative office must prepare and maintain single-entry accounts according to the Romanian accounting rules. The expenses of the representative office must be justified through accounting/financial documents prepared according to the law.

Listing on local stock exchange

The regulation and operation of the capital market in Romania is placed under the authority and supervision of the Financial Supervisory Authority (Autoritatea de Supraveghere Financiară), an autonomous administrative authority under Parliament control. The market operators currently authorised by the Financial Supervisory Authority are the Bucharest Stock Exchange (Bursa de Valori Bucureşti (BVB)) and the Sibiu Monetary — Financial and Commodities Exchange (Bursa Monetar — Financiară si de Mărfuri SA Sibiu (SIBEX)).

As a general rule, a prospectus must be prepared prior to the admission of securities to trading on a regulated market, which must be approved by the Financial Supervisory Authority before publication. A simplified prospectus may be accepted only in those situations strictly provided for by the Capital Market Law no. 297/2004 and the regulations issued by the former National Securities Commission and the Financial Supervisory Authority.

Capital Market Law sets minimum requirements regarding the issuer (which must be duly incorporated and compliant with the law, have a preliminary level of capitalisation, and have operated for at least three years before submitting the application for listing) and the shares (these are to be freely negotiable and fully paid and to have sufficient spread to the public) that have to be observed prior to admission to trading. Issuers applying to list their securities may be required to fulfil additional conditions set by each market operator for each listing category. The issuers having their securities listed on a regulated market must observe certain specific governance rules as well as the market transparency requirements.

Giving of upstream guarantees

Romanian Company Law provides for certain restrictions in relation to giving upstream guarantees. A breach of these restrictions may constitute a criminal offence. In particular, the act of a founder (i.e. shareholder), administrator, executive director or legal representative causing the company it manages, a company controlled by the company it manages or
company controlling the same, to provide security for its own indebtedness (i.e. indebtedness incurred by the founder, administrator, director etc.) constitutes a criminal offence. This can be punished with imprisonment of between one to three years (Art. 272 (1) par. 3 of the Romanian Company Law). From a civil law perspective, any legal act concluded in breach of this provision may be challenged in court and deemed null and void due to its alleged illicit cause or lack of corporate benefit for the company providing the respective securities.

Charging of assets
The charging of corporate assets is permitted, in principle, subject to certain limitations. The provision of financial assistance is one such area where limitations must be observed. A company is prohibited from granting advances or loans or providing security for the subscription or acquisition of its own shares by a third party. This restriction applies to joint stock companies. However, it is not applicable to transactions carried out by credit institutions or other financial institutions in the ordinary course of their business, or to transactions carried out for the purpose of acquisition of shares by the employees of the respective company (i.e. the target company), provided that such transactions do not result in a decrease of the company’s net assets below the cumulated value of the subscribed share capital and of the reserves prohibited from distribution according to the law or the articles of incorporation.

Furthermore, the board of directors of joint stock companies may not conclude transactions for the acquisition, disposal, lease or encumbering of corporate assets exceeding half of the accounting value of the company’s total assets, unless the shareholders’ general meeting has granted its prior approval.

Employment
Employee relations
Romanian labour relations are regulated by statutory legislation, collective bargaining agreements and individual employment contracts.

Romania possesses technically skilled, qualified personnel who can be easily trained and adapted to modern production processes and western work standards. Communication with employees goes relatively flawlessly, as 38% of Romanians speak a foreign language fluently and nearly just as many (30%) speak two foreign languages fluently.

Wages in Romania are variable; the amount of the wage depends on the branch location, qualification and the region. The minimum wage is determined by the government. As of 1 May 2016, the minimum gross salary amounts to 1,250 RON, approximately €280. As of 1 January 2016, the average gross salary amounts to 2,681 RON, approximately €595.

Employment relationships
Employment relations are regulated in detail by legislation. The main source of legislation in this area is the Romanian Labour Code, which has been in force since 1 March 2003 (Labour Code) though numerous amendments have been undertaken to the Labour Code since then.

The Labour Code acts as a frame for legislation, whereas the regulation of employment relations has been further refined by additional special regulations, such as:

- Law no. 62/2011 regulating the social dialogue
- Law no. 217/2005, regulating the European works council
- Law no. 67/2006, regulating the safeguarding of employees’ rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses

Employment agreements
Employment agreements must be concluded in writing.

The minimal provisions of an employment agreement are regulated by the standard employment agreement. Special clauses such as a confidentiality clause, a post-contractual noncompetition clause or a mobility clause (i.e. a clause for employees who do not have a fixed working place) can be agreed by the parties and stipulated in the employment contract.
A job description has to be attached to the standard employment contract. The job description is usually prepared by the employer and agreed with the employee.

The employment agreement must be concluded in two copies. The employer has the obligation to register the employment agreement in a so called “Register of the employees” (a soft named Revisal), which must be kept by the company and submitted to the competent labour authority.

The provisions of the applicable collective bargaining agreement are to be observed when drafting individual employment agreements. Collective bargaining agreements can be negotiated at company level by a group of undertakings and at that activity’s sector level.

The clauses of the above-mentioned collective bargaining agreements regulate issues such as working time, working conditions, remuneration packages, holidays, health and safety at work, protection of working women and young people, individual employment agreement, professional training, rights of the trade unions representatives etc.

Management representation

Employees (through their representatives) are entitled to be consulted in case of collective redundancy procedures with respect to the restructuring plan of the company, the possible measures to be taken in order to avoid the collective dismissals or the social measures which aim the professional requalification of the dismissed employees. In the case of corporate transactions, the representatives of the employees have to be consulted and notified with respect to the envisaged transfer. This obligation is incumbent upon both the assignor and the assignee companies.

The negotiation of collective bargaining agreements brings with it further obligations such as informing the representatives of the employees with respect to the financial situation of the company.

Termination of individual employment contracts

An individual employment contract can be terminated as follows: by law (de jure), by agreement of the parties, by the employee (resignation) and by the employer (dismissal).

Individual employment contracts can be terminated by agreement of the parties on the basis of a written convention. The employment relationship is terminated beginning with the day stipulated in the convention, the granting of a notice period is not mandatory.

The termination of an individual employment contract by the employee must be undertaken in writing. The employee has the right not to justify his/her decision of resignation. Pursuant to the Romanian Labour Code, a notice period of 20 (maximum) working days (for non-executives) or of 45 (maximum) working days (for executives) must be granted to the employer by the employee.

There are two types of dismissals, namely:

► Dismissals due to reasons dependent on the employee
► Dismissals due to reasons independent to the employee (i.e. redundancies).

The first type of dismissal can only occur in cases expressly regulated by law, such as disciplinary misconduct of the employee, professional inaptitude of the employee, physical and/or psychical incapacity of the employee proved by a medical certificate etc.

In the case of redundancies due to business operations, employees are entitled to receive a notice period of at least 20 working days, pursuant to the Romanian Labour Code, as well as compensation pursuant to the applicable collective bargaining agreement. Furthermore, the employees to be dismissed shall be selected by taking into consideration performance criteria and, subsequently, social criteria.

In case of mass layoffs a complex procedure has to be observed, starting with the economical-technical justification of the mass layoff that has to be submitted by the employer to the trade union/ representatives of the employees. The purpose of the consultation with the trade union/representatives of the employees is to try to avoid the collective dismissal, to decrease the number of the employees being dismissed and to take measures concerning the professional retraining and reconversion of
the employees. The process ends with the notification of the Labour Authority, the Authority for employment of working force as well as the trade union representatives of the employees with respect to the final decision regarding the mass redundancy.

Trade unions/representatives of the employees have no co-determination rights in case of mass layoffs, but do have consultation rights.

Foreign employees

As a rule, foreign employees need to obtain a residence permit as well as a work permit. It can take up to three months in order to obtain both documents. The costs for obtaining a work permit and a residence permit amount to circa €200 and circa €180 respectively.

However, there are certain categories of foreign employees for which no work permit is required, such as:

► Foreign persons with an unrestricted residence permit
► Foreign persons who hold the position of a director of a subsidiary, branch or representative office in Romania of a foreign company with its headquarters abroad
► Foreign persons who are family members of a Romanian citizen
► Foreign persons employed by a company whose headquarters are in an EU/EEA country and have been delegated to Romania etc

No work permit is necessary for citizens of an EU/EEA-country or the citizens of Switzerland. However, EU/EEA and Swiss citizens are deemed to obtain a registration certificate (Aufenthaltstitel) in case their stay in Romania exceeds 90 days. The registration certificate is issued by the Immigration Office within the same day the application is submitted and the issuance fee is extremely low (i.e. under €1).

Economy and government

The Romanian economy expanded by 3.7% in 2015, and ranked among the countries with the highest increase in the European Union. The International Institutions forecast an increase of 4% for 2016.

The country’s deficit improved significantly from 4.5% of GDP in 2011 to 2.5% in 2013 and 1% in 2015. The current account deficit is forecast to widen slightly in 2016 and 2017, reflecting the deterioration in the trade balance driven by higher imports. However, it is still expected to remain contained at 3 % of GDP.

The labour market recovered somewhat in 2015 but challenges remain, in particular, high youth unemployment. Unemployment remained relatively constant in the last two years – 5.2% in 2014 and 4.9% in 2015, but youth unemployment, is expected to remain high.

Annual average inflation has been on a downward trend since 2013 as a consequence of abundant harvests (in 2013 and 2014), falling global oil prices and consecutive reductions in VAT rates for different categories of products and services. In 2015, inflation turned negative after the cut of the VAT rate for all food items and non-alcoholic beverages from 24% to 9% from 1 June. In August 2015 inflation recorded a historical low of -1.7% (year-on-year), ending 2015 at an annual average of -0.4%. At the same time, the harmonised consumer price index in constant taxes excluding energy and volatile food prices doubled within the course of 2015, pointing towards increasing pressure on prices.

Restrictions / regulations

Irrespective of whether the investment is foreign or domestic, in the case of takeovers, mergers or acquisitions, competition law and regulations must be observed.

Transactions might be subject to the provisions of Romanian antitrust law regarding economic concentrations, if particular conditions are met. Please note that an economic concentration is realised by means of any legal act which, regardless of its form, either (i) operates to transfer the ownership or the right of use over the goods, rights and obligations of an undertaking as a whole or over parts thereof; or (ii) enables one or more undertakings to significantly influence, directly or indirectly,
another undertaking or several undertakings. Economic concentrations operate as mergers or through acquiring control via share or asset deals, contracts or other means.

Economic concentrations having, as an effect, the creation or the consolidation of a dominant position, leading or being likely to lead to a significant restriction, prevention or restriction of competition on the Romanian market are prohibited under Romanian legislation.

An operation, as described above, is to be considered an economic concentration if (i) the aggregate turnover of the involved undertakings exceeds €10 million; and (ii) there are at least two undertakings involved who have each achieved (in Romania) a turnover amounting to the RON-equivalent of €4 million.

In calculating the above-mentioned thresholds, the results of the business in the year preceding the transaction have to be considered. The “turnover” is defined as the sum of incomes achieved out of the sales of products and/or provision of services, from which the amounts representing fiscal obligations and the accounted value of direct or indirect exports, including intra-community exports, are subtracted.

Furthermore, if one of the parties involved in the transaction is part of a group of undertakings, the turnover of the whole group is relevant for the calculation of the €10 million threshold (worldwide) and the €4 million threshold (in Romania).

All economic concentrations which meet the conditions described above have to be filed with the Romanian Competition Council and authorised by that authority.

Exchange control and currency regulations

The currency regulation currently applicable in Romania is Regulation no. 4/2005 of the National Bank of Romania regarding foreign currency regime (as subsequently amended). The regulation establishes, as a general rule, that payments, receipts, transfers and any other similar operations between residents, resulting from the trade with goods and services or from the remuneration of work, must be carried out in national currency (RON). Romanian residents may, only in exceptional circumstances, carry out certain transactions in foreign currency (such as those not included in the above-mentioned categories or those which are related to foreign trade contracts etc).

Non-Romanian residents may possess local or foreign currency as well as open bank accounts in RON or other foreign currencies at Romanian credit institutions. Moreover, non-residents may perform currency exchange transactions on the foreign exchange market.

Legal entities resident in Romania opening bank accounts with foreign banks must notify this fact, as well as all transactions carried out through those accounts, to the National Bank of Romania. The notification has to be made in writing before the 20th calendar day of the following month. The same applies to non-monetary transactions carried out by Romanian residents.

In accordance with Regulation no. 4/2014, all Romanian residents (natural and legal persons) who conclude a foreign currency capital transaction agreement on reimbursement terms longer than one year with non-residents must notify such agreements to the National Bank of Romania within 30 days of the signing date. Romanian residents must further notify any change of their registered office, creditor, borrower, loan amount and the termination of the agreement within 15 days of the occurrence of such event.

Grants and incentives available to investors

The Romanian Government is eager to attract FDI in all domains, and has decided to continue its commitment to finance viable investment projects through the recent approval of two state aid schemes available for the period 2014-2020. One of the schemes finances investments in assets, while the other finances salary costs for projects that are focused on creation of new places of work, rather than capital expenditure. The main eligibility criteria for such projects is minimum investment value of €10 million (asset scheme) and generate minimum 10 new places of work (salary costs scheme), with funding intensities of up to 50% of the total eligible costs. The total budget allocated for these project is over €1.5 billion. Until the end of 2015, approximately 30 investment projects were approved, with a total investment value of over €280 million, creating more than 7,000 new working places.

Profit invested in technological equipment (machinery, tools and installations) which was acquired and used until 31 December 2016 and is used for economic activities is exempted for payment of profit tax of 16%. Research and development activity benefits from the following incentives:
A supplementary deduction of 50% of the eligible expenses for research and development at the moment of calculation of the taxable profits

Application of the accelerated depreciation method in the case of machinery and equipment used for research and development activities

The above-mentioned tax incentives can be used by any Romanian company that is registered for declaration and payment of profit tax.

Taxation – legislation in force as of May 2016

From a tax point of view, a limited liability/joint stock/limited partnership company are subject to the same tax treatment. Practically, they follow the same tax/accounting regime.

The Romanian fiscal code specifies that the fiscal year of a Romanian company is the calendar year (from 1 January until 31 December). However, companies which have opted for a financial year different from the calendar year, according to the accounting regulations, can opt for the fiscal year to correspond to the financial year. Romanian companies are required to submit monthly, quarterly and annual tax returns. There are specific provisions for determining the first fiscal year, for notifying this option to the tax authorities, for submitting the annual profit tax return and, respectively, for paying the profits tax.

Any request of a company must be answered by the tax authorities within 45 days, unless the tax authorities require additional documents when the term could be prolonged to 6 months.

The tax authorities are entitled to audit a company in respect of its due taxes in the last five years, starting with 1 July of the next year for which the tax is due. In the case of fiscal fraud, the tax authorities could go back for up to 10 years.

The duration of a tax audit cannot be longer than: (i) 180 days for large tax payers and tax payers that have secondary offices; (ii) 90 days for medium tax payers; and (iii) 45 days for the other tax payers.

Payable taxes can be off-set with reimbursable VAT or overpaid taxes. The interest rate for late payment of taxes is 0.02% per each day of delay. Also, late payment penalties are levied at the rate of 0.01% per day of delay. On 1 January 2016 the penalty for non-declaration of/wrong declaration of taxes amounting to 0.08% per day was introduced. In specific cases, the penalty for non-declaration of/wrong declaration of taxes could be reduced with 75%.

In case of fiscal obligations administrated by local authorities, there will be applicable late payment increases of 1% per month or month fraction.

Employee tax residency

According to the Romanian fiscal code, any individual is considered tax resident in Romania if he fulfils at least one of the following conditions:

- he is domiciled in Romania
- he has the centre of his vital interest in Romania
- he is present in Romania for a period or periods exceeding 183 days in any 12 month period ending in the fiscal year concerned
- he is a Romanian citizen working abroad as an employee of Romania in a foreign state.

Income tax and social security contributions

Tax resident employees

- Salary tax - 16%
- Employee health fund contribution - 5.5%
- Employee pension fund contribution - 10.5%
Employee unemployment contribution - 0.5%

The above-mentioned contributions are not paid by the employee itself, but are withheld by the employer from gross salary and paid by the latter to the tax authorities.

Non-tax resident employees

Non-tax residents are only subject to the Romanian taxation on their income deriving from Romania. The foreign individuals who are employed by Romanian companies are treated, with regards to tax, the same as a Romanian employee (please see above).

Employers, in relation to their employees

► Employer health fund contribution - 5.2%
► Employer pension fund contribution - 15.8% (for normal work conditions)
► Employer unemployment contribution - 0.5%
► Occupational accident and illness fund contribution (depending on the type of activity performed) 0.15% - 0.85%
► Contribution for medical leave indemnities - 0.85%
► Contribution to special fund for guaranteeing of wages - 0.25%

Employers are liable for the computation, declaration and payment of the salary tax and salary-related contributions (both due by the employer and the employee).

Business vehicles

Entity tax residency

Romanian resident entities are subject to tax on worldwide income (an entity is resident in Romania if it is incorporated in Romania or if its effective management and control are in Romania).

Taxation of tax-resident business vehicles

The following tax rates are applicable to legal entities (companies):

► Corporate income tax (the standard rate) – 16%

► Micro-enterprise tax (companies with turnover below equivalent in RON of €100,000) – 1% applied to turnover for micro-enterprises that have more that 2 employees inclusively; 2% for micro-enterprises that have 1 employee or 3% for micro-enterprises that do not have employees (these companies do not owe corporate profits tax)

► Dividend tax – 0%/5% (reduction/zero rate may be achieved by virtue of Double Tax Treaties or parent – subsidiary directive)

► Withholding tax – 16%/50% (reduction/zero rate may be achieved by virtue of Double Tax Treaties)

► VAT – 20% (the standard VAT rate) / 9% for a certain category of products (e.g. medicines, hotel accommodation, food and beverages – excluding alcohol beverages, restaurant/catering services) / 5% (e.g. books, newspapers, delivery of a certain category of buildings) / simplification measure in case of deliveries of wood materials, cereals and technical plants, transfer of green certificates, delivery of constructions, parts of constructions and land, mobile phones, etc. – under specific conditions

► Building tax (local tax) – 0.08-0.2% for residential buildings owned by individuals/entities; 0.2-1.3% for non-residential buildings owned by individuals/entities of the taxable value

► Land tax – due according to an algorithm provided by the law
Tax on special constructions - 1% of the gross-book value (certain assets are not subject to this tax, e.g. buildings for which tax on buildings is owed)

Romanian companies do not owe trade tax.

Taxation of non-tax resident business vehicles

Non-Romanian tax residents are subject to a withholding tax rate of 16% (reduction/zero rate may be achieved by virtue of Double Tax Treaties) in respect of their incomes obtained from Romania.

If Romania does not have a double tax treaty with the country of residence of the recipient, the withholding tax rate is 50%.

Permanent establishments of foreign companies in Romania are treated like a regular Romanian company, with some exceptions (e.g. no withholding tax regarding the distribution of profits).

Transfer taxes

If a Romanian company sells its assets, there is no specific tax to be applied to the sale of the assets (besides the profits tax and normal VAT implications). Romanian companies do not pay real estate transfer tax.

Holding companies

A Romanian company does not include (in the computation of the profit tax) the dividends received from a Romanian/foreign legal person paying profit tax and located in a non-EU country (with whom Romania has concluded a double taxation avoidance agreement), in case the Romanian legal person receiving the dividends holds minimum 10% of the share capital of these entities for an uninterrupted period of 1 year (certain conditions have to be fulfilled).

A Romanian company does not include (in the computation of the profit tax) the revenues from the sale/assignment of the participation titles held in a Romanian/foreign legal person located in a state with whom Romania has concluded a double taxation avoidance agreement, in case, on the sale/assignment date, the first company holds for an uninterrupted period of 1 year minimum 10% of the share capital of the legal person in which it holds the participation titles.

Similarly, a Romanian company does not include (in the computation of the profit tax) the revenues from the dissolution of another Romanian/foreign legal person located in a state with whom Romania has concluded a double taxation avoidance agreement, in case, on the start date of the dissolution operation, the first company holds for an uninterrupted period of 1 year minimum 10% of the share capital of the legal person subject to dissolution.

Dividends paid to foreign corporate shareholders

A Romanian company can only distribute dividends of the current year in the next year after the accounting of the current year is finalised and the financial statements of the current year are prepared and approved.

As a general rule, incomes obtained by foreign companies in Romania are subject to withholding tax in Romania, at a rate of 5%, in accordance with Romanian provisions (specific conditions should be fulfilled). However, this tax rate can be reduced in virtue of different EU Directives or Double Tax Treaties.

Based on the provisions of the EU Parent/Subsidiary Directive, the dividends paid by a Romanian legal entity to a legal entity residing in a EU member state are tax-exempt in Romania provided that, at the date of the dividends’ payment, the beneficiary of the dividends holds at least 10% of the shares in the company paying the dividends for a continuous period of one year ending at the date of payment. Other specific conditions should be fulfilled in order to benefit from the provisions of the EU directive.

Dividends received from foreign companies

A Romanian company does not include (in the computation of the profit tax) the dividends received from a Romanian/foreign legal person paying profit tax and located in a non-EU country (with whom Romania has concluded a double taxation avoidance agreement), in case the Romanian legal person receiving the dividends holds minimum 10% of the share capital of these entities for an uninterrupted period of 1 year (certain conditions have to be fulfilled).

The dividends received by a Romanian company from its subsidiary, a legal entity residing in an EU member state, are tax-exempt in Romania provided that, at the date of the dividends’ payment, the Romanian company holds at least 10% of the
shares in the company paying the dividends for a continuous period of one year ending at the date of payment. Other specific conditions must be fulfilled in order to claim the exemption.

Otherwise, if the above-mentioned requirements are not fulfilled, the dividends received by a Romanian legal entity from the respective foreign companies are included in the taxable profits of the Romanian company and subject to 16% profits tax.

**Interest and Intellectual property (IP) royalties paid to foreign corporate shareholders**

Interest and royalty income obtained from Romania by a legal entity residing in a EU member state are tax exempt in Romania if the beneficiary of the interest/royalty holds a minimum 25% of the value/number of shares in the Romanian legal entity for a continuous period of two years ending at the date of payment.

Otherwise, the interest/royalties obtained by foreign companies from Romania are subject to withholding tax at a 16% rate. However, this tax rate may be reduced as a consequence of certain Double Tax Treaties.

**Tax Exemption for Reinvested Profit**

No profit tax will be imposed on the profit invested in technological equipment (working machinery and installations), as provided under a specific subgroup of the Catalogue regarding the fixed assets. This technological equipment has to be new, to be used for the economic activity of the company and to be manufactured/purchased after 1 July 2014 and commissioned until 31 December 2016. The accelerated depreciation cannot be applied in case of this equipment.

At the end of the financial year, the profit exempted from profit tax must be distributed as reserves. The technological equipment taken into consideration when implementing the facility must be kept at least for a period equal to half of the economic use period, but no longer than five years.

**Thin capitalisation rules**

According to the Romanian thin capitalisation rules, interest related to debt contracted out from entities other than banks and other credit institutions in a foreign currency (e.g. €) is currently subject to a deductibility restriction of 6% per annum (this rate could change). The interest limitation related to loans in Romanian currency is subject to the National Bank interest reference rate.

Any interest exceeding the 4% interest rate (or the National Bank interest reference rate) is a non-deductible expense for the purpose of calculating the taxable profits of the Romanian entity.

After the application of the above rule, Romanian law provides for a second limitation of the deductibility of the interest costs incurred by a Romanian entity, which applies to interest costs that pass the previous test. This second limitation is linked to the debt-to-equity ratio of the Romanian entity. Thus, if the debt-to-equity ratio of the company is higher than 3:1 or if the company has a negative equity, then all interest cost passing the first deductibility test presented above will represent a non-deductible expense in the current period. However, this non-deductible interest cost will be carried forward for tax purposes and it will be available for setting off against profits of future taxable periods when the company’s debt-to-equity ratio falls below 3:1.

**Controlled foreign company rules**

There are no controlled foreign company rules in Romania.

**Transfer pricing**

According to the transfer pricing rules (arm’s length principle), prices established between affiliated parties must follow the market price. This means any estimate of market price must be thoroughly demonstrated in the transfer pricing documentation.

Romanian tax law provides that, where services are rendered between related (affiliated) parties, the arm’s length principle should be observed when establishing the price of the services. Thus, the price of the services between affiliated persons should observe normal open market price, as if the transaction took place between two independent parties. Otherwise, the Romanian tax authorities are entitled to adjust, for tax purposes, the taxable profits of the Romanian company so that they reflect the market price of the services, thus resulting in a situation where additional profits tax and dividend tax could be computed. The adjustment of the profits of the Romanian company does not lead to the modification of its financial statements.
The Romanian Fiscal Code mentions, explicitly, that the transactions subject to the transfer pricing analysis of the tax authorities, as described above, include transactions between Romanian related parties, as well as transactions between Romanian and non-Romanian related parties.

When estimating the market price of the transactions between affiliated parties the following methods can be used:

- Comparable uncontrolled price method
- Cost-plus method
- Resale price method
- Net margin method
- Split of profit method
- Any other methods recognised by the Transfer pricing guidelines issued by OECD and mentioned by the Romanian Fiscal Code

The Romanian legislation referring to the transfer pricing file is based on the Transfer pricing guidelines issued by OECD and the Code of conduct on transfer pricing documentation, published in the Official Journal of EU no. C176/1 published 28 July 2006.

**Taxation of imports and exports**

As of 1 May 2016 Romania applied the new Union Customs Code. Romania also applies the other agreements concluded by the EU with third countries. Goods which are imported in other EU member states and are subsequently transported to Romania are not subject to customs duties in Romania. Import licences are required for specific products (e.g. oil, weapons). Customs duties are computed based on the EU Common Customs Tariff.

**Double tax treaties**

Romania has concluded over 80 Double Tax Treaties with various countries (e.g. with Australia, Austria, Belgium, Canada, China, Cyprus, Denmark, Finland, France, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Malta, Netherlands, Norway, Portugal, Russian Federation, Spain, Sweden, Switzerland, United Kingdom and the United States of America).

Please note that for the application of the Double Tax Treaties, the foreign company must present to the payer of the income its tax residence certificate issued by the tax authority from its state of residence. A tax residence certificate has certain minimum prescribed requirements.

**Dispute resolution**

**Court process**

The Romanian Court system is tiered and consists of the High Court of Cassation and Justice, the Courts of Appeal, Tribunals and Local Courts. All courts have jurisdiction over criminal and civil matters. The Civil Sections of the courts have jurisdiction over cases between tradesmen as well.

A basic principle of Romanian civil procedural law is the adversarial principle, which means that the judge has to listen equally to the claimant and the defendant. Each party has the right to present, argue and provide evidence for its claim or defence and discuss/rebut allegations and evidence of the counterparty.

Civil trials start by filing a written statement of claim with the competent court. The claim must state the subject matter of the claim and its value, as the claimant evaluates it. The claim must be supported by facts and law and the claimant is obliged to refer to the evidence by which he intends to prove his case. Documentary evidence has to be attached to the claim. There is no pre-trial discovery or disclosure under Romanian law.

In the Romanian legal system, legal fees and expenses advanced by the claimant are borne by the losing party. Yet, the court does not decide about costs ex officio, but rather on the request of the winning party. The judge cannot reduce the amount of the judicial stamps and the costs incurred by the witnesses, but he can reduce the fees of the attorneys-at-law and of experts
whenever he considers that the fees are too high according to the value or complexity of the matter and the work carried out by the attorney-at-law or the expert. However, the agreement between the attorney-at-law and his client shall not be affected by the reduction measure taken by the court.

Arbitration / Alternative Dispute Resolution

The basic legal framework for arbitration is the Romanian Code of Civil Procedure, Book IV "On Arbitration".

Individuals with full legal capacity are entitled to settle their disputes by means of arbitration, except for the disputes related to civil status and individuals' capacity, inheritance issues, family relations, as well as the rights that cannot be alienated by the parties. If it is the case that the parties have concluded an arbitration agreement, the exclusive jurisdiction belongs to the arbitration court.

The arbitration agreement shall be made in writing, as a compromissory clause, provided for in the main agreement or as a separate agreement, called compromise.

The contracting parties may set forth, in their arbitration clause, the date and place of arbitration, the arbitration rules, the arbitrators’ appointment, dismissal and replacement. In international disputes, the parties of an arbitration agreement may also set forth the law applicable to the dispute, the language to be used in the hearings and in the documents filed.

The arbitration awards can be appealed by means of a plea for annulment. The plea for annulment is judged by the Court of Appeal which has jurisdiction in the district in which the arbitration took place. Further, the decision of the court regarding the plea for annulment can be appealed by recourse.

Competition

Antitrust legislation is strictly implemented in Romania. The competent authority is the Romanian Competition Council (RCC), a public self-governing authority endorsed to supervise, control and protect the normal competitive environment of the Romanian market. Its role has two major dimensions: a corrective dimension, restoring and maintaining a normal competitive environment and a preventive dimension, monitoring markets and observing the behaviour of the participants of such markets.

Competition law prohibits an express or tacit agreement between undertakings and any concerted practices, which have as their object or may have as their effect the restriction, prevention or distortion of competition on the Romanian market or on a part of it. This especially applies to those aiming at concerted fixing, directly or indirectly, of the selling or purchase prices, tariffs or rebates, limiting or controlling production, distribution, technological development or investments or eliminating competitors from the market, limiting or preventing access to the market, bid rigging etc.

Another important provision of competition law is the abuse of a dominant position. Abuse of a dominant position has two consecutive components: (i) market dominance, which is not prohibited; and (ii) abusive exploitation of dominance. Such abuse may, in particular, consist of: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts etc. Consequently, the higher the market position of a company, the more rules it has to obey from a competition law point of view.

In exception to EU law, the Romanian competition law sets a rebuttable presumption that there is dominance, if the undertaking has more than a 40% market share.

Moreover, both vertical agreements (i.e. any agreement or concerted practice between two or more undertakings, each of them operating, for the purposes of the agreement, at a different level of the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services) and horizontal agreements (i.e. agreements or concerted practice entered into between companies operating at the same level(s) in the market and thus competitors) are well regulated by Romanian antitrust law. However, both types of agreements can be exempt from the application of competition rules if particular conditions are met, e.g. a safe harbour is created by the block exemption regulations in case of vertical restraints or, on the other hand, horizontal co-operation which can lead to substantial economic benefits where it is a means of sharing risk, making cost savings, pooling know-how and launching innovations faster.
The RCC guidelines suggest that companies must constantly evaluate themselves, their position on the relevant market and, in particular, their market share/market power, in relation to the importance of the traded products, in order to ensure sufficient inter-brand competition on the affected market.

Companies are also under the obligation to notify and obtain the approval of the RCC in the case of economic concentration operations (i.e. any legal act which, regardless of its form, either operates to transfer the ownership or the right of possession over the whole or part of an undertaking’s property, its rights and obligations, or has as an object or an effect to enable an undertaking to significantly influence, directly or indirectly, another company or group of companies) which reach certain thresholds established by competition law (i.e. the aggregate turnover of the involved undertakings exceeds, during the previous financial year, the equivalent in RON of €10 million, and there are at least two undertakings involved who have each achieved in Romania a turnover amounting to the RON-equivalent of €4 million). Such clearance is mandatory in order to implement a business (e.g. purchase of a competitor company) and the procedure/conditions to obtain it are also well regulated by the law.

**Intellectual property**

The following industrial property rights are protected in Romania by registration with the State Office for Inventions and Marks (OSIM): Patents, Plant Variety Rights, Topographies of Integrated Circuits, Industrial Designs, Trademarks, including collective and certification marks, and Geographical Indications. Trade secrets are expressly protected under unfair competition law. Trade names and so-called emblems are protected only based on registration with the local Chamber of Industry and Commerce.

Romania is a member of the Paris Convention, the WIPO Convention and of the TRIPS Agreement, of the European Patent Convention, the Budapest Treaty, the Strasbourg Agreement and UPOV, of the Trademark Law Treaty, the Madrid Agreement and the Madrid Protocol, the Nice Agreement and the Vienna Agreement, of the Hague Agreement and the Locarno Agreement. Furthermore, Romania has concluded a bilateral agreement with the EU obliging the country to introduce standards of intellectual property protection corresponding to the EU standards and a bilateral Agreement with the USA.

**Trademarks**

Romanian legislation regarding protection of trade marks was adopted in 1998 by Law no. 84 (Trademark Act). According to the Trademark Act, a trade mark is a sign of graphic such as words, including personal names, or designs, letters, numerals, the shape of goods or of the packaging of goods, or sounds as well as any combination of these, which serves to distinguish the goods or services of one undertaking from those of other undertakings.


The proprietor of a national trademark is conferred a right of exclusive use of the trademark for the goods and/or services that were registered for a period of 10 years from the date of filing, as well as the right to prohibit others to use it or to imitate it fraudulently. A trademark can be renewed with OSIM for consecutive periods of 10 years.

Infringements of intellectual property rights, whether industrial property rights or copyright and related rights, are subject to civil, criminal and administrative sanctions. Civil proceedings may be initiated by ordinary courts by the proprietor of the trademark. For infringements of trademark rights, remedies available are injunctive relief (permanent or preliminary) and/or damages.

Further enforcement measures are customs measures. The customs authorities may suspend customs clearance of goods infringing an IP right on application of the right holder or his legal representative ex officio.

**Patents**

A patent is an exclusive right granted for any invention, in all fields of technology, provided it is new, involves an inventive step and is industrially applicable. In order to be patentable, the invention must fulfill certain conditions, as provided by Law no. 64/1991 (Patent Act). On 26 June 2014, Romania adopted new regulations regarding the protection of patents, respectively
Law no. 83/2014 on inventions under an employment agreement, which provides particular regulations in cases of employee’s inventions.

To gain patent protection, a patent application has to be filed with the Romanian State Office for Inventions and Trademarks. The protection term of national patents is 20 years from the filling date.

Patent enforcement is similar to trademark enforcement.

**Utility models**

As per Law no. 350/2007 on utility models, the utility model shall protect any technical invention, provided that it is new, it exceeds the framework of mere professional skill and it is susceptible of industrial application.

The duration of a utility model shall be 6 years from the filing date, renewable for consecutive periods of 6 years each.

Utility models are enforced similar to patents and trademarks.

**Copyright**

The copyright in a literary, artistic or scientific work and in any similar work of intellectual creation shall be recognised and guaranteed as provided by Law no. 8/1996 (Copyright Act). That right vests in the author and embodies attributes of moral and economic character. A work of intellectual creation shall be acknowledged and protected, independently of its disclosure to the public, simply by virtue of its creation.

Databases are protected by copyright if they constitute an intellectual work due to the selection or arrangement made.

Computer programs may be protected by copyright as well. The protection of computer programs includes any expression of a program, application programs and operating systems expressed in any kind of language, whether in source code or object code, the preparatory design material and the manuals. The author of a computer program shall enjoy by analogy the rights provided by the Copyright Act.

The right holder (Author) of a work shall have the exclusive economic right to decide whether, how and when his/her work is to be used or exploited, including the right to authorise the use of the work by others.

The economic rights provided by the Copyright Act shall last for the author’s lifetime and, after his/her death, shall be transferred by inheritance, according to civil legislation, for a period of 70 years regardless of the date on which the work was legally disclosed to the public.

**Marketing agreements**

**Agency**

Agency agreements are regulated by the Romanian Civil Code. The law expressly provides for the parties’ rights and obligations and the parties are not allowed to derogate from those mandatory legal provisions. In addition, the agency agreement is governed by the general principles regarding the commercial mandate and the ones applicable to the commission agreement. Agents can negotiate and conclude business arrangements only for and in the name of the beneficiary. Agency agreements concluded for an undetermined duration can be freely terminated by either party, subject to the observance of a prior notice period, while agreements concluded for a determined duration can be terminated by either party provided that such unilateral termination right is expressly stipulated in the agreement.

**Distribution**

There are no specific legal provisions to regulate distribution agreements but, according to the legal doctrine, this type of agreement is governed by the general legal principles applicable to agency agreements, mandate and commission agreements. The distributor is free to establish its own price, and its revenue will be the difference between the price of acquisition and the sale price of the products.
Franchising

There is no standard format for a franchise agreement, the current legal framework, respectively, the Government Ordinance No. 52/1997 as subsequently amended by Law No.79/1998 (Franchise Law) regarding the legal regime applicable to franchise, establishes only the main provisions and the principles that should govern this specific type of agreement.

For example, the Franchise Law sets forth inter alia the pre-contractual obligations of the franchisor, the contract's main provisions and other obligations of the parties after the termination of the franchise agreement.

According to the Franchise Law, the purpose of a pre-contractual stage is to enable each party to make the business decision in full knowledge of the facts and to confirm their will to start the collaboration. Moreover, the franchise law stipulates certain obligations for the franchisor in order to protect the franchisee against any potential negative effects due to the franchisee's potential lack of information or experience in connection with the future business.

In this respect, the franchisor is legally bound to disclose to the following information:

► Business experience (the law does not provide any details in this regard but we are of the opinion that in this case the information should make reference inter alia to the franchisor’s company, management, history of the company etc.)

► Contract financial terms (the entrance fee, periodical royalties, advertising fees, products prices etc.)

► Relevant information enabling the franchisee to make the business plan and to forecast the financial results (the law does not stipulate any details in this regard, but according to the legal doctrine, such information should make reference to the competition, the general and local status of the market, the development perspectives etc.)

► Objectives and territory (the information should refer to limits/restraints for the franchisee)

► The contract duration and the renewal/amendment/termination/assignment conditions

According to the Franchise Law, the main clauses and the principles applicable to the franchise agreement can be summarised as follows:

► Object of the agreement

► Parties’ rights and obligations

► Financial terms and conditions

► Duration of the agreement (to cover at least the amortisation of the investment made by the franchisee)

► Renewal/amendment/termination conditions

► Non-compete clause for know-how protection

► Conditions for the assignment of the agreement

E-commerce

Law no. 365/2002 regarding electronic commerce, as subsequently amended by Law no. 121/2006 and Law no. 187/2012, is the legal framework regulating the conclusion, validity, legal effects of the contracts concluded by electronic means. It also establishes the minimal obligations of the providers of informational society services towards the beneficiaries, especially the obligation to provide complete and accurate information about the contract formation, archiving and accessibility.

Law no. 455/2001, as subsequently amended, regulates inter alia the legal regime of electronic signatures and of the electronic documents (especially regarding the conditions to be met in order for such documents to qualify as evidence in court, namely, the documents have to be generated with the aid of electronic communication means, to bear an extended electronic signature based on a valid qualified certificate and to have been generated by secure means of creation of electronic signatures).
Government Emergency Ordinance (GEO) No. 34/2014 comprises the statutory provisions for consumer protection at the conclusion and during the performance of distance selling contracts and provides for the minimal information and guarantees that the seller has to provide in case of distance sales. The GEO 34/2014 transposes the Directive 2011/83/EU on consumer rights which replaced the Distance Selling Directive 97/7/EC and Doorstep selling Directive 85/577/EEC. The GEO 34/20014 applies to any contract concluded between a professional (in Romanian "profesionişti") and a consumer concluded on 13 June 2014 and repeals Government Ordinance No.106/1999 regarding the off-premises contracts and Government Ordinance No. 130/2000 regarding consumer protection in connection with the conclusion and performance of distance contracts. The new piece of legislation set forth specific formal requirements for off-premises and distance contracts, as well as the right of withdrawal for the consumer, which can be exercised for both distance and off-premises contracts, without giving any reason, within 14 days.

The expiry date of the 14 day period may vary depending on the nature of the contract/of the goods.

In case the professional has not provided the consumer with the information regarding the right of withdrawal, the withdrawal period shall expire within 12 months following the end of the initial withdrawal period.

The consumer may exercise the right of withdrawal by either using the withdrawal form as set out in section B of the Annex to GEO No.34/2014 or by making an unequivocal statement setting out the decision to withdraw from the contract.

The professional must reimburse all payments received from the consumer, including, if applicable, the costs of delivery without undue delay and in any event not later than 14 days from the day when the professional was informed of the consumer’s decision. The professional must use the same means of payment used by the consumer in the initial transaction, unless the consumer agrees otherwise and provided that the consumer does not incur any fees as result of such reimbursement.

Data protection

The data protection field is well regulated and closely monitored by the competent authority – The National Supervisory Authority for Personal Data Processing. The main piece of legislation is Law no. 677/2001 (Personal Data Law), as subsequently amended, which deals with the protection of individuals with regard to the processing of personal data and the free movement of such data as subsequently amended. Processing of personal data must be in accordance with the Personal Data Law, including any operation or set of operations which are performed upon personal data automatically or manually, such as collecting, registering, organising, depositing, adapting amending, using or disclosing to third parties by transfer, dissemination or any other way of combining, blocking, deleting or destroying them. In accordance with the Personal Data Law, “personal data” means any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified directly or indirectly, in particular, by reference to an identification number or to one or more factors specific to his physical, psychological, mental, economic, cultural or social identity.

The data subject has a series of rights in the context of personal data processing, such as: (i) the right to be informed by the data controller about the purpose and duration of the data processing; (ii) the right to access such data; (iii) the right of intervention upon the incorrect or incomplete data; (iv) the right to object at any moment, based on justified and legitimate reasons related to its particular situation, to a processing of data; and (v) the right to file a legal suit, in case it was prejudiced by an unlawful processing of personal data.

Furthermore, apart from personal data protection (including sensitive/special data, transfer of personal data to third parties, confidentiality, secrecy and security rules), other pieces of legislation regulate related domains, such as electronic communication sector or electronic storage of data.

Product liability


The Product Liability Act legislates for the legal relationship between manufacturers and persons injured by defective products, the civil liability for the damage caused by these products and the right of action for compensation.
"Manufacturer" means the manufacturer of a finished product, of any raw material or of a component part, any person who presents himself as a manufacturer, any person who imports a product into the European Community, as well as the supplier of the product (as the case may be) and as defined by the Product Liability Act.

According to the Product Liability Act, a product is defective when it does not provide the safety that a person is entitled to expect.

The injured person is entitled to claim damages caused by the defective product against the manufacturer of the product provided that he/she proves the damage, the defect and the causal connection between defect and damage.

According to the Product Liability Act, special provisions of the Product Liability Act are supplemented by the Romanian Civil Code regarding the extra-contractual tortious liability. Yet the Romanian Civil Code sets forth that the liability for the damage caused by defective products is legislated by special law, i.e. the Product Liability Act.

Product liability claimants may also claim on the basis of contract law. Contractual liability is based on the principle that causing damage results in an obligation to pay compensation. Further, all contractual clauses which limit the manufacturer’s liability or release him from liability are null and void.

Furthermore, according to the Romanian Civil Code, unless otherwise provided for by the law, neither party can exclude the application of the rules of contractual liability in order to opt for other rules which might be more advantageous to it.

The legal framework for product safety is Law No. 245/2004 as subsequently amended by Law No. 363/2007 (Product Safety Act), regarding general product safety, which applies to all traders (manufacturers, distributors and retailers) that bring goods onto the market or sell to consumers. According to the Product Safety Act, a product used under normal and foreseeable circumstances is safe if it is not subject to any or only minor risks.

Traders are also obliged to only bring products and services to the market that conform to the declared and prescribed characteristics, to inform consumers of product risks and not to use any abusive trading customs.

Bribery and corporate crime

The Romanian Criminal Code sanctions against both active and passive bribery, as well as, the acceptance of undeserved goods (art.289-291 Romanian Criminal Code). According to Article 289 of the Romanian Criminal Code passive bribery constitutes the deed of a clerk, who directly or indirectly, requests, accepts money or other undeserved goods or accepts or fails to reject the promise of such benefits, with the scope to impede or delay the drafting or execution of an act which lays within his official duties, or acts against his duties. Passive bribery is punished with imprisonment of three to up to ten years.

Active bribery is defined by Article 290 of the Romanian Criminal Code as being the promise, offering or giving of monies or other goods or benefits, in the scope mentioned at Article 289. It is punishable with imprisonment for a term of two up to seven years and prohibition of certain rights.

Another important piece of legislation is represented by Law No. 78/2000 for the prevention, discovery and the punishment of corruption offences, as subsequently amended.

The Romanian legislator extended the applicability of criminal offences relating to bribery over the private sector through the above-mentioned law, thus, introducing measures for the prevention, discovery and punishment of criminal offences. This applies to persons holding, in a permanently or temporary, a position or a specific assignment in a commercial company, to the extent that they were involved in the decision making process, or are able to influence the process of decision in such companies; and persons who grant specific assistance to the above-mentioned companies if they participate or are able to influence the process of decision.

Money laundering and other corporate crime

The relevant piece of legislation is Law No. 656/2002 for prevention, punishment of money laundering and also for setting up of some prevention and elimination measures of financing terrorist actions, as subsequently amended.

Persons to whom the provisions of Law No. 656 apply are as follows:

- Credit institutions and Romanian branches of foreign credit institutions
► Financial institutions and Romanian branches of foreign financial institutions

► Administrators of private pension funds, in own name or for the private pension funds they administrate, within the market of private pensions authorised marketing agents

► Casinos

► Auditors, individual and legal persons that provide fiscal or accounting consultancy

► Public notaries, lawyers and other persons that exercise liberal professions, in the event they provide assistance in the elaboration or performance of operations for their clients concerning transactions, sales or buying of fixed goods, stocks or shares or goodwill components, administration, management of financial instruments or other goods belonging to clients, establishment and management of bank accounts, for savings or financial instruments, formation of the subscription process necessary for the set up, performance of the activity or management of a company, set up, administration or management of a company, securities market investment entity or other similar structures, or act, according to the law of other fiduciary activities, inclusive of the case when they are representing their clients in any operation with financial character or concerning immovable assets

► Service providers for commercial companies or other entities, other than the ones detailed above

► Persons with attributes within the privatisation process

► Estate agents

► Associations and foundations

► Other natural or juridical persons which commercialise goods and/or services, only as long as they perform cash operations in lei (Romanian currency) or foreign currency, whose minimal limit represents the equivalent in RON of €15,000, regardless if the transaction is being performed by a single operation or by more operations which seem connected

Corporate crimes are mainly regulated by Company Law and include the following offences: the acquisition of shares in other companies, on the company account, by the administrator, director or legal representative of the company for a price that is obviously higher than the market purchase price; the disposal of the company’s shares for a price that it is under market value only for the purpose of obtaining a profit and, as such, prejudicing the company; or the use in bad faith of the company’s assets for a purpose which is against the company’s interests but is for their own benefit. Such offences are punishable by imprisonment from six months up to three years or fines may be applicable.

Real estate

 Owning Restrictions on Foreign Companies and Foreign Citizens

Law no. 312/2005 on the acquirement of title to land by foreign citizens and foreign legal persons provides that citizens of the European Union Member States not residing in Romania and legal persons who have not established a secondary office in Romania are allowed to acquire land beginning with the lapse of five years as of Romania’s accession to the EU (i.e. beginning with 1 January 2012), provided however, that such land has a construction attached to it which is able to serve as a secondary residence/office. For agricultural land, forests and forestry land there is a seven year transition period as of Romania joining the EU (i.e. beginning with 1 January 2014).

It would seem that, as of 1 January 2014 the aforementioned persons should be able to acquire the ownership right over land located in Romania, irrespective of the designation of that land, be it for building, agricultural or forest land. However, said Law no. 312/2005 has received several different interpretations from public bodies, so that, at the moment, the procedural aspects with regard to the transfer of the ownership right are unclear.

In addition, Law no. 17/2014 regarding the transfer of agricultural land located beyond city limits was adopted in March 2014. According to said law, as of 11 April 2014, sale-purchase agreements for such land shall have to be concluded with strict observance of the right-of-first-refusal of co-owners, leaseholders, neighbours and the Romanian State, in this order. Failure to observe said provision shall render the sale-purchase agreement void.
Non-EU citizens and non-EU legal persons may not acquire title to land in Romania.

**Different types of interests in land**

Ownership of real property is protected by Romanian law.

The "ownership right" entitles the owner to possess, to use and to dispose of the property.

Apart from the ownership right, land may be also subject to related real estate rights (so called “dismemberments of the ownership right”).

Thus, the beneficiary of a "superficies right" has a right of ownership over a building and a right of use over the land on which the building is erected. The "superficies right" can be constituted for a period of maximum 99 years, with a possibility of renewal, as opposed to the provisions of the Civil Code 1864 which set forth the possibility of constituting the "superficies right" for the entire duration of the building.

A "right of usufruct" is the right of a person to hold and use a certain asset and to benefit from its products, without having the right to sell the “naked” ownership right or to decide in respect to the substance of the owned object.

A "right of use" is a particular species of the right of usufruct and, as the latter, it bears the right of a person to hold and use a certain asset to the extent of his/her own and his/her family members' benefit.

An "easement" is the right to use the real property of another without possessing it. Easements require the existence of at least two land plots belonging to two different parties.

A "concession right" is the right of a person to use private or public property (land and/or buildings) of the localities or the Romanian state for a limited period of time (i.e. 49 years, to be extended under certain conditions by another maximum 24 years and six months).

**Form and Registration Requirements upon Owning Land**

The execution in notarised (authentic) form of certain deeds is a compulsory requirement for the transfer or instatement of real rights (rights in rem, like the ownership right or aforementioned dismemberments thereof) to land and/or buildings. Such form is further compulsorily required for any deeds regarding the dismantling or merger of land plots.

The execution/signing of deeds in authentic notarised form must be done by way of the notary executing a sole original deed which must be retained in the notary’s archive, whilst the parties receive duplicates thereof. The duplicates have the same legal force as the original deed.

When executing a deed by which a real property right is instated or transferred (e.g. sale-purchase agreements or agreements for instating a use/usufruct right, or mortgage agreements etc.) the public notary must investigate the legal status of the real estate, the encumbrances imposed upon it and, as the case may be, the matrimonial status of the parties involved in the transaction. The notary is liable for failing to state the legal issues that he is required by law to investigate in the executed deed.

The public notary which notarises the deed by way of which a real estate right is transferred, modified, created or terminated has to request, at the conclusion date or the next day at the latest, the registration with the land book of the respective right.

According to the New Civil Code, the ownership transfer and/or the real property rights respectively shall become effective only upon registration with the relevant land book. However, until completion of cadastral works for each territorial unit, registrations shall still be performed solely for third parties' acknowledgement purposes only. The completion date of cadastral works for each territorial unit remains at the moment uncertain.

In Romania, parties have no obligation to pay a specific tax on acquiring title to land and/or buildings, aside from notary fees and VAT, as the case may be.

**Existing law is stated as it applied in June 2016.**
# Useful contacts

## MINISTRIES AND COMMERCIAL ORGANISATIONS

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<td>The Association for Investors Protection:</td>
<td><a href="http://www.investitor.com/anpi">http://www.investitor.com/anpi</a></td>
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## Further information

SPRL Menzer & Bachmann – Noerr

Str. General Constantin Budisteanu nr. 28 C, sector 1

010775 Bucuresti / Romania

☎ T +40 21 3125888

✉ F +40 21 3125889

## Contact Partners

### MANAGING PARTNER

<table>
<thead>
<tr>
<th>Prof. Dr. Jörg K. Menzer</th>
<th>+ 40 21 3125888</th>
<th><a href="mailto:joerg.menzer@noerr.com">joerg.menzer@noerr.com</a></th>
</tr>
</thead>
<tbody>
<tr>
<td>Partner</td>
<td></td>
<td></td>
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<tr>
<td>Head of CEE Offices</td>
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## CORPORATE

<table>
<thead>
<tr>
<th>Name</th>
<th>Contact Details</th>
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<tbody>
<tr>
<td>Rusandra Sandu</td>
<td>+ 40 21 3125888</td>
</tr>
<tr>
<td>Partner</td>
<td><a href="mailto:rusandra.sandu@noerr.com">rusandra.sandu@noerr.com</a></td>
</tr>
<tr>
<td>Avocat (RO)</td>
<td></td>
</tr>
<tr>
<td>Gabriel Popa</td>
<td>+ 40 21 3125888</td>
</tr>
<tr>
<td>Associated Partner</td>
<td><a href="mailto:gabriel.popa@noerr.com">gabriel.popa@noerr.com</a></td>
</tr>
<tr>
<td>Avocat (RO)</td>
<td></td>
</tr>
<tr>
<td>Mihai Macelaru</td>
<td>+ 40 21 3125888</td>
</tr>
<tr>
<td>Associated Partner</td>
<td><a href="mailto:mihai.macelaru@noerr.com">mihai.macelaru@noerr.com</a></td>
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<td>Avocat (RO)</td>
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## COMMERCIAL & REAL ESTATE

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<tr>
<th>Name</th>
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<tr>
<td>Roxana Dudau</td>
<td>+ 40 21 3125888</td>
</tr>
<tr>
<td>Associated Partner</td>
<td><a href="mailto:roxana.dudau@noerr.com">roxana.dudau@noerr.com</a></td>
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<td>Avocat (RO)</td>
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## EMPLOYMENT & PENSIONS

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<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Andreea Suciu, LL.M.</td>
<td>+ 40 21 3125888</td>
</tr>
<tr>
<td>Avocat (RO)</td>
<td><a href="mailto:andreea.suciu@noerr.com">andreea.suciu@noerr.com</a></td>
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## LITIGATION

<table>
<thead>
<tr>
<th>Name</th>
<th>Contact Details</th>
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<tbody>
<tr>
<td>Alexandru Ene</td>
<td>+ 40 21 3125888</td>
</tr>
<tr>
<td>Associated Partner</td>
<td><a href="mailto:alexandru.ene@noerr.com">alexandru.ene@noerr.com</a></td>
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<td>Avocat (RO)</td>
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## MEDIA, IP, IT

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<th>Name</th>
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<tr>
<td>Cristiana Fernbach</td>
<td>+ 40 21 3125888</td>
</tr>
<tr>
<td>Avocat (RO)</td>
<td><a href="mailto:cristiana.fernbach@noerr.com">cristiana.fernbach@noerr.com</a></td>
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Other relevant points

The current legal framework represents the outcome of a long adjustment process for the purpose of the full harmonisation with EU legislation which has been ongoing since 2007, when Romania became an EU member. Romania’s strategic priorities for the forthcoming period aim at developing the infrastructure, ensuring energy security and alternative routes of transport, modernising the agriculture and improving the quality of education and healthcare. After years of debates and assiduous work on developing a new civil code, Romania finally adopted a modern Civil Code (October 2011) to meet the needs of a modern society.

The adoption of the New Civil Code was essential for the emergence of Romania as a modern society unconstrained by the rigid civil law institutions created under the former civil code dated almost two centuries ago. The New Civil Code brings significant changes to the private law including matrimonial law, the land book regime, the warranties regime etc.
DOING BUSINESS IN RUSSIA
Introduction and legal system

General information

Located in Europe and Asia and reaching from Eastern Europe to the Far East, Russia is the world’s largest country by area. It has a population of 143 million inhabitants, the majority of whom live in the European part of the country. Russia is a multi-ethnic state, with most of the population being defined as ethnic Russians.

The country borders Finland, Norway, Poland, Lithuania, Latvia, Estonia, Belarus, Ukraine, Georgia, Azerbaijan, Kazakhstan, Mongolia and China, and also has maritime borders with Japan and the United States.

The biggest cities in Russia are Moscow and Saint Petersburg, followed by Yekaterinburg, Novosibirsk, Omsk, Perm, Samara, Kazan and Rostov-on-Don. Moscow is the capital and one of the world’s ten biggest cities, with over ten million permanent residents. It is the political, financial and business centre of Russia, and its investment potential is constantly growing.

Political system

Russia is a semi-presidential republic in the form of a federation, with the president as the head of state. The president is elected directly by the people and has comprehensive powers, such as appointing state officials to executive bodies and drafting legislation within the scope of his / her powers. The legislative function is exercised by the Federal Assembly (parliament), which consists of two houses: the Federation Council (upper house) and the State Duma (lower house). The Federation Council is made up of representatives of the federal states, while members of the State Duma are elected by the people for a five-year term on the basis of the political parties eligible for election. The highest executive authority is the government, which is led by the prime minister; the government is in charge of ministries, federal services and federal agencies.

The territory comprises 83 federal states (so-called constituent entities) with equal status. Each federal state has its own legislative bodies (parliament, legislative assembly) and executive bodies. In addition to the structure described above, the federal states are grouped into eight federal districts, each administered by an envoy appointed by the Russian president.

Russia is the legal successor of the USSR and assumed its permanent membership on the UN Security Council and its membership in other international organisations following the collapse of the USSR. It is a G8 country and a member of the Council of Europe and the Organisation for Security and Co-operation in Europe (OSCE).

Legal system

Russia has a civil law legal system characterised by the precedence of legislation duly passed by the State Duma. On the basis of this legislation, the competent authorities often pass delegated legislation, which defines the statutory regulations more precisely. International agreements and treaties between Russia and other countries also apply in the Russian legal system.

The Russian court system is divided according to different categories of disputes and consists of three branches: the courts of general jurisdiction (civil courts), which rule on civil, administrative and criminal matters and are subordinated to the Supreme Court of the Russian Federation; the commercial court system under the Supreme Arbitrazh Court of the Russian Federation (jurisdiction for matters in connection with business activities) and the Constitutional Court of the Russian Federation (as well as constitutional courts in a number of administrative entities of the Russian Federation), handling all matters with respect to the compliance of legislation with the constitution.

Foreign investment policy

General issues

The Russian government is stimulating investment, individual business initiatives and the development of industrial and high-technology sectors of the economy. The development of nano-technologies has become one of the main goals of the technological improvement and modernisation of the Russian economy. The Russian government is attracting foreign investment and technology exchange by establishing joint venture projects in the country and providing tax and customs relief, as well as other business advantages.

Investment is also being attracted by the process of privatisation, reducing the state share in many different enterprises owned by the state since Soviet times, which started in the 1990s and allows the state to raise significant funds for modernisation. Currently, the share of the state in the national economy is estimated at 45-50%, though the Russian...
government plans to reduce state ownership to 30% by 2015. State regulation, however, still plays a major role in many areas of business, predominantly in mining (oil and natural gas exploration), foreign trade and currency regulation.

State investment support

The Russian government supports foreign investment by granting foreign investors the same investment conditions as domestic investors enjoy, whether through financial means or in other ways. For example, Federal Law No. 160-FZ, on foreign investment in the Russian Federation, dated 9 July 1999, and a series of other statutory provisions, specify basic guarantees for the activities of foreign investors.

In December 2011, Russia completed negotiations on entering the WTO and became a full member in July 2012, after ratification of all the necessary treaties with this organisation.

Moreover, Russia is now a party to approximately 60 bilateral investment treaties with other countries, signed for the purpose of granting additional investment protection to foreign investors. These treaties include the main international standards of protection necessary for secure investment on the territory of Russia. Among such standards, we can mention the following:

- Fair and equitable treatment
- Full protection and security
- An umbrella clause (promise to stick to the obligations assumed under the relevant bilateral treaty)
- Access to justice, fair procedure
- Preservation of rights
- No arbitrary and discriminatory measures
- National treatment provisions
- Granting of most-favoured-nation status
- Transfer of funds

Nonetheless, bilateral investment treaties provide only a general legal framework for investors. In order to protect specific investments, it is advisable that the investor enters into an investment agreement with the relevant state (federal, regional and / or municipal) body. The reason for entering into an investment agreement is to obtain clearer, more stable and more beneficial terms and conditions than those existing in the absence of such an investment agreement.

Types of business vehicles

The main types of business vehicles used by foreign investors are corporations (including joint ventures with Russian partners) under Russian law, and branches or representative offices opened by a foreign investor.

Corporations

Russian law specifies two types of corporations: limited liability companies (obschestvo s ogranitchennoy otvetstvennostyu or OOO) and joint stock companies (aktsionernoe obschestvo or AO). The charter capital of these companies is made up of the participatory shares of the participants (in the case of an OOO) or the shares of the shareholders (in the case of an AO). General regulations with respect to corporations are set out in the Russian Civil Code. Detailed provisions regarding the incorporation and management of these types of corporations are contained in Federal Law No. 14-FZ, on Limited Liability Companies, and Federal Law No. 208-FZ, on Joint Stock Companies.

Limited Liability Company (OOO)

According to the law On Limited Liability Companies, the founders (participants) of an OOO can be either natural persons or legal entities. The number of participants, though, may not exceed 50; if the number goes over this specified limit, the company has to be transformed into an open joint stock company within one year. A limited liability company can have a sole
participant. However, this sole participant may not be a company which is also wholly owned by one person; therefore, either the OOO or its sole participant must have at least two shareholders.

The founders of an OOO have to adopt a resolution for the incorporation of the company, which also contains other decisions in connection with the incorporation (e.g. the adoption of the articles of association and the appointment of the executive body of the company).

The minimum charter capital of an OOO is RUB 10,000 (at the current exchange rate app. €250), which represents the minimum assets of the OOO and is intended to protect the interests of creditors of the company. At least half of the charter capital has to have been paid up by the founders by the time the state registration of the company takes place. An increase in the charter capital is only permitted after it has been paid up in full.

A limited liability company is subject to state registration in the Unified State Register of Legal Entities. The registration process is established in Federal Law No. 129-FZ, On State Registration of Legal Entities and Individual Entrepreneurs. The registration of an OOO is carried out by the federal tax authority within five calendar days of submission of all relevant documents.

Participatory shares in the charter capital of an OOO do not require state registration and can be paid in cash or in kind, including by contributing rights having a monetary value.

The company is managed by a sole executive body (managing director) or by a sole executive body and a collective executive body (management board). Nonetheless, in both scenarios the company is represented vis-à-vis third parties only by the managing director; members of the management board may represent the company only on the basis of a power of attorney issued by the managing director. In addition, the company’s articles of association may stipulate the establishment of a supervisory board (board of directors). All corporate bodies are accountable to the participants.

**Joint Stock Company (OAO, ZAO)**

The law on Joint Stock Companies stipulates two types of joint stock companies: the closed joint stock company (zakrytoe aktsionernoe obschestvo or ZAO) and the open joint stock company (otkrytoe aktsionernoe obschestvo or OAO). A joint stock company can have a sole shareholder; however, a company which is wholly owned by one shareholder cannot be the sole shareholder of an AO.

The maximum number of shareholders of a ZAO is 50; if the number exceeds this threshold, the ZAO has to be transformed into an OAO within one year. The shares of a ZAO may only be distributed amongst a group of persons determined in advance (by closed share subscription). A ZAO is not entitled to offer shares to the public (by open subscription), and its shareholders enjoy pre-emptive rights if shares are sold to third parties.

The number of shareholders of an OAO is unlimited. An OAO may offer shares to the public (by open subscription), and there are no pre-emptive rights for the other shareholders should there be a sale of shares to third parties.

One of the special features of the OAO is the ‘golden share’, which vests a special right in the Russian Federation, the federal states and the municipalities to take part in the decision-making processes of the OAO. This category of shares was created during the privatisation of state-owned enterprises and may still be imposed by a resolution of state bodies with respect to strategically important enterprises.

The procedure and requirements for the registration of an AO are virtually identical to those connected with an OOO, apart from the obligation to additionally register the issue of shares of the AO with the state, in accordance with Federal Law No. 39-FZ, on the Securities Market.

The company is managed by a sole executive body (managing director) or by a sole executive body and a collective executive body (management board). In addition, the company’s articles of association may provide the establishment of a supervisory board (board of directors). In an OAO with 50 shareholders or more, the establishment of a board of directors is mandatory.

**Joint ventures**

A joint venture between a foreign investor and a Russian partner is usually established in the form of an OOO or a ZAO.
Special rules for establishing a commercial organisation with foreign investment are stipulated in Federal Law No. 57-FZ, on Foreign Investment in Russia, which applies to companies in which at least 10% of the charter capital is owned by foreign investors.

**Branches and representative offices**

Business activities in Russia can also be carried out by a foreign investor by opening a branch or a representative office. Representative offices and branches are not legal entities, but subdivisions of a foreign entity in Russia. They are subject to state registration and are represented by the head of the branch or representative office acting on the basis of a power of attorney issued by the foreign entity. Branches and representatives are subject to Russian profit and assets tax if its employees conduct business activities in Russia so that the branch or representative office assumes the status of a permanent establishment.

**Branch**

A branch is a subdivision of a legal entity which is located outside the entity’s principal place of business and which carries out all or some of the functions of the legal entity, including business activities.

**Representative office**

A representative office is a subdivision of a legal entity outside its principle place of business which represents or safeguards the interests of the corresponding legal entity.

In any case, a representative office does not, as a rule, conduct any business activities. Accordingly, it usually does not generate income and does not pay any corporate tax.

**Employment**


**Employment agreements**

Employment agreements are governed by the Labour Code. The aim of the Labour Code and the relevant court practice is the protection of the rights of the employee and the employer, whilst recognising that the bargaining power of employees and employers is not always equal.

The employment agreement must be in writing, but if there is no written agreement in place when an employee starts to carry out their relevant duties with the employer’s consent, an employment agreement is deemed to have been concluded. The employer has an obligation to execute a written employment agreement within three days of the commencement of the employment.

The Labour Code also sets out certain content requirements for employment agreements. Obligatory information includes the place of work, duties, date of commencement of employment, remuneration, provisions regarding mandatory social security, working hours and holiday entitlement (if holiday entitlement deviates from the employer’s rules). Any provision in an employment agreement that worsens the position of an employee in comparison with his / her position under the Labour Code is invalid, and the provisions of the Labour Code prevail.

Employment agreements are usually entered into for an indefinite period. The possibility of concluding fixed-term employment agreements is restricted by law and depends on the activities to be carried out. In the event of a dispute, the employer bears the burden of proving the need for the agreement to be for a fixed term. A fixed-term employment agreement can, for example, be entered into with a managing director, his / her deputies, or a chief accountant for a maximum of five years.

A probationary period of a maximum of three months can be stipulated in an employment agreement, but cannot be established for some categories of employees, e.g. pregnant women and people invited to work through a transfer from another employer.
Hiring and termination

The conditions for entering into and terminating employment agreements are regulated by law. The Labour Code also sets out certain requirements for working conditions, such as minimum wage and a minimum holiday.

An employee can – without the consent of the employer – voluntarily terminate an employment agreement by giving at least two weeks’ notice to the employer. The agreement may be terminated in less than two weeks with the employer’s consent. At any time before the expiry of the notice period, the employee may withdraw the application for termination.

The Labour Code stipulates an exhaustive number of grounds for an employer to terminate an employment agreement: an employee’s repeated breaches of the employment agreement, an employee’s (documented) incompetence, redundancy or liquidation of the employer, etc. The employment agreement with a managing director may contain additional contractual grounds for termination, including the termination of his powers as managing director.

As a general rule, an employee may not be dismissed during a period when he / she is temporarily disabled or on vacation, and legislation prohibits dismissing pregnant women (with the exception of when the company is being liquidated or the employer terminates its activities).

When the employment conditions in an employment agreement cannot be maintained any longer due to a redundancy, the reorganisation of technological processes or other similar reasons, the employer can change the employment conditions. This can be done with two months’ prior notice to the employee. If the employee does not agree with the new working conditions, the employer is obliged to offer the employee another job in line with the employee’s qualifications. If there is no opportunity to provide alternative employment or an employee does not agree to start the new employment, the employment agreement must be terminated. If such reorganisation could lead to mass redundancies, the employer has a right to offer part-time work to employees for up to six months.

In addition to individual employment contracts, collective employment agreements may be entered into (typically at large industrial businesses) by the employer and employee representatives, where they establish the basic employment conditions in addition to the Labour Code provisions.

Trade unions have begun to play a more significant role in employment relations. A number of employment issues can only be resolved with the consent of trade union representatives. Labour law establishes certain guarantees for employees who are members of trade unions. An employer can only terminate an employment agreement with such an employee with the consent of the trade union.

The Labour Code sets out specific employment conditions and guarantees for some categories of employees such as women, employees under 18 years of age, seasonal workers and employees in certain specific geographical areas.

The Federal Labour Inspectorate is responsible for overseeing compliance with labour legislation requirements by inspecting employers' premises, requesting any internal regulations and bringing claims in cases where labour law requirements have been breached.

Disputes between employers and employees can be resolved by a special ad hoc commission on labour disputes, consisting of employer and employee representatives. Employment disputes can also be resolved in court. In Russia, there is no specific labour court, so these disputes can be brought before a civil court.

Employees have the right to defend their rights. This includes the right to refuse to carry out work which is not set out in the employment agreement or constitutes a danger to their health.

Foreign employees

Under Russian law, a work permit and a work visa have to be obtained before a non-Russian citizen commences his / her work in Russia. Russian law currently specifies two procedures for obtaining a work permit:

- Standard procedure
- Simplified procedure for highly-qualified specialists
Standard procedure

In order to proceed with obtaining a work permit under the standard procedure, the relevant employer must have obtained a ‘quota’ for those jobs in which it plans to employ foreign nationals. If no quota has been duly obtained in advance, only jobs from the list of non-quota positions may be filled by non-Russians. The list of non-quota jobs is adopted yearly by the Ministry of Health and Social Development and consists mainly of executive positions and technical specialists.

The work permit procedure consists of several stages:

► The employer submits a quota application for the next year by 1 May of the current year
► The employer obtains a permit to hire foreigners
► The non-Russian citizen obtains a personal work permit

The whole procedure for obtaining the permit to hire foreigners and the personal work permit takes approximately 3-4 months. Work permits are issued for a period of up to one year.

After receiving the work permit, a work visa must be obtained by / for the candidate for employment. For this purpose, the employer must be registered with the Federal Migration Service in order to obtain the relevant visa invitations; such registration takes about three weeks and is performed together with the issuance of the first visa invitation. If the non-Russian citizen is receiving a work visa for the first time, they first receive a three-month work visa in their country of citizenship. This short-term visa is then extended for the term of the personal work permit in Russia.

Highly-qualified specialists

The simplified procedure can be used for foreign highly-qualified specialists whose annual salary under a Russian employment agreement amounts to at least RUB 2 million (€51,000) per annum.

This procedure is less time consuming and requires fewer documents than the standard procedure; the quota or permit to hire foreigners need not be obtained by the employer. The procedure for obtaining a work permit for a highly-qualified specialist takes approximately one month, and the permit can be issued for a period of up to three years.

The documents for the work visa invitation in order to obtain the work visa can be filed along with the documents / application for the highly-qualified specialist’s work permit. In this case, the visa invitation will be issued simultaneously with the work permit.

Notification

Certain state authorities must be notified of a non-Russian’s employment: Russian tax authorities, the Russian State Labour Inspectorate, the Russian Employment Centre and the Federal Migration Service.

Economy and government

Economy

The Russian Constitution guarantees the free movement of goods, services, and capital, the promotion of competition and the freedom of private economic activity. The geographic location and territorial size of Russia facilitate access to various regions and markets and contribute to Russia’s attractiveness for realising investment projects.

Despite the negative impact of the global economic crisis, the Russian economy has been characterised by constant growth and stability promoted by state measures to stimulate the economy in the form of subsidy programmes for individual industries (including the automotive industry). Natural resources – in particular oil and gas – are an important source of income for Russia. The services industry is also one of the most important economic sectors, employing approximately 60% of the workforce and accounting for more than half of Russia’s GDP.

Investment agreements

Investment agreements are often used to set forth the rights, obligations and liabilities of parties in connection with the implementation of investment projects. In the areas of industrial construction and implementation of infrastructure projects, investment agreements (also called investment contracts or cooperation agreements) are widespread in Russia as a form of
cooperation between the state (federal, regional and / or municipal authorities) and business. Most constituent entities of the Russian Federation have their own regional legislation in regard to investment activity, which stipulates the form, content and procedure for concluding investment agreements.

At the federal level, investment agreements are regulated in Russia by three main laws: Law No. 1488-1, on Investment Activity in the RSFSR, dated 26 June 1991; Federal Law No. 39-FZ, on Investment Activity in the Russian Federation Carried out in the Form of Capital Investment, dated 25 February 1999; and Federal Law No. 160-FZ, on Foreign Investment in the Russian Federation, dated 9 July 1999. These laws, though, are all quite general and contain no detailed regulation (or even definition) of the investment agreement as a legal form of cooperation among the participants in an investment project. As investment agreements are not explicitly regulated by the Civil Code of the Russian Federation and there have been many different opinions on their correlation to agreement types set forth in the Civil Code of the Russian Federation, the practice of implementing such contracts has been controversial.

On 11 July 2011, the Supreme Arbitrazh Court adopted Resolution No. 54, according to which an investment agreement should be qualified as (i) a sale and purchase agreement, (ii) a contractor’s agreement, or (iii) a simple partnership agreement (the qualification depends on who the owner of the land is, who invests the money and who conducts the construction work). Thus, the legal implications of investment agreements became more predictable, as a sale and purchase agreement, contractor’s agreement and simple partnership agreement are governed by the Civil Code of the Russian Federation.

An investment agreement between an investor and a state or municipal body usually aims to provide the participants in an investment project with, inter alia:

- **Guarantee of stability during the implementation term of the project (including a grandfather clause)**
- **Step-by-step procedure for the transfer of rights to land for construction purposes (including a description of obligations, milestones, guarantees, the fixed amounts of different payments (e.g. rent for the land or the purchase price) and liability / penalties in case of any delays or breaches of the obligations)**
- **Terms and conditions of external (i.e. outside the construction site) and internal (i.e. within the construction site) infrastructure construction and the payment conditions concerning connection fees**
- **Tax, financial and other preferences**

An investment agreement between private legal entities and individuals usually aims to set forth the contributions of each party to a commonly financed project (for example, in the course of Real estate development) and their sharing of the completed project and risks.

**Restrictions on investment activities**

There are generally no restrictions on foreign investment in Russia, certain sectors, such as banking, insurance and telecommunications, excepted. Consent from the Federal Anti-Monopoly Service is required for transactions (i) entered into for the purpose of acquiring voting shares in the charter capital of a strategically important business by a foreign investor or (ii) which would lead to a foreign investor acquiring control of such a business pursuant to Federal Law No. 57-FZ, on Procedures for Foreign Investment in Business Entities of Strategic Importance for Russian National Defence and State Security. The law classifies 42 types of business activities as having strategic importance, including those in connection with nuclear materials, the manufacture and distribution of weapons, the manufacture and maintenance of aviation technology, activities in space, some print media with a circulation in excess of one million copies, geological surveying activities and the extraction of mineral resources in territories of federal significance.

Acquisition of a significant share in a Russian bank or an insurance company may also be limited and is subject to the authorities’ approval. In addition, general antitrust merger control rules apply (see below - Competition).

**Licensing**

Certain activities, like insurance and stock exchange operations, banking activities and the manufacture of pharmaceuticals and medical devices, may be conducted only after receipt of a respective licence from the relevant federal or regional authority.
A licence is granted following presentation of documents evidencing that all statutory requirements have been met (as per the relevant government order) and the licence fee paid. Average licence fees are currently €65. Licensing fees for financial / security market activities, as well as for making alcoholic beverages, are significantly higher (from €2,000 to €150,000).

In most cases, licences are granted without any expiration date.

The Russian state declared its intention to reduce the number of licensed activities. In 2007-2012 many business activities (such as construction, planning and auditing) were exempted from licensing. However, these exempted activities became subject to approval from respective professional associations (so-called self-regulatory organisations) and to carrying mandatory insurance of third party liability risks.

**Taxation**

**Overview**

**Individual income tax**

Russian tax residency is established where an individual is physically present in Russia for at least 183 calendar days during a consecutive 12-month period. Tax residents are subject to tax on their worldwide income, generally at the rate of 13%. Another rate may apply to specific types of income.

Tax non-residents are subject to tax on their income from Russian sources only. The standard rate for non-residents is 30%. Benefits may be provided by applicable double taxation treaties.

**Social security contributions**

Contributions for the social security of employees are levied on employers and represent an additional business cost. These contributions are paid to the Pension Fund, Social Security Fund and Medical Insurance Fund.

The aggregate rate of social security contributions is 30%, based on a salary of up to RUB 512,000 (€13,000) per annum per person. Moreover, contributions to the Pension Fund at the rate of 10% are levied on salary exceeding RUB 512,000.

The amount of social security contributions levied on the salary of foreign nationals depends on whether or not the foreign nationals hold a temporary or permanent Russian residency permit.

Social security contributions are not paid on the remuneration of those foreign nationals who (i) are employed for less than six months in Russia, or (ii) have so-called “highly qualified specialist” status.

**Corporate income tax (Profits Tax)**

Corporate income tax (profits tax) is assessed on the difference between taxable income and deductible expenses. The standard tax rate is 20% (2% of which is payable to the federal government, while 18% goes to the regional government).

Generally, tax losses can be carried forward for ten years without limitation.

Consolidated profits tax reporting is allowed, but due to stringent qualification requirements, is available to major Russian corporate groups only.

Russian law provides a participation exemption for dividends received by a parent entity from a domestic or foreign subsidiary if the parent company holds at least a 50% share of the subsidiary and the investment period is at least 365 consecutive days. Gains from the disposal of unquoted shares and participation interest in Russian companies may also be exempted from tax, provided certain requirements are met.

**Taxation of foreign companies**

Foreign companies are subject to profits tax on their business income in Russia only if a permanent establishment is created. The definition of a permanent establishment under Russian national law is generally consistent with that in the OECD Model Tax Convention: a permanent establishment is created if a foreign entity carries on business activities on a regular basis at a fixed place in Russia. Be that as it may, Russian law does not contain an objective test for defining a certain activity as regular. A dependent agent may also give rise to a permanent establishment.
Payments made by Russian legal entities or individual entrepreneurs to foreign entities may be subject to withholding tax on Russian-sourced income. Under Russian law, the following types of payments are subject to Russian withholding tax: dividends, interest, royalties, gains from disposal of Real estate, rental or lease income, freight income and others. The standard withholding tax rate is 20%, but other rates may apply to specific types of income, e.g. dividends are taxed at 15%. Withholding tax may be reduced or eliminated under an applicable double tax treaty.

**Value Added Tax (VAT)**

VAT is assessed on the supply of goods and services and on imported goods. The standard VAT rate is 18%. Taxable persons may deduct from the VAT they have charged the amount of tax they incurred on purchases for their business activities. In certain cases a VAT refund can be a bureaucratic and cumbersome procedure.

VAT on exported goods is 0%. Certain supplies, such as selected medical products, goods for children and essential food products are subject to 10% VAT.

Certain transactions are exempt from VAT: the sale of shares, financial loans, banking and insurance transactions, transfer or assignment of certain Intellectual property (but not trademarks), etc.

Foreign companies may obtain re-imbursement of input-VAT only upon registration in Russia. If foreign companies render services which are subject to Russian VAT in Russia without tax registration, the Russian buyer is usually obliged to withhold Russian VAT from its payments to the foreign company and pay the VAT to the state.

**Assets Tax**

Assets tax is levied on the net balance sheet value of fixed assets as per Russian statutory accounts. The maximum rate is 2.2%.

Foreign companies having no permanent establishment in Russia are subject to assets tax only with respect to their immovable property in Russia (tax base is to be calculated according to the administrative value determined by the registration authorities).

**Anti-avoidance rules**

**Thin capitalisation rules**

Russian thin capitalisation rules affect the tax deductibility of interest if:

- Debt financing is recognised as a ‘controlled debt’, meaning:
  - debt financing is provided by a foreign company that directly or indirectly owns more than 20% of the shares in a Russian company
  - debt financing is provided by a Russian affiliate of such a foreign company
  - debt financing is provided by another person, but repayment of the loan is guaranteed or otherwise secured by such a foreign company or its Russian affiliate
  - The controlled debt-to-equity ratio of the borrower exceeds 3:1 (12.5:1 for banks or leasing companies).

If the above criteria are met, interest on excess debt is considered non-deductible and reclassified as dividends subject to Russian withholding income tax.

**Transfer pricing**

The Russian tax authorities may impose taxes on the basis of arm’s length prices in the following cases (controlled transactions):

- foreign trade transactions between related parties
- transactions involving third parties that are not related parties, if such third parties do not exercise any additional functions, take on any risks or use any assets

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foreign trade transactions involving commodities traded on global exchanges, if the total proceeds from such transactions exceed RUB 60 million per calendar year, or if particular types of commodities are traded in such transactions

transactions with residents of any of the jurisdictions on the Russian Ministry of Finance’s list of tax havens, if the total proceeds from such transactions exceed RUB 60 million per calendar year

transactions between Russian related parties, if the total proceeds from such transactions exceed RUB 3 billion per calendar year (for 2013 the threshold is RUB 2 billion), or if either of the parties to the transaction enjoys preferential tax treatment or certain tax advantages (for such transactions the thresholds will be much lower)

One of the main criteria for recognising parties as related is the direct or indirect holding of more than 25% of the shares by one in the other party.

The following five methods of market price determination are provided: (i) comparable uncontrolled price; (ii) resale price; (iii) cost plus; (iv) transactional net margin; (v) profit split.

Major Russian taxpayers may enter into advance pricing agreements with the Russian tax authorities.

Tax benefits

Russian law recognises a spectrum of tax benefits available based on the residency principle (regional benefits and special economic zones) or the special status of a particular industry.

Regional benefits

Constituent Russian entities have the right to reduce the regional part of their profit tax burden from 18% to 13.5%, thus bringing the maximum overall profit tax (including the federal part) to 15.5% (inclusive of the federal part). A significant reduction in or full exemption from assets tax and land tax may also be provided. Such exemptions normally require that the investor meet specific investment criteria applicable to the region.

Special economic zones

Special economic zones are designated areas which, by Russian Government decree, enjoy profit tax benefits and an exemption from asset tax and land tax. Furthermore, a resident of a special economic zone may benefit from a customs free regime and apply accelerated tax depreciation. Russian law also explicitly provides a guarantee against unfavourable changes in tax law (grandfather clause).

Skolkovo innovation centre project

Skolkovo participant status provides an exemption from VAT, profits tax and assets tax. Moreover, a reduced rate of social contributions (14%) is applicable. This exemption is limited to ten years. It terminates once the income of a participant reaches a certain threshold.

Exemptions to certain industries

Agricultural producers, medical centres and educational institutions meeting certain criteria may be exempted from profit tax.

Double taxation treaties

Russia has signed double tax treaties with many other countries of the world, which are usually based on the OECD Model Treaty and the UN Model Convention. The table below contains the tax rates applicable under several double taxation treaties to which Russia is a party.

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**Amendments to double taxation treaties**
Starting from 2013, protocols amending double tax treaties with Cyprus and Switzerland apply.
In 2013, the protocol amending the double tax treaty with Luxembourg has been ratified and will enter into force starting from 2014. Further, in 2013 Russia signed a protocol with Malta which is expected to become effective in 2014.

All new protocols contain information disclosure requirements, anti-conduit provisions, amendments regarding taxation of capital gains derived mainly from investments in immovable property and income from mutual investment funds at source. Generally, the changes are aimed at achieving compliance with OECD standards on fiscal transparency and information sharing on effective beneficiaries.

Dispute resolution

The Russian state court system consists of three separate branches:

► Constitutional courts
► Courts of common jurisdiction and
► Arbitrazh (commercial) courts

The Constitutional Court of the Russian Federation decides whether federal laws and other federal regulatory acts, as well as the constitutions, laws and other regulatory acts of constituent entities of the Russian Federation, comply with the Constitution of the Russian Federation. In addition, constitutional courts of constituent entities exist which rule on whether laws and other regulatory acts of the respective constituent entities conform to the constitutions thereof.

Courts of common jurisdiction consider a wide range of cases, including criminal, labour, civil, and administrative disputes, involving various participants, except for disputes connected with business activities. The Russian system of courts of common jurisdiction consists of magistrate courts; three levels of federal courts (district courts, courts of each constituent entity of the Russian Federation and the Supreme Court); and specialised courts.

The Arbitrazh (commercial) court system in Russia consists of arbitrazh courts of the constituent entities of Russia, appellate arbitrazh courts, federal circuit arbitrazh courts, the Supreme Arbitrazh Court and specialised arbitrazh courts (for instance, the Court on IP Rights). Arbitrazh courts specialise in commercial disputes and other disputes connected with business activities. Most often, the parties to such disputes are legal entities and individual entrepreneurs, but in some cases arbitrazh courts also consider business disputes with individuals who are not individual entrepreneurs. The competence of courts of common jurisdiction and arbitrazh (commercial) courts sometimes overlap.

Competition

Competition law needs to be observed when doing business in Russia. The Federal Law No. 135-FZ, on the Protection of Competition, dated 26 July 2006 contains general provisions, while specific laws exist regarding competition in the retail and banking sectors and for natural monopolies. The authority responsible for overseeing competition is the Federal Antimonopoly Service, known as the FAS.

The law on the Protection of Competition specifies rules on the control of mergers (called economic concentration), abuse of dominance rules, vertical and horizontal agreements, holding tenders and the procedures for granting state and local benefits.

Russian merger control is primarily concerned by acquisitions of more than 1/3 of the shares in Russian limited liability companies, 25% of the shares in Russian joint stock companies, and more than 20% of the assets of Russian companies. Specific rules also exist for establishing new companies if their shares are paid with the shares of other companies and for mergers in the finance sector. Depending on the ‘economic power’ of the parties, a transaction may require either the prior approval by, (in which case the transaction may not be performed until the approval is granted), or a post closing notification to the FAS. Economic power is defined through thresholds tied to the total assets and the turnover of the whole group of companies, to which the legal entity (being a party to the transaction) belongs. As for transactions taking place abroad and among foreign companies, Russia adheres to the so-called effects doctrine, i.e. essentially, Russian antimonopoly law applies if the transaction has an impact on the Russian market. Since the beginning of 2012, the FAS needs not to be notified if the transaction involves a turnover of not more than RUB 1 billion on any Russian market.

Dominance, which may be very broadly defined as having a market share of over 35% (note that safe harbour is only 8%), is burdensome in Russia, since it significantly limits a company’s conduct. For dominant businesses, in particular, the following is prohibited: excessive and predatory pricing, price discrimination, market foreclosure and imposing ‘unfair’ terms. If a
company suspects it may be dominant in any Russian market, it is advisable to reassess its trading terms and other activities in the context of potential abuse of dominance allegations by the FAS. It must be pointed out in this regard that the FAS often tends to define markets narrowly, with respect to both the product and to the geographical area, so the FAS may establish high market shares for some separate products and in geographically very local ‘markets’.

Cartels are officially the number one enforcement priority for the FAS. The investigative powers of the FAS have been extended, and the FAS has entered into cooperation agreements with the Russian police, which allows, in particular, reading corporate e-mail obtained in dawn raids and wiretapping. Amendments to the law On the Protection of Competition in early 2012 limited cartel offences to price fixing, bid rigging, market division, artificially lowering supply and avoiding contracting with specific parties.

In the case of vertical agreements, i.e. those between a supplier and a purchaser, current rules are quite complex, and the lawfulness of specific agreements should be analysed on a case-by-case basis. It is worth noting, though, that safe harbour for vertical agreements is 20% of the market share for both parties.

The FAS is arguably among the most active Russian government agencies, and it makes efforts to investigate and prosecute any kind of anticompetitive conduct in Russia.

Therefore, taking into account that the FAS may impose penalties of up to 15% of turnover generated by the offender in the relevant market where the offence is determined to have taken place, extra care is highly recommended if there is any doubt about the issue of competition compliance in the Russian markets.

**Intellectual property**

**Types of Intellectual property rights**

In the age of economic globalisation and the development of global markets, including Intellectual property markets, due legal protection of Intellectual property has taken on special significance. Clearly, such protection is effective only if businesses take all the necessary steps to establish their Intellectual property rights in Russia.

Russian IP law recognises the following types of Intellectual property:

- **Trademarks**
- **Know-how (trade secrets)**
- **Copyrights: science, literature and art, software**
- **Databases, performances, audio recordings, broadcasting**
- **Patents: inventions, utility models, industrial designs**
- **Corporate names**
- **Trade names**
- **Others**

**Trademarks**

A trademark is a brand designation that functions to distinguish the goods or services of one person or company from similar goods or services of others. A trademark may consist of one or more words, a design or logo, a packaging shape, a colour or colour combination, a sound or hologram, or some combination of these. Because a trademark designates the origin of goods or services, it serves not only to establish and preserve brand visibility and the reputation of the trademark owner, but also to protect the trademark owner’s market by influencing the purchasing decisions of businesses and consumers who have come to rely on the quality and reputation of that particular brand.

Trademark rights in Russia are established and maintained only by registration either directly with the Russian Federal Service for Intellectual property, Patents and Trademarks (Rospatent) or with WIPO, with Russia designated as a registrar.
country. The trademark registration procedure can last one year or more. Trademark protection is granted for a period of ten years from the filing date and may be renewed for a subsequent ten-year period. In Russia, the first-in-time / first-in-right principle applies. Until a trademark owner has filed an application to register its trademark in Russia – by means of either national or international registration – anyone else can file an application to register that trademark, and by doing so can obtain the exclusive right to use it in Russia. Such a registrant can prevent the would-be owner from using that trademark, or permit such use only in return for royalty payments. Nonetheless, the would-be trademark owner can oppose the registrant by showing that the mark as registered by the other party misleads potential consumers regarding the type of goods / services in question, or regarding their provider.

**Know-how**

The right of ownership to know-how commences from the time of its creation.

Pursuant to the Russian Civil Code, know-how includes knowledge / proficiency of any kind (e.g. relating to output or to technical, business or operational processes), the result of intellectual processes in the scientific / technical area and expertise on the processes of business activities, if:

- it has a real or potential economic value due to the lack of its knowledge by third parties
- third parties have no legal access to it
- it is classified as a trade secret by the entitled party

Information is considered a trade secret after the entitled party has:

- created a list representing the trade secret
- limited access to that information by erecting procedural rules for regulating the use of the information and ways to administer it
- registered everyone with access to the information and / or those who will be provided with access in future
- regulated the handling of the information by entering into agreements with employees and with business partners
- documented the trade secret information and applied the annotation “trade secret”, including the name and address of the entitled rights holder

**Copyright**

The law protects:

- written, oral and three-dimensional works
- sound and visual recordings
- images
- computer programs

Protection arises automatically from the time the work is created. A copyright is protected for the lifetime of the author and a further 70 years following the author’s death. Copyrights for work, whose author is unknown or died before his / her work was created, expire after 70 years, counting from the day the work was legitimately published. Upon the expiry of the effective term of the exclusive right, a scientific, literary or artistic work, whether it has been disseminated or not, passes into the public domain.

Copyrights extend to both disseminated and non-disseminated works expressed in any objective form, including written and oral forms (in the form of a public pronunciation, a public performance or another similar form), images, sound or video recordings and three-dimension spatial forms.
**Patents**

What is protected by patents?

- **Inventions**
- **Utility models**
- **Industrial designs**

An invention is a technical solution in any domain relevant to a product (in particular, a device, substance, strain of microorganism or culture of cells of flora or fauna) or means (process for effectuating actions on a material object with the assistance of material means). An invention is patentable if it is new, a non-trivial “inventive step” (non-obvious) and “industrially applicable” (useful). The disclosure of invention-related information does not exclude patenting an invention if the application for the patent is filed within six months from the date of disclosure.

A utility model is described as a technical solution relating to a device. A utility model can be protected if it is new and industrially applicable. Please note that non-obviousness is not required for a utility model. Other provisions related to inventions are applied mutatis mutandis.

An industrial design is described as an artistic design solution for the manufacture of industrial or handicraft production determining its external appearance. An industrial design can be protected if it is new and original.

We would like to stress that the Russian priority system is ‘first-to-file’ rather than ‘first-to-invent’. The first-to-file system might seem to be somewhat less fair, but it is much easier to administer. The priority of a foreign invention, utility model or industrial design may be established by the filing date of the first application in a country that is a signatory to the Paris Convention, if the application in Russia is filed within twelve months (for inventions and utility models) or six months (for industrial designs) from the filing of the original application; the applicant should – within a defined period of time – also notify the Russian Federal Service for Intellectual property, Patents and Trademarks (Rospatent) of its intention to file such an application.

Protection lasts twenty years for inventions, ten years for utility models and fifteen years for industrial designs, starting from the date of filing. In some circumstances, the term can be extended (for five years for inventions related to medicines, etc; for three years for utility models; and for ten years for industrial designs). On the expiration of the protection period, the patent moves into the public domain.

**Corporate names**

A corporate name is the name under which an entity performs its business, which is defined in its constitutive documents and is registered in the State Register of Legal Entities.

A company owns the exclusive right to its corporate name. However, company names can not be licensed, assigned or otherwise transferred to third parties. The right of ownership to a corporate name commences from the time a legal entity is founded.

**Trade names**

Legal entities in Russia may use trade names for the individualisation of trade, industrial and other enterprises belonging to them and that are usually used on billboards. Trade names are not included in constitutive company documents or otherwise registered, and may be used for the individualisation of one or several enterprises. The right of ownership to a trade name commences at the moment when the name has gained notoriety within a certain territory.

The exclusive right to a trade name individualising a Russian enterprise is protected within the territory of Russia. Such an exclusive right is terminated if not used continuously for a year.

**Marketing agreements (in particular franchise agreements)**

In the marketing business in Russia contracts for services, commission contracts and agency contracts are widespread. Such contracts are governed by the Civil Code of the Russian Federation and differ mostly in scope and type of services, as well as in liability vis-à-vis third parties and termination rules.
In addition to the above types of contracts, licensing and franchising contracts are usually used for the marketing and distribution of goods and services in Russia.

**Franchise agreements**

Under a Russian law franchise agreement, a franchisor grants a franchisee, for consideration, a set of IP rights, mandatorily including the right to conduct business using the franchisor’s trademark and/or service mark. In addition, other Intellectual property rights, such as the right to use a trade name or the right to gain access to trade secrets, must be granted under a franchise.

Because every franchise in Russia involves a trademark, it requires registration with the Russian Federal Service for Intellectual property, Patents and Trademarks (Rospatent). The trademark in question must be validly protected in Russia at the time the franchise agreement is submitted for registration.

Russian franchise law differs from that of many other countries with respect to its strict registration requirements. In Russia, each franchise agreement must be registered; even if a franchise agreement has been signed by the parties, it has no validity prior to registration. A franchise agreement between parties not located in Russia but intended to establish sub-franchises within Russia must likewise be registered; otherwise, no sub-franchise can be established, as Rospatent will refuse to register any sub-franchise agreement. The same is true for any amendment to or premature termination of a franchise agreement; no amendment or termination is effective until registration is granted.

Russian law also provides specific franchisee and consumer protection, which may apply even to cross-border franchise agreements with a Russian franchisee.

**E-commerce**

Russian e-commerce legislation is still being developed. Several draft laws, including on electronic trade and on legal regulation of rendering internet services, are currently under consideration by the Russian Parliament, with the aim of improving the legal basis for the regulation of business on the internet.

The use of electronic signatures (e-signatures) is already allowed in Russia, provided that certain criteria are met and that the signatures are obtained through a special procedure.

E-signatures are presently used mostly by banks and e-trade platforms where a rapid and constant exchange of documents that have to be duly signed is required. To sign a contract electronically, both parties must have their own e-signatures and follow the procedure prescribed by law.

Should a company wish to use an e-signature, it must obtain a certificate of electronic signature by filing an application with a state-accredited certification centre. There are currently a number of such centres in various regions in Russia, including Moscow.

In 2011 the Russian Parliament adopted a new law on e-signatures, which completely superseded the previous law as of 1 July 2012.

Generally, the new law does not dramatically change the procedures established by the previous law, although, it does provide a broader definition of an e-signature, which includes:

- a simple e-signature created with the use of passwords, allowing the creator to be verified and
- an e-signature with enhanced protection (being similar to the currently applicable protection of e-signatures)

Furthermore, foreign e-signatures may be recognised in Russia under the new law. However, the procedures for such recognition are still unclear.

**Distance selling**

There are no specific laws governing contracting on the internet. It is possible, nonetheless, to draft and conclude contracts electronically. The Civil Code establishes that a contract in written form may be entered into by means of document exchange via “…telegraphic, teletype, telephone, electronic or other communications allowing determining with certainty that the
"document comes from the party to the contract". In practice, to comply with the written form requirement, it is advisable to have the contract signed by e-signatures.

In addition to the above, Russian law allows adhesion contracts, i.e. those in which terms are defined by one of the parties in a formulaic or other standard form. It can be accepted by another party only by adhering to the offered contract as a whole. This is the most common way of contracting on the internet in Russia, where the adhesion contract is signed by the buyer following delivery of the goods. The Civil Code protects the adhering party against depriving of rights which are generally granted under the relevant type of contract.

Data protection

Any company doing business in Russia must comply with the requirements of Federal Law No. 152-FZ, on Personal Data, dated 27 July 2006. The law on Personal Data applies to all entities, organisations, institutions and individuals that collect and process any personal data in Russia.

The definition of personal data is also very broad, covering any data which may relate directly or indirectly to the individual in question.

Key obligations under the law on personal data

Consent

The law requires obtaining the consent of individuals whose data are collected and then processed. The consent must be given "in any form which allows proving such consent". In practice, this means that it is advisable to have such consent in writing.

Furthermore, consent is required if data should be transferred to a state (e.g. the residence of a holding company or a service provider involved in data processing) which “does not provide adequate protection of personal data”. For instance, the law does not consider the USA to be a state “providing adequate protection” for personal data. In contrast, the member states of the Council of Europe’s Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data are considered to provide adequate protection and, thus, no prior consent for cross-border transfer is required for transfers to these states.

Registration with a data protection authority

The competent authority in the sphere of data protection is the Federal Service for Supervision in the Sphere of Information Technologies and Mass Communications (Roskomnadzor). The registration is simple and can be completed and filed online at www.rsoc.ru, but must then be followed by a hard copy.

Organisational and technical security measures

Since 1 July 2011, all operators have to maintain special systems for protecting personal data (software and hardware measures). The systems must comply with the requirements of the Russian Federal Security Service (FSB) and the Federal Service for Technical and Export Control (FSTEK), and in particular with the Joint Order of the FSB and FSTEK dated 13 February 2008. The compliance of the systems with the requirements of the law On Personal Data and the above order may be reviewed by Roskomnadzor.

Internal data privacy officer

Every company doing business in Russia must appoint an internal data privacy officer, who is responsible for all data protection issues within the company. Normally, this would be an HR director or someone with similar duties within the company.

Fines

At the moment, fines for breaching the law on Personal Data are quite low (maximum of RUB 10,000 (€250)), but Roskomnadzor is currently preparing changes to the law, which will then be brought to the Russian Parliament.
Product liability

Product liability and consumer protection

Product liability in Russia is governed by the Consumer Rights Protection Law (CRPL) dated 7 February 1992 and by the Second Part of the Civil Code of the Russian Federation. The provisions in the Civil Code include both general tort law regulations and a chapter on special product liability provisions, which are very similar to those of the CRPL, except that in the CRPL they are somewhat more detailed. The CRPL applies only to consumers (i.e. natural persons who buy or intend to buy goods for personal, family, household or other non-commercial purposes), while the Civil Code also applies to non-consumers and legal entities purchasing products for non-commercial purposes.

According to the CRPL and the Civil Code, damage to the life, health or property of an individual or the property of a legal entity as a consequence of design or other defects in goods, work or services, or as a consequence of unreliable or insufficient information concerning the goods (or work or services) is subject to compensation by the manufacturer or the seller of the goods (the service provider, work executor), irrespective of fault or of whether the injured person was in contractual relations with the parties which caused the injury or not.

Damages for personal injury and to the property of a person may be recovered without any restrictions. There is no limitation on the amount of damages (except for those arising during the carriage of goods or baggage).

The CRPL also provides for compensation for damages for pain and suffering; however, in this case, the fault of the tortfeasor has to be proven by the injured party. The amount of compensation for pain and suffering is stipulated by the court and is independent of any amount of compensation for other damages.

It is worth mentioning that some other acts may establish special limits on product liability. For example, in the Medical Preparations Act enacted in 1998, special legal grounds are stipulated for the manufacturer’s and the seller’s liability.

Russian civil law also provides the seller’s contractual liability for delivery of defective products. Based on this, the buyer may demand any of the following:

► a price reduction
► repair of the product
► reimbursement of repair costs

If the product defects are substantial (i.e. they cannot be fixed or they arise again after repair), the buyer is entitled to rescind the contract and have the price refunded or demand the replacement of the product.

Consumer rights concerning poor product quality are wider. Consumers are entitled to claim the following:

► Replacement of the defective product with the same model
► Replacement of the defective product with a similar but different model, along with recalculation of the price
► Repair of the defective product or reimbursement of repair costs
► Rescission of the contract and refund of the purchase price

According to recent amendments to the CRPL, the first and fourth claims above can also be raised against the manufacturer, importer or authorised agent of the manufacturer (or the seller). The authorised agent of the manufacturer (or of the seller) is a legal entity or individual entrepreneur authorised by contract with the manufacturer (or the seller), including a foreign manufacturer (or a foreign seller), to accept and to satisfy the consumer’s claims.

Exceptions apply to durable goods (e.g. refrigerators, washing machines), as listed by the government. According to recent amendments to the CRPL, consumers are entitled to claim 1, 2 and 4 only within 15 days after receipt of the durable good. Upon expiry of this period, these claims may be raised only if (i) there is substantial damage, or (ii) the term set for repair was not complied with, or (iii) the defect was fixed more than once and resulted in the inability to use the product for more than 30 days within each year of the term of the guarantee.
Bribery and corporate crime

Russian criminal law imposes liability for bribery in the public and private sectors.

It is not permitted to offer to a governmental official (and a governmental official is not allowed to receive) any form of benefit (e.g. money, financial credit documents, presents, gratuitous lean of goods or services, payment for entertainment or recreation, or any other property or property benefits). Only usual gifts, the price of which does not exceed RUB 3,000 (€75), are allowed, provided that such presents are not given under condition of performance of particular official actions by a government official. Gifts received by a government official with regard to some ceremonial events, business trips and other official events (except for gifts under RUB 3,000) are state property and must be transferred by the government official to the authority where he or she conducts his or her duties.

Bribery in the private sector is the illegal transfer of material assets or rendering of services to a person, representing a legal entity, in order to induce such person to use its position for acting or non-acting in favour of the giver.

Offering and accepting a bribe in both the public and private sectors are criminal offences. A person who has given a bribe can be discharged from liability if the bribe has been extorted or if this person has notified the criminal investigation authorities of an instance of bribery. Both offering and accepting a bribe can be punished with a fine of up to ninety times the amount given as the bribe or imprisonment for up to 12 years, depending on the severity of the offence.

Additionally, it is important to mention that only natural persons can be punished under Russian criminal law. With regard to legal entities, the Anti-Corruption Law, which entered into force on 10 January 2009, establishes the administrative liability of legal entities for bribery in the private and in the public sectors. Legal entities making bribes in the public or private sector can be punished with severe fines of up to a hundredfold the amount of the bribe. The punishment meted out to a legal entity for offering a bribe does not prevent criminal prosecution of its officials for the same deed under criminal law.

Money laundering is also illegal under the Criminal Code and may lead to a fine or imprisonment.

Real estate

In Russian law, the term ‘Real estate’ includes the land, subsoil and other structures / erections / constructions firmly fixed to or on the ground, in particular buildings, facilities and installations. Buildings and other structures erected on a land plot are deemed to be separate real property. A part of a building (apartments and industrial, office and other premises) may be registered under Russian law as separate real property.

Real estate in Russia can be owned or leased, mortgaged or transferred to a trust manager (Russian law does not recognise a trust). The law does establish, however, so-called trust management agreements for an estate, but is seldom used). Parts of land plots may be used by the respective building’s owner under the law, even without an agreement. Russian law does not recognise licensing Real estate.

In spite of the fact that foreign investors can generally buy any Real estate which is or may be privately owned, there are certain restrictions on foreign investors that do not apply to domestic ones. For example, there is a statutory prohibition on the acquisition of the ownership of agricultural land and land in border areas (i.e. territories located near the state border of the Russian Federation, the list of which is approved by Order No. 26 of the President of the Russian Federation dated 9 January 2011) by non-Russian nationals and legal entities where 50% or more of the share capital is owned by non-Russian nationals or legal entities.

Some Real estate may not be privately owned at all, and must remain under state ownership, such as forests, lakes, rivers, and seas and other water bodies, and facilities and plots which enjoy special protection or are of relevance to state security.

For historical reasons, long-term leasing of land is widespread, usually for up to 49 years. Long-term land lease rights under an agreement with the Russian federal government, local government or municipality can, in certain cases, be assigned or pledged without the consent of the lessor.

Real estate deeds, deed transfers, and certain types of contracts on Real estate are subject to state registration in the Unified State Register of Real Property and Transactions Therewith. Such registration provides, to a certain extent, protection for a good faith acquirer (vindication from a good faith acquirer is, nonetheless, possible in cases of fraudulent acts and title transfers free of charge).
In addition to the state registration of rights, real property is registered in the technical cadastre, which reflects all the measurements and boundaries. Unfortunately, the cadastre of land plots and buildings (facilities) has not been unified yet; thus, it is often the case that cadastre plans of plots do not reflect respective buildings.

Options for using a certain land plot depend on (i) its category; (ii) the so-called permitted use; and (iii) environmental applications. Both the land category and its permitted use may often be changed to meet the needs of an investment project. However, the process for doing so (especially changing the land category) is time consuming and significantly depends on the discretion of many federal and local authorities.

Even if the investment project complies with the land plot category and permitted use, certain environmental requirements have to additionally be considered. One important consideration is the ‘sanitary protection zone’ for industrial property, which is established for all industrial properties which emit pollution and which can extend from 50 to 1,000 metres from the boundaries of the site on which the industrial property is located, depending on the risk posed by the property. Usually, no private residences or social infrastructure (e.g. schools) may be located within a protection zone.

Customs

General overview

Customs regulation in Russia is based on international standards. Russia is a member of the World Customs Organization and a signatory to the Convention on Temporary Import (Istanbul, 1990), while it joined the Kyoto Convention on Simplification and Harmonization of Customs Procedures in 2010. Russian customs legislation contains provisions which are similar to those of the EU Customs Code.

In 2012, Russia entered the World Trade Organisation. For this reason, Russian customs law will be modernised and simplified before 2020.

In 2010, the Customs Union among Russia, Belarus and Kazakhstan was established. Goods originating in the Customs Union member states, along with those goods already imported into the Customs Union and cleared by customs, may circulate within these three countries without further customs clearance or control procedures. Currently, however, an importer may not choose in which country to clear its goods with customs. The importer of record should register with the customs authorities of the country of residence and apply for importation with the relevant customs authorities.

Customs coding

At present, the Unified Customs Nomenclature of the Customs Union is applicable in Russia. This nomenclature is based on the Harmonized Commodity Description and Coding System. Therefore, theoretically, the first six digits of the commodity code should be identical in Russia and in the EU, although there are sometimes differences in practice. It is possible to obtain a binding decision from the customs authorities concerning the classification of goods.

Customs procedures

The movement of all goods and vehicles across the border of the Customs Union is carried out under one of the provided customs procedures. Each procedure provides different terms and conditions for clearance, which have a considerable effect on tariff and non-tariff barriers. Below is a summary of the main customs procedures.

Release for domestic consumption

The customs procedure of release for domestic consumption is used when goods are imported into Russia without the intention of their being subsequently exported. This is the most frequently used and most straightforward procedure, under which, after the payment of customs duties, import VAT and customs clearance fees, the goods are considered to be in circulation on the market in Russia.

Bonded warehouse

When goods are imported under the bonded warehouse customs procedure, the imported goods are kept in a special warehouse under the supervision of the customs authorities (customs bonded warehouse) until their sale to the final customers, their final use in Russia or their exportation outside Russia. The payment of customs duties and import VAT is postponed until the actual sale of the goods to the final customers in Russia and their removal from the customs bonded warehouse.
Goods kept in a customs bonded warehouse must remain in an unaltered condition, i.e. it is prohibited to rework, assemble, or transform goods stored in a customs bonded warehouse.

The period of storage of goods in a customs bonded warehouse may not exceed three years. After the expiration of the storage period, the goods are placed under another customs procedure. If they are released for domestic consumption, customs duties and VAT are due, but if they are exported to a country outside the Customs Union, no customs duty or import VAT are due.

**Temporary importation**

Temporary importation is the customs procedure under which the use of goods in Russia is permitted with full or partial exemption from customs duties and import VAT.

The time period for temporary importation may not exceed two years (or 34 months for leased fixed assets).

A full exemption is granted in limited cases for goods which are intended to be used in non-sales operations. Typical examples of temporary importation with full exemption are goods for an exhibition or for testing in Russia.

A partial exemption is granted in other situations where the goods will be retained in Russia for a limited period of time and will be exported afterwards. Under the partial exemption, the importer has to make customs payments in monthly instalments of 3% of the total amount calculated as if the goods had been released for circulation on the market. These amounts are not refunded if the goods are subsequently exported.

This procedure is widely used in practice, in particular in the case of importation for leasing in Russia.

**Procedures for processing goods inside or outside Russia**

There are two main procedures involving processing:

- **Processing of goods in Russia for export.** Under this procedure, companies whose business involves the processing of goods in Russia can, under certain conditions, import goods into Russia for their processing without payment of customs duty and import VAT. Once the goods have been processed and constitute finished products, they should be exported. If the finished products are released onto the market in Russia, customs duty and import VAT are due on the value of the raw materials, as well as late payment interest. A bank guarantee may be required to secure the payments of customs duties and taxes which might be due if the conditions for this procedure will be violated.

- **Processing of goods outside Russia.** The procedure of processing goods outside Russia allows exportation of goods for their processing and subsequent importation into Russia. Customs duties and import VAT are due only on the value added by the processing operations, not on the value of the exported goods. This procedure is quite advantageous for goods which need to be exported for repair outside Russia.

**Imports Licensing**

Certain types of products require permits / licences before they may be imported into Russia (such as meat and pharmaceutical products). In certain cases, even simple consumer goods (e.g. mobile phones, computers) are subject to licensing on importation into Russia. In all cases, appropriate documents have to be presented during customs clearance. Regarding simple consumer goods, Russian importers must provide customs with simplified types of licences (e.g. permits, notifications).

Actually, there is a long list of licensing documents which need to be prepared and submitted to the customs authorities, and they include certificates of conformity, declarations of conformity, import licences, permits and notifications. The list of documents to be submitted in order to import goods depends on the type of goods and the code according to the Unified Customs Nomenclature of the Customs Union (based on the Harmonized Commodity Description and Coding System). It is strongly recommended to obtain these licensing documents in advance (i.e. before the actual importation of goods into Russia) by applying to Russian state authorities.
Customs payments

Import customs duties vary according to the product group and are generally calculated as a percentage of the declared customs value: they can be applied on the basis of the weight, volume or quantity of goods or in accordance with fixed customs tariffs, while a combination of the above is also possible. Usually, customs duties range from 0% to 20% of the value of the goods. Zero customs duty rates apply for certain types of books, medicines, most technological equipment and some other goods. Due to Russia's accession to the WTO, the duty rates should gradually decrease.

Import VAT is payable at the standard rate of 18%, which is calculated on the basis of the sum of the customs value and the customs duty. Import VAT paid by the importer can generally be offset against its output VAT. Certain categories of technical equipment with no Russian-produced counterparts (according to a list approved by the Russian Government) are exempted from import VAT. In addition to customs duties and VAT, customs clearance fees also have to be paid in the form of a fixed amount based on the value of the goods being imported. All amounts normally have to be paid in advance of customs clearance.

Conformity assessment

Under Russian law and the regulations of the Customs Union among Russia, Belarus and Kazakhstan, some products may be launched on the Russian market or the market of the other members of the Customs Union only after their conformity with safety regulations has been duly assessed. The safety regulations are contained in special regulatory acts called the Technical Regulations, but, to date, there are only 26 Technical Regulations of the Customs Union and only 24 Technical Regulations of the Russian Federation, while some of them have not yet entered into force. The safety of products for which no Technical Regulations have been adopted yet is established in accordance with state (GOST-R) and interstate standards (GOST).

Product conformity can be assessed in two different ways: (i) The applicant obtains a certificate of conformity (the conformity is tested and the certificate is issued by a certification body), or (ii) the applicant, along with the certification body, issues a declaration on conformity which will be registered in a special register. The applicant may be the manufacturer or the seller (importer) of the respective product, or the authorised representative of the foreign manufacturer. Which form – certification or declaration – is required depends on the requirements of the particular Technical Regulation.

With regard to products for which no Technical Regulation yet exists, the Russian government has issued lists of the products for which a conformity certificate must be obtained and for which a conformity declaration must be issued (Government Regulation No. 982 dated 1 December 2009). For products mentioned neither in the respective Technical Regulations nor on these lists, the manufacturer can voluntarily obtain a conformity certificate.

In addition, some products (including foodstuffs and cosmetics) must be registered with the Federal Service for Oversight of Consumer Rights Protection and Human Well-Being before they may be launched in Russia or in the Customs Union. The list of such products was adopted by Decision of the Customs Union Commission No. 299, on the Application of Sanitary Measures in the Customs Union, dated 28 May 2010.

Export

Russia restricts the export of goods, information, work, services and intellectual output (disks, literature, etc.) which can be used in the production of military equipment and military technology. In order to export such items, the exporter is required to obtain a special licence from the Ministry of Defence. In practice, even if the exported products are of a “non-military nature” (e.g. car tyres, computers, radios). Russian customs requires that special letters be provided from the Ministry of Defence or other relevant authorities that confirm that these products are not military in nature, and thus can be exported from Russia without licences.

Only raw materials (e.g. oil, natural gas, timber) are subject to export customs duties.

The export of products from Russia to the territories of Kazakhstan and Belarus is regulated by the legislation of the Customs Union. No customs payments or economic restrictions are applied, with the exception of special protection, anti-dumping and compensation measures, and some special measures applied to specific commodity classes (e.g. export duties for oil and a special procedure for importing used cars into the Russian Federation from Belarus or Kazakhstan).

Existing law is stated as it applied in March 2014.
## Useful contacts

### MAJOR COMMERCIAL ORGANISATIONS

- American Chamber of Commerce – [www.amcham.ru](http://www.amcham.ru)
- Association of European Businesses – [www.aebrus.ru](http://www.aebrus.ru)
- German-Russian Chamber of Commerce (in Russian and German) – [http://russland.ahk.de/ru](http://russland.ahk.de/ru)
- Russo-British Chamber of Commerce – [www.rbcc.com](http://www.rbcc.com)
- Chambre de commerce et d’industrie franco-russe (in Russian and French) – [www.ccifr.ru](http://www.ccifr.ru)
- Russian Union of Industrialists and Entrepreneurs – [http://eng.rssp.ru](http://eng.rssp.ru)

### RUSSIAN MINISTRIES, AGENCIES AND SERVICES

- Ministry of Foreign Affairs – [www.mid.ru](http://www.mid.ru)
- Federal Customs Service – [http://eng.customs.ru](http://eng.customs.ru)
- Ministry of Justice (in Russian) – [www.minjust.ru](http://www.minjust.ru)

**OTHER WEBSITES**

- [http://www.waytorussia.net/WhatIsRussia](http://www.waytorussia.net/WhatIsRussia)
- [www.invest2russia.com](http://www.invest2russia.com)

**Further information**

Noerr OOO  
1-ya Brestskaya ul. 29  
P.O.B. 247  
125047 Moscow  
Russian Federation  
+7 495 7995696  
F +7 495 7995697

**Contact Partners**

<table>
<thead>
<tr>
<th>MANAGING PARTNER</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Björn Paulsen</td>
<td>+7 495 7995696</td>
<td><a href="mailto:bjoern.paulsen@noerr.com">bjoern.paulsen@noerr.com</a></td>
</tr>
<tr>
<td>Managing Partner</td>
<td></td>
<td></td>
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<tr>
<td>Rechtsanwalt (Germany)</td>
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<th>COMMERCIAL</th>
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<tbody>
<tr>
<td>Dr Thomas Mundry</td>
<td>+7 495 7995696</td>
<td><a href="mailto:thomas.mundry@noerr.com">thomas.mundry@noerr.com</a></td>
</tr>
<tr>
<td>Partner</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rechtsanwalt (Germany)</td>
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**REAL ESTATE**

Dr Thomas Mundry  
Partner  
Rechtsanwalt (Germany)  
+7 495 7995696  
thomas.mundry@noerr.com  

Ekaterina Evdokimova, LL.M  
Associated Partner  
Rechtsanwalt (Germany), Lawyer (RU)  
+49 89 28628178  
ekaterina.evdokimova@noerr.com  

**CORPORATE/M&A**

Björn Paulsen  
Managing Partner  
Rechtsanwalt (Germany)  
+7 495 7995696  
boem.paulsen@noerr.com  

Hannes Lubitzsch  
Associated Partner  
Rechtsanwalt (Germany)  
+7 495 7995696  
hannes.lubitzsch@noerr.com  

**BANKING & FINANCE**

Vladislav Skvortsov, PhD  
Partner  
Lawyer (RU)  
+7 495 7995696  
vladislav.skvortsov@noerr.com  

Stefan W. Weber  
Associated Partner  
Rechtsanwalt (Germany)  
+7 495 7995696  
stefan.weber@noerr.com  

**REGULATORY & GOVERNMENTAL AFFAIRS**

Ekaterina Evdokimova, LL.M  
Associated Partner  
Rechtsanwalt (Germany), Lawyer (RU)  
+49 89 28628178  
ekaterina.evdokimova@noerr.com
### MEDIA, IP & IT

<table>
<thead>
<tr>
<th>Vyacheslav Khayryuzov</th>
<th>+7 495 7995696</th>
<th><a href="mailto:vyacheslav.khayryuzov@noerr.com">vyacheslav.khayryuzov@noerr.com</a></th>
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<td>Senior Associate</td>
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### DISPUTE RESOLUTION

<table>
<thead>
<tr>
<th>Viktor Gerbutov</th>
<th>+7 495 7995696</th>
<th><a href="mailto:viktor.gerbutov@noerr.com">viktor.gerbutov@noerr.com</a></th>
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### TAX & FINANCIAL ADVISORY SERVICES

<table>
<thead>
<tr>
<th>Maxim Vladimirov</th>
<th>+7 495 7995696</th>
<th><a href="mailto:maxim.vladimirov@noerr.com">maxim.vladimirov@noerr.com</a></th>
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<tr>
<td>Associated Partner</td>
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<td>Tax advisor Lawyer (RU)</td>
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<table>
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<tr>
<th>Nikolay Baranov, PhD</th>
<th>+7 495 7995696</th>
<th><a href="mailto:nikolay.baranov@noerr.com">nikolay.baranov@noerr.com</a></th>
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Introduction and legal system

Scotland 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).

The Scottish Parliament was established in 1998 and is located in Edinburgh. It has 129 elected members, known as Members of the Scottish Parliament (MSPs), who are elected for four-year terms under a mixed member proportional representation system. 73 MSPs represent geographical constituencies with a further 56 returned from eight additional member regions (7 per region).

In September 2014, a referendum took place as to whether or not Scotland should become an independent country. 55% of voters rejected independence, with the result that Scotland remains part of the UK.

Legal system

The legal system in Scotland is a separate legal system from the other countries in the UK. It is a “bridge” system incorporating elements of civil law (particularly Roman law) and common law systems as well as the views of certain Scottish institutional writers. 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 and can be passed at Westminster or, in respect of devolved matters, by the Scottish Parliament. Devolved matters include education, health, agriculture, justice and some forms of taxation. A UK Act must be approved by the House of Commons, the House of Lords and, finally, given Royal Assent before it becomes law. An Act of the Scottish Parliament is passed by the Scottish Parliament and then also requires Royal Assent. 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 Scotland 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 Scotland. 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 Scotland (as with 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

The structure and performance of the Scottish economy is not markedly different from that of the UK as a whole. 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 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 reorientating 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, the UK has 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 sectors. 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 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 Prudential Regulation Authority (PRA). The 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 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% of global GDP and is a significant player in trade in services (namely, financial services and other business activities) which represent 37% of UK total exports and 23% 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.

Edinburgh is the UK’s largest financial centre after London and is a major European centre for asset management and asset servicing.

The UK and Scottish governments both play an active role in attracting foreign investment and operate an open and (as far as possible) unrestricted approach to investors.

Although there is 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 (CA06). 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.

Companies may be registered in Scotland or in England and Wales under the CA06. It is the key statute to which all these types of company must adhere.

Private Limited Companies

There are around 190,000 private limited companies registered with the Registrar of Companies at Companies House in Scotland.

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 a 75% majority vote).

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 two 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: first, 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's 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 business structure in Scotland are referred to as "partnerships“ but each has important differences:

► general partnerships
► limited partnerships (LPs) and
► limited liability partnerships (LLPs)

General partnerships

A partnership is a legal relationship arising from an agreement (oral or written) by which two or more persons (including bodies corporate) come together to carry on a business with a view to making a profit. Unlike the position in England, a Scottish partnership is a separate legal entity distinct from the partners and, as a consequence, contracts may be entered into in the partnership's name and the partnership may hold property in its own name. Partners in a partnership act as agents of one another and have unlimited liability. Partners are jointly and severally liable for the debts and obligations of the partnership and 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, in the absence of an agreement to the contrary, 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 which is registered in Scotland is also a separate legal person in its own right (which is not the position in England) and, as a result, Scottish LPs are frequently used in structured financings, particularly in relation to funds and property transactions.

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).

As with a general partnership, a limited 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 (Scottish LLPs are registered at Companies House in Scotland) 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, 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 the CA06. 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 in putting termination provisions in writing prior to finalising their JV arrangements.

Taking security and charging of assets

Security over businesses and assets is generally available in Scotland to creditors, although there are fairly complex rules as to its creation and to its priority according to its type and date of creation.

There are fundamental differences between the legal position on taking security under Scots law and that under English law. Scots law on security is based on both common law and statute and is more closely aligned to the European civil law jurisdictions. The form of security is closely tied to the specific type of asset over which it is to be taken.

In Scotland, a charge can be fixed or floating.
Fixed security is always created by the grant of a statutory or common law right in favour of the secured creditor. Scots law does not recognise the English law concept of a split between legal and equitable interests. The following types of fixed security can be taken under Scots law:

► Security over land and buildings (including over leases for more than 20 years) is taken by means of a statutory form of standard security

► A pledge can be used to take security over tangible moveable property (i.e. property which physically exists and can be moved such as goods, vehicles, plant and machinery). However, a pledge requires actual physical control of the secured assets to be held by the secured creditor and this requirement makes such security of limited use

► An assignation in security is used to take security over certain types of intangible property (i.e. property which only exists in an incorporeal form such as rights under a contract or Intellectual property rights)

There is no equivalent under Scots law of the English law debenture, which creates fixed and floating charges over, usually, all the assets of a company. Instead, a Scottish company, in addition to any fixed charge it may grant over any of its assets which can be charged by a fixed charge, will often grant a specific Scottish form of floating charge over all of its assets.

Assets which are subject to a floating charge are permitted to be used (and disposed of) in the ordinary course of business of the grantor until a specified default event occurs, at which time the floating charge will crystallise and the grantor 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 of assets or all the assets of a company.

Under Scots law, if the strict legal requirements for the creation of a security over a particular type of asset are not complied with, no valid security, actual or equitable, will be created.

Almost all security (other than security over cash or financial investments) created by a Scottish company, an LLP, an LP or an overseas company with a registered place of business in Scotland, will be required to be registered at Companies House in Scotland in order to make the security effective against the creditors of the grantor, or its liquidator or administrator or equivalent otherwise the security will be void against them.

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 secured creditor will be protected on the grantor'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 and methods of perfection. For charges created by companies, priority in respect of the same type of charge will usually 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 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 20% of net floating charge realisations up to a maximum of £600,000. It is important to note that priority and recovery rates can also be regulated by contractual arrangements between secured creditors.

**Employment**

**Employee relations**

The employee relations climate in the UK is relatively stable. Scotland has a slightly higher unemployment rate than the UK as a whole and the recent downturn in the oil and gas industry has led to significant redundancies in that sector.

Employment regulation applies throughout the whole of the UK. In recent years there has been a move to reduce the burden of employment regulation on UK employers, with notable changes including the recent introduction of employment tribunal fees, and the increase of the service requirement for unfair dismissal to two years.
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 (TUPE) 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 £78,335 (£80,541 from 6 April 2017) 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, colour, nationality, ethnic or national origin, sex, sexual orientation and religion or belief. The EA also confers the right for women and men to be paid equally. Regulations have recently introduced a mandatory gender pay gap reporting requirement for non-public sector employers with a least 250 employees.

TUPE provides protection for employees who are affected by a transfer of an undertaking or a service provision change. Any dismissal connected to such a transfer will be unfair unless it is for an economical, technical or organisational reason. An employer must inform and consult about any transfer to which TUPE applies. TULRCA requires employers to collectively consult with employees affected by redundancy where it is proposed that 20 or more employees will be dismissed at the same establishment within a 90 day period.

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.

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 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 Innovation & Skills – 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.

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.

With exceptions for taxes currently devolved or to be devolved in future by the UK to the Scottish Government wholly or partly, Scotland is generally subject to the same tax laws and rates that apply elsewhere in the UK. At present the UK tax authority (HMRC) exercises its powers equally throughout the UK and collects taxes at uniform rates from all UK taxpayers centrally on behalf of the UK Government, except for those taxes wholly or partly devolved to the Scottish Government, which are collected on its behalf either by HMRC or the separate Scottish tax authority, Revenue Scotland.

In very rare situations, the distinct legal systems of England and Scotland may cause different tax results to arise under provisions which are of theoretical equal application throughout the UK, for example, when dealing with partnerships, the separate legal personality of Scottish partnerships can, in certain unusual situations, give different tax results for a Scottish partnership compared to the position for an English partnership.

Devolution of Tax-Raising Powers

The Scotland Act 2012 contained provisions which devolved certain tax-raising powers (relating to Scottish matters) to the Scottish Government and granted the Scottish Government a limited power to set its own rate of income tax on non-savings income of Scottish individual residents. Taxes on land transactions in relation to Scottish property and landfill tax on landfill waste generated in Scotland were wholly devolved to Scotland. The Land and Building Transaction Tax came into force on 1 April 2015 and there are now different tax rates for property acquisitions in Scotland compared to acquisitions of property in the rest of the UK.

The Scotland Act 2016 contained further powers to set rates and bands of tax on all non-savings, non-dividend income of Scottish taxpayers from April 2017. Personal allowances and tax reliefs, however, will continue to be set by the UK Government. Furthermore, dividend and savings income rates will be charged at the same rates as the rest of the UK. Aggregates levy and air passenger duty in so far as they relate to Scotland are to become fully devolved to the Scottish Government from a date to be set by the UK Treasury.

In summary, these provisions grant Scotland the power to assess an element of income tax on Scottish residents and completely transfer to Scotland powers to raise on Scottish land transactions, landfill tax for disposal of refuse in Scotland, aggregates levy for the winning of Scottish aggregate and air passenger duty for Scottish flights.

Currently, other existing taxes remain wholly within the power of the UK Government but the Scotland Act 2012 also allows the Scottish Government to introduce new taxes specific to Scotland.

Corporation tax

Generally speaking, UK 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:

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<tr>
<th>FINANCIAL YEARS STARTING ON OR AFTER</th>
<th>RATE</th>
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<tr>
<td>1 April 2016</td>
<td>20%</td>
</tr>
<tr>
<td>1 April 2017</td>
<td>19%</td>
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<tr>
<td>1 April 2020</td>
<td>17%</td>
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Patent Box and other reliefs - the UK operates a concessionary 10% rate of corporation tax for companies exploiting patented products or similar intellectual property under the Patent Box regime.

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’.

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 the 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).

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

► 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.

For UK resident individuals, the 20% rate (called the basic rate) applies to taxable income (i.e. above the personal allowance) up to £45,000, the 40% rate for higher rate taxpayers to income in excess of £45,000 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.

Scottish resident individuals will pay the Scottish Income Tax on non-savings, non-dividend income from 6 April 2017. The Scottish Income Tax rates are the same as the UK Income Tax rates for tax year 2017/18 except for the higher rate threshold; the Scottish Income Tax higher rate threshold was frozen at £43,000 whereas for the purposes of UK Income Tax, the higher rate threshold was increased to £45,000 for tax year 2017/18. Scottish residents will pay the same tax as the rest of the UK on dividend and savings income.

► 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 £2.85 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 £8,164 up to and including £45,000 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, exceed £45,000, whereupon the 20% rate applies. Rates of 28% and 18% apply to basic and additional rate taxpayers respectively in relation to carried interest and gains on non-exempt residential property. Most taxpayers are entitled to an annual exemption. For the tax year 2017/2018, the annual exemption is £11,300.

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.

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

Companies

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.

Individuals

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 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.

Individuals resident in Scotland

Individuals treated as resident in Scotland for tax purposes are subject to the Scottish Income Tax on their non-savings, non-dividend income. The main criterion for a person to be a Scottish tax resident is the location of their home in Scotland even if the taxpayer works in the rest of the UK or elsewhere.

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 paying company.

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** — for account periods beginning after 1 April 2017 a complex set of new rules was intended to be introduced to 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. The new rules have not yet been introduced.

- **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 which disallowed interest deductions where UK net debt of a group exceeds 75% of the group's worldwide gross debt was intended to 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 (NICs) on employment income are accounted for by employers to HMRC under the Pay As You Earn (PAYE) system. The employer deducts income tax and NICs from the employee's income or occupational pension and then accounts for such deductions to HMRC. The employer is also required to pay employer’s NICs in respect of each employee, which cannot be deducted from the employee’s salary, to HMRC. Employment income for these purposes includes sick pay, maternity or paternity pay and most benefits in kind.

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 will receive a corresponding pay slip every month setting out the amount the employee has been paid (gross), the tax and NICs deducted from the employee's gross pay and any other deductions from the employee's gross pay, leaving the employee's 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 EU 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

From 1 April 2015, stamp duty land tax (SDLT) has not applied to Scottish land transactions having been replaced by land and buildings transaction tax (LBTT). LBTT is administered by a new, separate, body Revenue Scotland.

LBTT is charged at different rates to SDLT. LBTT rates apply only to the amount of consideration falling within the relevant band.

When buying residential property in Scotland, the purchaser will be liable to pay LBTT and the rates are as follows:

0% on consideration up to £145,000
2% on any amount above £145,000 and up to £250,000
5% on any amount above £250,000 and up to £325,000
10% on any amount above £325,000 and up to £750,000
12% on consideration above £750,000

These rates apply only to the purchase of a residence by an individual who does not already own a main residence (which can be located anywhere, not just in Scotland). When an individual buys a residential property and already owns a main residence that will not be sold by the date of the new purchase, or when a company or other entity buys any residence, the rates shown above are all increased by 3% (so the minimum LBTT chargeable in such a case is not nil as shown above, but 3%). An individual may reclaim the additional 3% LBTT paid if after purchase of the new residence he subsequently disposes of his original main residence within a qualifying period. This additional 3% LBTT rate does not apply to property purchases for consideration below £40,000 nor to transactions where six or more residences are purchased.

Where residential and non-residential properties are purchased together this is treated as a non-residential (commercial) transaction for LBTT (and SDLT) purposes and the commercial rates apply – see below. Although these transactions are taxed at non-residential rates, in Scotland the additional 3% still applies to that part of the consideration which is attributable to the residential properties (a just and reasonable apportionment is required). This is in contrast to the position in England where the 3% surcharge does not apply to non-residential or mixed use transactions.

“Multiple dwellings relief” will apply to transactions in which:

► the subject-matter of the transaction consists of an interest in either (i) at least two dwellings or (ii) at least two dwellings and other property or

► the subject-matter of the transaction consists of (i) an interest in a single dwelling or a (ii) an interest in a single dwelling and other property; it is one of a number of linked transactions; and the main subject-matter of at least one of those other linked transactions consists of (a) an interest in another dwelling or dwellings or (b) an interest in some other dwelling or dwellings and other property

Where this relief is claimed, the purchaser pays LBTT based on the average price for each dwelling rather than the LBTT which would have been payable on the total consideration. This is subject to a minimum payment of 25% of the tax which would be payable without the relief. When buying commercial property in Scotland, the purchaser will be liable to pay LBTT and the rates are as follows:

0% on consideration up to £150,000
3% on any amount above £150,000 and up to £350,000
4.5% on consideration above £350,000

As value added tax is applied to the purchase price for much non-residential property, the consideration used for calculating LBTT includes any VAT added to the consideration.
LBTT is payable in respect of rental payments due under commercial leases. LBTT is payable on the value of the net present value of the rents, calculated according to a formula within the Land and Buildings Transaction Tax (Scotland) Act 2013. LBTT will be payable at a rate of 1% of any amount of the net present value exceeding £150,000. LBTT is based on the actual rents payable throughout the lease term and so tenants are required to submit LBTT returns to Revenue Scotland every three years throughout the life of a lease. The additional returns will take account of any changes made to a lease since the previous return was submitted and the amount of tax chargeable on the lease in question will be reviewed, taking account of any such changes. If more tax is due (eg. if there has been a rent review that increases the rent or an extension of the duration of the lease), then it must be paid and if less tax is due, then a claim for repayment should be included in the LBTT return. Additional returns will be required if the lease is assigned or when the lease comes to an end.

Under LBTT, where there are two or more property transactions which involve the same buyer and seller, the transactions are treated as being “linked” for LBTT purposes. This means that LBTT will be calculated on the total value of all the linked transactions. Where transactions include land in both Scotland and elsewhere in the UK, the LBTT transactions are not linked with transaction subject to SDLT and, correspondingly, the SDLT transactions are not linked with transactions subject to LBTT, due to the fact that SDLT and LBTT are separate taxes.

SDLT will continue to be payable on transactions concerning property in the UK apart from Scotland.

On the purchase of shares, stocks and securities, the purchaser is liable to pay stamp duty or stamp duty reserve tax at the rate of 0.5% on the consideration.

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 apart from those wholly devolved to Scotland. Scotland has a separate general anti-abuse rule which applies to the taxes wholly devolved to Scotland and the scope of which is probably wider than the UK GAAR. The Scottish GAAR is intended to operate in tandem with TAARs contained in devolved tax legislation and the purposive approach adopted by the Scottish courts and tribunals when interpreting such legislation.

- 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 Scotland are conducted in either the relevant local Sheriff Court or the Court of Session in Edinburgh which is Scotland’s supreme court for civil matters. The Sheriff Courts have, subject to certain exceptions such as in intellectual property disputes and exchequer cases, exclusive jurisdiction to deal with cases where the sum sued for is £100,000 or less. Notwithstanding that rule, both courts can hear high value or complex claims, although it tends to be the case that these are dealt with by the Court of Session.
The civil court system in Scotland is undergoing a period of reform in terms of which various changes have already been, and will be, introduced. These include introduction of (1) summary sheriffs to deal with low value, routine civil disputes; (2) a new “Simple Procedure” to replace small claims and summary cause; and (3) new specialist sheriffs to deal with particular matters. In addition, in January 2016 the newly established Sheriff Appeal Court came into operation for civil matters.

Civil cases are heard in the first instance by a single judge in the Court of Session or a single sheriff in the Sheriff Court. The process of litigation is largely managed by the parties but in terms of the civil court reforms there is a move towards more judicial management of cases.

The courts have powers to grant a wide range of interim remedies before and during the course of proceedings and may grant interim relief in respect of legal proceedings in other jurisdictions.

Remedies awarded by the courts commonly include damages, declarations, interdicts (equivalent of English injunctions), specific implement or orders for sale. Interest may be awarded on monetary judgements.

The unsuccessful party is usually liable to pay expenses to the other side. The successful party can hope to recover a proportion (but not all) of its costs - usually in the range of forty to sixty percent of their actual legal spend. However, the courts have discretion to decide the extent to which costs are payable by one party to another.

Scottish judgments can be enforced in Europe under the Brussels Regulation or the new Brussels Regulation (Recast) depending on the date when proceedings were commenced. Outside the EU, various reciprocal arrangements allow for international recognition and enforcement of Scottish judgments.

**Alternative Dispute Resolution (ADR)**

Businesses can use the following alternative methods to resolve disputes in Scotland:

**Arbitration**

Businesses can agree to use arbitration to resolve disputes. In Scotland, arbitration is governed by the Arbitration (Scotland) Act 2010. This Act contains two types of rules - mandatory, which apply in all cases and cannot be disapplied by agreement between the parties; and default rules which apply absent any agreement to the contrary by the parties. An arbitral award is legally enforceable and can be enforced internationally under the New York Convention.

**Adjudication**

Adjudication is a “fast track,” binding, interim method of dispute resolution introduced by s108 of the Housing Grants, Construction and Regeneration Act 1996. It is used in construction disputes. It gives parties to construction contracts the right to refer any dispute for adjudication. 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 to issue an adjudication award. The adjudicator’s decision can be “appealed” to the courts, or to arbitration.

**Expert determination**

Expert determination is the resolution of a dispute by an expert. In Scotland it is used for disputes which require specific expertise. For example, in a financial dispute an accountant might be appointed to give an expert determination; in a property valuation dispute it would be a surveyor. Expert determination is used as agreed by the parties and there is no right of appeal.

**Mediation**

Mediation is a negotiation facilitated by a third-party neutral mediator, who works with the parties confidentially and on a without-prejudice basis to try to achieve an agreement between them. If an agreement is reached it will be recorded in writing. Mediation is encouraged by the Scottish courts and the courts have power to “sist” (freeze) civil proceedings while mediation takes place.
Competition

Mergers, acquisitions and certain structural alliances (including some joint ventures) may be subject to merger control rules, either at a 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. In Scotland, proceedings can be brought in the IP Court in the Court of Session in Edinburgh, which is part of the Supreme Court of Scotland.

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). Proceedings in Scotland can be raised in the IP Court in the Court of Session.

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, or an International trademark registration which designates the UK through the World Intellectual Property Organisation.

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 or, in Scotland, the IP Court in the Court of Session.

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). Actions in Scotland can be raised in local Sheriff Courts or the Court of Session.

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 Scotland (as in the rest of the UK), 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 in Scotland (and the rest of the UK). 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 Scottish Information Commissioner handles only compliance with the freedom of information regime in Scotland. 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).
The ICO maintains a register of data controllers which is accessible via its website:


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 Maximilian 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.


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 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 £50 million 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 in Scotland for manslaughter 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 2002 (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 it 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 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.

Fraud

In Scotland, fraud is a common law crime, which is committed by the “bringing about of any practical result by false pretences”. The false pretence can be express or implied and may result from either positive actions or a failure to do something. There must be an intention to deceive or defraud and the victim must have acted in a way that they would not have otherwise done, without the false pretence, to the benefit or advantage of the person committing the fraud, or to the prejudice of the interests of another person.

The Criminal Justice and Licensing (Scotland) Act 2010, section 49 also contains two fraud offences:

► a person commits an offence if he has in his possession, or under his control, an article for use in, or connection with, the commission of fraud, and this offence carries a possible sentence of imprisonment of up to 5 years, or a fine, or both
► a person commits an offence if he makes, adapts, supplies or offers to supply an article knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud, and this offence carries a possible sentence of imprisonment of up to 10 years, or a fine, or both

The offence of fraud may be committed by a body corporate if any director, manager, secretary or officer acts as a directing mind of the body. Fraud requires that the accused knew that the pretence was false and intended to deceive the other party and it is possible to ascribe to the company the necessary state of mind of a natural person who is the company’s controlling mind and decision-maker, and thereby attributing the company with criminal responsibility.

The National Fraud Initiative in Scotland is a counter-fraud exercise led by Audit Scotland, assisted by the Audit Commission. It uses computerised techniques to compare information about individuals held by different public bodies, and on different financial systems, to identify circumstances that may suggest the existence of fraud.

There is also a separate common law crime of “uttering”, which is where some article, usually a document, is passed off as genuine to the prejudice of another person.

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

The system of landholding in Scotland is different from that in England and, in particular, the English Law of Property Act 1925 does not apply in Scotland. The system of land ownership in Scotland is one of outright ownership of heritable (i.e. freehold) property. Land is commonly held subject to title conditions (“real burdens”) which are enforceable by third parties.

The process for registration of title to land in Scotland has changed significantly in recent years. Historically, title to land was registered in a deed based register (the Register of Sasines). From 1979, titles for certain areas were registered in the Land Register of Scotland which is based on the cadastral map. Since 8 December 2014 (when the Land Registration etc. (Scotland) Act 2012) came into force), the Sasine Register has been closed to many deeds and the target is to complete the transfer of all titles to the Land Register by 2024.

There are currently no specific restrictions on a foreign incorporated company owning land in Scotland. The relevant documents must be signed in accordance with Scots law.

Legislation passed by the Scottish Parliament in March 2016 (the Land Reform (Scotland) Act 2016) provides for regulations to be made requiring the provision and publication of information about persons who have controlling interests in owners and tenants of land. The commencement date for this is not yet known.

Stamp duty land tax does not apply in Scotland and has been replaced by Land and Buildings Transaction Tax which is administered by Revenue Scotland. For more detail on this see the taxation section.

Existing law is stated as it applied in May 2017.
### USEFUL CONTACTS

<table>
<thead>
<tr>
<th>Financial Conduct Authority</th>
<th>Competition and Markets Authority</th>
<th>Confederation of British Industry</th>
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<tr>
<td>25 The North Colonnade</td>
<td>Victoria House</td>
<td>Cannon Place</td>
</tr>
<tr>
<td>Canary Wharf</td>
<td>Southampton Row</td>
<td>78 Cannon Street</td>
</tr>
<tr>
<td>London</td>
<td>London</td>
<td>London</td>
</tr>
<tr>
<td>E14 5HS</td>
<td>WC1B 4AD</td>
<td>EC4N 6HN</td>
</tr>
<tr>
<td>(+44) 20 7066 1000</td>
<td>(+44) 20 3738 6000</td>
<td>(+44) 20 7379 7400</td>
</tr>
<tr>
<td><a href="http://www.fca.org.uk">www.fca.org.uk</a></td>
<td><a href="mailto:general.enquiries@cma.gsi.gov.uk">general.enquiries@cma.gsi.gov.uk</a></td>
<td>Fax: (+44) 20 7379 7200</td>
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<th>The Law Society of Scotland</th>
<th>Information Commissioner</th>
<th>HMRC</th>
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<tr>
<td>26 Drumsheugh Gardens</td>
<td>Information Commissioner’s Office</td>
<td>Euston Tower</td>
</tr>
<tr>
<td>Edinburgh</td>
<td>Wycliffe House</td>
<td>286 Euston Road</td>
</tr>
<tr>
<td>EH3 7YR</td>
<td>Water Lane</td>
<td>London</td>
</tr>
<tr>
<td>(+44) 131 226 7411</td>
<td>Wilmslow</td>
<td>NW1 3UL</td>
</tr>
<tr>
<td>Fax: (+44) 131 225 2934</td>
<td>Cheshire</td>
<td>(+44) 843 504 0633</td>
</tr>
<tr>
<td>DX: DX ED1</td>
<td>SK9 5AF</td>
<td><a href="https://www.gov.uk/contact-hmrc">https://www.gov.uk/contact-hmrc</a></td>
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### Further information

**Key contacts at Addleshaw Goddard LLP**

#### CORPORATE

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone Number</th>
<th>Email</th>
</tr>
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<tbody>
<tr>
<td>David Kirchin</td>
<td>(+44) 131 222 9813</td>
<td><a href="mailto:david.kirchin@addleshawgoddard.com">david.kirchin@addleshawgoddard.com</a></td>
</tr>
<tr>
<td>Partner</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Andrew Ley</td>
<td>(+44) 131 222 9806</td>
<td><a href="mailto:andrew.ley@addleshawgoddard.com">andrew.ley@addleshawgoddard.com</a></td>
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#### FRAUD REGULATORY & CORPORATE CRIME

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<tr>
<th>Name</th>
<th>Phone Number</th>
<th>Email</th>
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<tbody>
<tr>
<td>Nichola Peters</td>
<td>(+44) 20 7160 5948</td>
<td><a href="mailto:nichola.peters@addleshawgoddard.com">nichola.peters@addleshawgoddard.com</a></td>
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<tr>
<td>Partner</td>
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<tr>
<td><strong>TAX</strong></td>
<td>Justine Delroy</td>
<td>(+44) 161 934 6770  <a href="mailto:justine.delroy@addleshawgoddard.com">justine.delroy@addleshawgoddard.com</a></td>
</tr>
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<td></td>
<td>Partner</td>
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<tr>
<td><strong>COMMERCIAL</strong></td>
<td>Helena Brown</td>
<td>(+44) 131 131 222 9544  <a href="mailto:helena.brown@addleshawgoddard.com">helena.brown@addleshawgoddard.com</a></td>
</tr>
<tr>
<td></td>
<td>Partner</td>
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<tr>
<td><strong>COMPETITION</strong></td>
<td>Bruce Kilpatrick</td>
<td>(+44) 20 7544 5214  <a href="mailto:bruce.kilpatrick@addleshawgoddard.com">bruce.kilpatrick@addleshawgoddard.com</a></td>
</tr>
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<td>Partner</td>
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<tr>
<td><strong>LITIGATION</strong></td>
<td>Simon Catto</td>
<td>(+44) 131 222 9560  <a href="mailto:simon.catto@addleshawgoddard.com">simon.catto@addleshawgoddard.com</a></td>
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<td>Partner</td>
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<tr>
<td><strong>REAL ESTATE</strong></td>
<td>Miles Ede</td>
<td>(+44) 131 222 9819  <a href="mailto:miles.ede@addleshawgoddard.com">miles.ede@addleshawgoddard.com</a></td>
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<td>Partner</td>
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<tr>
<td><strong>EMPLOYMENT</strong></td>
<td>Kim Pattullo</td>
<td>(+44) 131 222 9556  <a href="mailto:kim.pattullo@addleshawgoddard.com">kim.pattullo@addleshawgoddard.com</a></td>
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<td>Partner</td>
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<tr>
<td><strong>INTELLECTUAL PROPERTY</strong></td>
<td>Helena Brown</td>
<td>(+44) 131 222 9544  <a href="mailto:helena.brown@addleshawgoddard.com">helena.brown@addleshawgoddard.com</a></td>
</tr>
<tr>
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<td>Partner</td>
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<tr>
<td><strong>E-COMMERCE</strong></td>
<td>David Anderson</td>
<td>(+44) 1224 965401  <a href="mailto:david.anderson@addleshawgoddard.com">david.anderson@addleshawgoddard.com</a></td>
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<tr>
<td>Simon Catto</td>
<td>(+44) 131 222 9560</td>
<td><a href="mailto:simon.catto@addleshawgoddard.com">simon.catto@addleshawgoddard.com</a></td>
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**PRODUCT LIABILITY**
DOING BUSINESS IN SLOVAK REPUBLIC
Introduction

The Slovak Republic is was formed in 1993. As one of the fastest growing economies in Central Europe, and as a member of both European Union (EU) and NATO, Slovakia is now one of the most attractive business markets and investment locations in the region. As a result of the 2004 EU enlargement, Slovakia, with its business and investment oriented economic environment, is now part of the world’s largest common market, comprised of more than 500 million consumers.

Other points of note

Slovakia is an ideal investment destination because of its political and economic stability, which is strengthened by the Euro and the availability of a highly skilled and educated workforce offering. It also has the highest labour productivity in the CEE region, with favourable labour costs and a flexible Labour Code. It boasts an infrastructure that is developing steadily, a large selection of industrial and commercially zoned real estate available for purchase or lease, harmonised investment incentives, and high innovation potential for R&D projects. Last but not least, the country has a favourable location in the heart of Europe, between East and West, bordered by Poland, Hungary, Austria and the Czech Republic.

The best investment opportunities can be found in the following emerging sectors: R&D, Design & Innovation, Technology centres, ICT & software development, High-tech industries and Tourism. Additional opportunities can be found in Slovakia’s traditional sectors: Machinery & Precision engineering, Automotive, Metallurgy & Metal processing, Electronics, and Chemistry & Pharmacy, which have further growth potential. The attraction of the Slovak investment environment is due to an ever increasing number of foreign investors and volume of foreign direct investments in the country.

Legal system

The Slovak legal system is based on civil law. It consists of a legislature and independent judiciary. The legislative power is carried out by the National Council of the Slovak Republic.

There are no restrictions on foreign investment. There are no exchange control or currency regulations, apart from anti-money laundering regulations.

What type of investment is welcomed?

Reasons to invest in Slovakia:

► central European hub and excellent geographic location between East and West with great export potential

► political & economic stability: one of the highest-ranked countries for economic growth in the EU in 2010, with positive economic growth in 2011 (+2.7%), in 2012 (+1.6%), 2013 (+1.4%) and 2014 (+2.4%) and 2015 (+3.1%) according to Eurostat. The prognosis for 2016 is also positive (+3.3%)

► stable, market-friendly political environment (the Economic Freedom Index has risen fairly consistently since 1999)

► low labour costs versus high labour productivity and a flexible Labour Code (the last amendment adopted in November 2015)

► very low labour costs (about 40% of the EU average)

► availability of highly skilled, stable, and relatively young labour force

► Euro as the official currency

► a large selection of industrial and commercially zoned real estate and offices available for purchase or lease

► harmonised investment incentives

► steadily growing infrastructure

► high innovation potential for various investment projects

The best opportunities for doing business in Slovakia are in the following sectors:
Automotive industry and supplier sector

Slovakia has a long-term tradition in mechanical engineering, which is closely connected to the automotive industry. The high quality of human resources and availability of engineers, researchers and scientists in the country make Slovakia an attractive proposition to investors. The presence of Volkswagen, PSA Peugeot Citroën, Kia Motors and Jaguar, together with their global sub-contracting companies, demonstrates the country's favourable environment. The next stage of development for the automotive industry is focused on obtaining foreign direct investment.

Electronics

Electronics is the second-largest (and fastest-growing) industry in Slovakia. In recent years, the rising interest in electronics investment has focused on optoelectronics, and Slovakia has become one of the world's leaders in LCD production. Samsung is a significant investor in this sector.

ICT and software development

These are the fastest-growing industries in Slovakia. World-renowned firms, working within various parts of ICT, are established here. Slovakia has several software houses that focus on software development (i.e. Eset, Siemens Program and System Engineering, Asseco Slovakia, Gratex International, Softec, Ness KDC, Unicorn, Datalan, PosAm, Anasoft APR, Ipsosoft, Datalock, Axa, Kros, Millennium 000), as well as game development houses (including Functu and Pixel Federation), and several services centres (Amazon, AT&T, IBM, Slovak Telekom, Lenovo, Soitron, Dell, Competence Call Centre Bratislava, Accenture Technology Solutions – Slovakia).

Power industry and renewable energy sources

The power industry is very important for the Slovak economy. The long-term power policy is based on the continuous reduction of energy consumption. Nuclear power, natural gas, and renewable energy sources are the most important sources of energy in Slovakia. Slovakia has built its own capacities such as VÚJE in Trnava (Research Institute of Nuclear Power), EVPÚ in Nová Dubnica, and university faculties and other centres with a focus on RES, such as: THERMO / SOLAR Žiar s.r.o. in Žiar nad Hronom.

New materials and lightweight materials

Slovakia shows interesting potential in local academic workplaces, such as the Slovak Academy of Sciences or specialised university institutes and is building several new Centres of Excellence that are focused on materials research. Slovakia's also participates in various EU projects and co-operates with industrial firms.

Medical technologies and welfare & care

Slovakia is focused on developing professional personnel training. There are several university faculties and institutes within the Slovak Academy of Sciences that, together, present a strong base for potential development of medical technologies production and welfare & care centres. Many investors (including Siemens, Johnson Controls and ON Semiconductor) have taken advantage of opportunities offered here for research and development.

Foreign investment policy

Investment possibilities

More than a decade ago, Slovakia embarked on an ambitious plan of deep structural reform, with a vision to become one of the best business locations within the European Union (EU). Today, Slovakia is widely seen as a successful model for other EU countries, having created an investor and business-friendly environment. Slovakia is a full member of the EU, NATO, OECD, Euro and Schengen Area.

Slovakia adopted the Euro on 1 January 2009, becoming the 16th member state of the Euro Area, thanks to sustainable development and good inflation forecasts. The official exchange rate was 30.1260 Slovak Crowns to €1.00. Membership in the Eurozone reduces currency exchange risks and tightens the fiscal discipline of adopting countries, resulting in greater economic stability. In the long run, this will continue to be beneficial for business activities in Slovakia.

Slovakia is recognised as an open-market economy, and is able to pay its liabilities. Based on Standard and Poor's ratings, Slovakia has become the leader in the Central European region. Slovakia has maintained its positive momentum and has the best ratings in the V4. This is a great advantage to foreign investors, as it means that Slovak banks and companies are in a
strong financial position and are able to repay their debts. Slovakia is one of the few countries maintaining a stable and positive outlook, and ratings are not expected to change in the near future.

As already mentioned, in recent years, comprehensive and deep, structural reforms of the Slovak Government have focused on creating a business-friendly environment for investors. The following is an overview of the main reforms directly or indirectly influencing economic stability:

Simple tax system – fair and effective

There are just two rates for personal income tax: 19% and 25% (depending on the amount of income), and one rate of corporate income tax: 22%. VAT is 20%, and a reduced 10% VAT rate was introduced for medicine, books and, since January 2016, also for meat, milk, butter and bread. Repatriation of profits is 100%.

Flexible Labour Code

This was recognised by the World Bank as one of the most flexible in the EU.

Reformed social system

Among other things, new measures have been introduced to avoid abuse of the social system and improve the targeting of social allowances (e.g. the introduction of an obligation on employers to pay sickness insurance benefits for the first 10 days of an employee’s illness leave has resulted in a decrease of the average sickness rate from 9% to 3.52%).

Second pension pillar

Individual pension saving accounts in private pension administration companies have been introduced.

Health care system reform

Market principles have been introduced into the health care system.

Reformed Act on Commercial Register

The amount of time required to register a new company has been cut to a maximum of two working days, and the issue of a trade licence is limited to a maximum allotted time of three working days after the filing of a complete application. As of 1 October 2007, points of single contact were introduced at Trade Licensing Offices. The application form contains an application for trade licences, tax registration and registration with a health insurance company.

Furthermore, integrated service places (IOM) were introduced, which are more accessible to the public and make obtaining of ownership certificates, certificates of criminal records, and even extracts from the business register for legal purposes, easier. Currently more than 601 offices of the Slovak post provide this service.

Banking & finance

The banking sector has been privatised, with 97% foreign ownership. This sector underwent a dramatic recovery.

Investment incentives programme

Act No. 561/2007 Coll. on Investment Aid enables fast and transparent negotiation and describes, in a more detailed way, the requirements that should be met for this aid.

Types of business vehicles

Forms of business vehicle

There are four types of companies that can be established in the Slovak Republic:

► **Spoločnosť s ručením obmedzeným** (Limited Liability Company), official abbreviation: "s.r.o." or "spol. s r.o."

► **Akciová spoločnosť** (Joint Stock Company), official abbreviation: "a.s." or "akc. spol."

► **Verejná obchodná spoločnosť** (General Commercial Partnership), official abbreviation: "v.o.s." or "ver.obch. spol."
Komanditná spoločnosť (Limited Partnership), official abbreviation: “k.s.” or “kom. spol.”

Jednoduchá spoločnosť na akcie (Simple Joint Stock Company), official abbreviation: “j.s.a.” or “jednoduchá spoločnosť na akcie”, which will be introduced in January 2017 along with three new optional rights: the right to join the transfer of shares, right to demand the transfer of shares and the right to demand the acquisition of shares.

The most common type is the limited liability company.

Setting up and registered capital

A limited liability company (SRO) may be established by one or more founders (maximum 50) that are either legal or natural persons, irrespective of their nationalities. A limited liability company that has only one partner (shareholder) may not be a sole shareholder in another limited liability company. This rule also applies to any foreign entities. The minimum registered capital in an SRO is €5,000, and the minimum contribution of a partner (shareholder) is €750. The registered capital must be paid within the period determined in the Foundation Deed (in case the company has only a single founder) or in the Articles of Association (Articles) (if the company is established by two or more founders), but not later than five years from the date of incorporation. If the company is founded by a single founder, the 100% of the registered capital must be paid before its incorporation. The contribution may be paid in cash or in kind. Act No. 513/1991 Coll. Commercial Code (Commercial Code) expressively prohibits certain contributions in kind (including those consisting of an obligation to deliver services). The contribution to the registered capital paid before the incorporation of the company needs to be tied up on the company's separate bank account, which may not be used before the incorporation of the company no longer needs to be tied up in a company's separate bank account. Since 1 January 2016, only a written statement, from the person entrusted with management of contributions, regarding the payment of contributions or any part thereof, needs to be attached to the application for incorporation of the company.

Registration formalities

The Articles must be signed by all shareholders. The signings must be verified by a notary public. The SRO must be registered with the Commercial Register, which is held by the respective district courts. The process of company incorporation takes usually takes between two and three weeks.

Reserve fund

The limited liability company is obliged to have a reserve fund of at least 10% of its registered capital. The reserve fund does not need to be created immediately at the time of establishment or incorporation of the company, but it must be created in the year when the company reaches its first profit.

Restrictions on the rights that can attach to shares in an SRO

Generally, the shareholder is entitled to transfer his share to another shareholder of the company if the consent of the required majority of the company's shareholders is given at the company's general meeting. A share transfer to a third party outside the company is only permitted where the Articles expressly allow this.

Restriction of foreign ownership

There are no special restrictions applying to foreign ownership of companies in the Slovak Republic. Indeed, it is specifically stated in the Commercial Code that foreign persons enjoy the same rights and have the same obligations as Slovak persons in relation to the ability to participate in the founding of a Slovak legal entity or to become a partner or sole owner of an existing legal entity. From 1 May 2004, non-residents can acquire real estate in the Slovak Republic. However, this does not include land that may be owned solely by the Slovak Republic (land to which the Slovak Republic has a statutory pre-emptive right). Legal acts prohibiting the acquisition of agricultural land by foreign entities have been abolished since 1 June 2014, but new conditions, which must be met in order to acquire agricultural land, are rather of a restrictive nature. Only approximately 1% of the total utilised agricultural area in the Slovak Republic is currently owned by foreign entities.

Management structure and any restrictions on foreign managers

Generally speaking, the structure of the SRO's bodies is simple. The Slovak SRO has two compulsory bodies: the statutory body, comprising one or more managing director(s); and the General meeting, consisting of the company's shareholders. The managing director of an SRO can only be a natural person. It is not a requirement that the managing director(s) be appointed from the shareholders of the company. They can be third persons standing outside the company. Their way of conduct – whether every single managing director is entitled to represent the company in case more are appointed, or whether a
collective statutory body is established – is defined by the Articles. However, unless stipulated otherwise in the Articles, the company is represented by every single managing director.

Directors’ liability

The managing directors of an SRO are liable to the company for any breach of their duties. Any kind of agreement between the company and the managing directors that eliminates or limits the managing directors’ liability is prohibited.

Parent company’s liability

The Slovak SRO is liable for its obligations with all of its assets (property). The term ‘limited liability’ refers to the company’s shareholders. The Commercial Code defines the liability of the shareholders for the company’s obligations up to the value of the unpaid contribution registered with the Commercial Register.

Details for opening a branch office or representative office

Opening a branch office gives foreign legal persons a business opportunity to conduct business activities within the territory of the Slovak Republic, without the need to establish a Slovak company.

Trade licences must be obtained in order to allow the branch to engage in business activity. Mostly, the so-called ‘free-trade’ licences (licences where no special requirements need to be fulfilled) are sufficient. In the last few years, it has become possible to notify the Trade Licensing Authority as well as the Tax Authority in a single filing.

Every branch needs to be registered with the Commercial Register. Registration of the company with the respective registration court takes up to two working days.

Listing on local stock exchange

The Bratislava Stock Exchange (Burza cenných papierov v Bratislave, a.s.) is rarely used. The rules of the stock exchange business are regulated mainly by Act No. 566/2001 Coll. Stock Act (Stock Act) and by internal regulations of the Bratislava Stock Exchange that respect the standards and regulations of the EU.

Within corporate groups, do any issues exist in relation to the giving of upstream guarantees?

The giving of upstream guarantees may be problematic. This kind of action can be presumed as a re-disbursement of the contribution to the shareholder, which is prohibited by the Commercial Code. This especially applies to companies in crisis, where upstream guarantees will be considered as a re-disbursement of contributions when they are done on the basis of an agreement between the company and its shareholder or for its benefit. Additionally, in cases when, inter alia, upstream guarantees are allowed, they always need to be based on the ‘arm’s length’ principle.

Laws relating to the charging of assets

Securing of assets is largely contained in several legal acts regulating the right of lien, including the Civil Code, Commercial Code (regarding the securing of shares) and the Stock Act, as well as Act No. 323/1992 Coll. Notary Act and Act No. 162/1995 Coll. Cadastral Act. In general, securing assets is effected on the basis of written contract and subsequent registration with the respective register, based on the asset being secured.

Employment

Employee relations

Employer/employee relations are governed by Act No. 311/2001 Coll. Labour Code (Labour Code), which regulates such matters as: establishment of employment, dismissal, working hours, annual vacation, salary conditions, working conditions, protection of expectant mothers and adolescent employees, and workplace health and safety.

Establishment of employment

The following types of employment contracts are possible according to the Labour Code:

- Employment for a definite term (for up to two consecutive years)
Employment for an indefinite term

Employment for reduced working hours

Additional extra-employment agreements are possible:

Agreements on work performed outside the employment relationship (work performance agreements, agreements on temporary jobs of students, agreements on work activity)

Trial period

The trial period in the employment agreement must be no longer than three months or, for employees in managing positions, no longer than six months. During this period, either party can cancel the contract at any time, and without having to state the reason. In the case of expectant mothers, mothers having given birth within the last nine months, or breastfeeding women, an appropriate reason unconnected to the pregnancy or maternity must be given.

Termination of employment

The Labour Code stipulates a notice period of one month for terminating employment by written notice, given by the employer or by the employee. A two-month notice period is required if the employee has been working for the employer for more than one year and less than five years, and a three-month notice period is required if the dismissed employee has been working for the employer for at least five years. The notice period starts from the first day of the month following the month when notice was delivered.

The employee does not have to state the reasons for leaving, but the employer can only terminate an employee’s contract in compliance with conditions set out in the Labour Code. When notice is given by the employer to the employee, one of the following reasons must be stated:

- the company (or a part of the company) is being disbanded or transferred
- the employee is being made redundant by a written resolution of the employer based on organisational changes
- the employee is not able to work for long-term health reasons
- the employee does not meet the preconditions for the job (e.g. there is unsatisfactory performance of the employee)
- there has been a breach of work discipline by the employee, or
- other serious reasons

If both parties agree, employment can be terminated at any time.

Furthermore, the company can terminate an employment contract immediately if:

- the employee is convicted of an intentional criminal offence
- the employee seriously breaches work discipline

Redundancy and severance payments

When made redundant, an employee working for an employer for at least two years receives a redundancy payment amounting to at least one month’s average salary. The employee will continue to work during the notice period (concurrency of the redundancy payments and notice period has been settled). An employee working for the same employer for at least five years is, in such cases, entitled to receive a redundancy payment amounting to at least twice the average monthly salary. An employee working for the same employer for at least 10 years is entitled to receive a redundancy payment amounting to at least three times the average monthly salary. An employee employed with the same employer for at least 20 years is entitled to redundancy payment of at least four times the average salary.
Working hours

The weekly working week is 40 hours, excluding breaks, which are not paid. One 30-minute break has to be provided if the employee’s working day is longer than six hours. Additional breaks may be arranged between the employer and the employee or the employer and a trade union. Employees who work on two shifts can work a maximum of 38.75 hours per week. Employees who work on three shifts, or on continuous rotation, can work a maximum of 37.5 hours each week.

Overtime work

Overtime work may not exceed, on average, eight hours per week, during not more than four consecutive months, unless the employer agrees to a longer period with the representatives of the employees. However, this period may not be longer than 12 consecutive months. The maximum amount of overtime work that an employer may request from an employee in any calendar year is 150 hours. Healthcare employees can agree on overtime work in excess of the limit set above, to the extent of no more than additional 100 hours per year.

Bonuses for overtime work

The employee is entitled to his normal wage plus a special bonus, equal to at least 25% of his average salary, for overtime hours worked. If the employer and the employee agree to leave as consideration for the overtime work, the employee is entitled to one hour of leave for one hour of overtime work, with no entitlement to any special bonus. The employer may agree with (i) managers, (ii) employees responsible for planning, systems, creative, methodological or commercial activities, and (iii) employees who direct, organise or coordinate complex processes or an extensive set of highly complex equipment, that their pay will include overtime, though not more than 150 hours per year.

Wage for night work

The term “night work” means work performed between 10.00 p.m. and 6.00 a.m. Here, the employee is entitled to a special bonus for each hour of night work of at least 20% of the minimum wage claim according to special law.

Wage for work during bank holidays

As a consideration for work performed during bank holidays, the employee is entitled to his normal wage, plus a special bonus of at least 50% of his average earnings. If the employer and the employee agree on leave as a consideration for work performed during bank holidays, the employee is entitled to one hour of leave for one hour of work during bank holidays, with no entitlement to any special bonus.

Vacation and time off

In addition to public holidays, employees are entitled to at least 20 days of paid vacation. In the year in which the employee reaches 33 years of age, this period increases to at least 25 days.

Employment of EU / EEA citizens

An EU or EEA citizen does not need a work permit. However, the appropriate Office of Labour, Social Affairs and Family (Labour Office) is to be notified by the employer regarding the commencement and termination of employment of such EU or EEA citizen within seven working days following the date of commencement or termination of employment. The appropriate Labour Office branch is the office of territorial competence at the work performance location of the EU or EEA citizen.

The breach of the aforementioned statutory notification duty by the employer is considered a breach of the employment regulations.

Employment of non-EU / EEA citizens

An employer can employ a non-EU / EEA citizen, only if the non-EU / EEA citizen:

► is a EU blue card holder, or

► was granted:

► a temporary stay permit for employment purposes, based on a confirmation of the possibility of filling a vacancy
an employment permit, and granted a temporary stay permit for employment purposes, unless special legislation provides otherwise

an employment permit and granted a temporary stay permit for the purpose of family reunification

an employment permit and granted a temporary stay permit, if the third-country citizen has the status of a long-term resident in a member state of the EU, unless special legislation provides otherwise, or

meets the conditions pursuant to §23a Act No. 5/2004 Coll on employment services

A blue card is a form of an EU-wide temporary stay and work permit allowing high-skilled non-EU / EEA citizens to enter, stay and work in the territory of the EU member state (excluding Denmark, Ireland and the United Kingdom) during the period for which the blue card was issued. The blue card is issued for duration of the employment contract, but for a maximum of three years. The respective Police Department is obliged to issue a blue card within 30 days after the submission of the non-EU / EEA citizen's application.

If an employer intends to employ a non-EU / EEA citizen, the employer is obliged to notify the respective Labour Office about the vacant position and about he intend to employ a non-EU / EEA citizen. If the Labour Office, within 30 days after such a notification, does not find a suitable candidate for the vacant position, the employer is entitled to issue the promise of employment or enter into the employment contract with the non-EU / EEA citizen.

A non-EU / EEA citizen is, after the aforementioned 30 day period, entitled to submit an application for the temporary stay permit to the Slovak Embassy or Consulate in his home state or to the respective Police Department in the Slovak Republic with attached (i) promise of employment or employment contract, and (ii) evidence of reached qualification and respectively other documents which are listed in the Act No. 404/2011 Coll. The respective Police Department issues the temporary stay permit in the period of 90 days after the application submission.

For citizens of some countries which have entered into an international treaty with the Slovak Republic, or which guarantee reciprocity, special rules will apply and the confirmation on the possibility of filling a vacancy may be issued for up to five years. Since the exchange of diplomatic notes on 17 February 2016, these rules apply also on the citizens of the USA.

A work permit is not required for:

a partner of a business company

the authorised body of a business company or

a member of the authorised body of a business company performing an activity on behalf of the business company in the territory of the Slovak Republic, or who was assigned to perform activities in the territory of the Slovak Republic within the framework of services of an employer whose domicile is in another EU member state

Labour market

Wages

The average monthly salary is still low compared to those paid in Western Europe. The minimum monthly wage in 2011 was €317.00; in 2012, the minimum monthly wage was €327.20; in 2013 it was €338; in 2014 it was €352 and from 1 January 2015 the minimum monthly wage has been €380. In 2016, the minimum monthly wage rose to its current value of €405. Social security payments in Slovakia cover all the social security costs, so there are no extra or hidden costs for the employer. The employer has to pay the social security costs for his employee of ca. 35% on top of his employee’s salary. The employee pays social security costs of ca. 13.4% of his salary. The social security payments in Slovakia are upwardly limited by law. Everything earned above the limit is not subject to social security payments.

Labour productivity

Labour productivity is presented per hour worked, expressed as GDP per hour worked. It is intended to give a picture of the productivity of national economies expressed in relation to the European Union (EU-15) average. Basic figures are expressed in Purchasing Power Standards (PPS), i.e. a common currency that eliminates the differences in price levels between countries allowing meaningful volume comparisons of GDP between countries. Labour productivity in Slovakia has risen continuously in recent years.
Unemployment

In recent years the unemployment level has fallen considerably, thanks, largely, to foreign direct investments. In 2008 employment was at 9.6, however, because of the economic crisis, some companies were forced to dismiss employees, so total unemployment rose: 14.40% in 2010, 13.40% in 2011, 14.00% in 2012 and 14.20% in 2013, and 12.79% in 2014. The current unemployment rate is 9.90% (March 2016). This means that a skilled and productive labour force is still available.

The level of unemployment also differs according to region. The lowest level of unemployment in the years referred to above was in the Bratislava region, and the highest levels of employment were recorded in southern and eastern regions of Slovakia.

Economy and government

Currently, the Slovak economy is successfully recovering from the economic crisis. As the Slovak economy is export-oriented, it is relatively vulnerable in relation to the different economic cycles. The main priority of the Slovak government in 2013, 2014 and 2015 has been to stabilise and improve the country’s public finance.

Nowadays, building on a skilled labour force, the main industries with potential for growth are in the following sectors: automotive, electronics, mechanical engineering, chemical engineering, and information technology. These sectors are currently represented by a number of well known industrial companies including companies like: Volkswagen (automotive), PSA Peugeot Citroën (automotive), Kia Motors (automotive), US Steel (metallurgy), Slovnaft (MOL GROUP) (oil industry), Samsung Electronics (electronics), Mondi SCP (paper), Whirlpool (electronics) and Jaguar Land Rover (automotive).

Over 40% of the land in Slovakia is cultivated. The southern part of Slovakia (bordering with Hungary) is known for its rich farmland, growing wheat, rye, corn, potatoes, sugar beets, grains, fruits and sunflowers. Vineyards are concentrated in the Little Carpathians, Tokaj, and other southern regions. The breeding of livestock, including pigs, cattle, sheep, and poultry, is also important.

Restrictions / regulations

There are no applicable restrictions regarding foreign investment in the Slovak Republic.

Moreover, in 2009, the Slovak Republic joined the European Monetary Union (adopting the Euro as its official currency). Therefore, no specific exchange controls or currency regulations are applicable.

Investment incentives and grants

The provision of investment incentives and grants (State aid) is primarily regulated by EU legislation, which also creates the basic legal framework for their provision in the legal order of the Slovak Republic, since national legislation has to be in conformity with EU legislation.

Apart from the EU legislation, the area of investment incentives is regulated by the Act No. 561/2007 Coll. on the Investment Incentives. The current system of the provision of investment incentives favours investments aimed at regions with higher unemployment rates. The system of State aid also favours investments with higher added value (e.g. in research and development or IT).

Under the Investment Incentives Act, State aid may take the following forms:

► subsidies for the purchase of tangible and intangible investment property

► tax relief

► subsidies for the creation of a workplace

► transfers of real estate for a lower than usual accounting price

Investment incentives may be provided for projects in the following areas:

► industrial production

► centres of strategic / shared services
► technological and investment centres

► tourism

There is no legal obligation to provide State aid.

**Taxation**

**Taxation overview**

The Slovak Republic has implemented one of the most flexible, dynamic and simple tax systems within the countries of the European Union.

As of 1 January 2016, the Slovak Republic entered into 65 double taxation agreements (e.g. with the United States, China, Singapore, Mexico, Germany, the Russian Federation, the United Kingdom, France, Italy, the Netherlands, Switzerland, Cyprus, Luxembourg and Malta), These double taxation agreements are based on the OECD Model Tax convention.

The tax system of the Slovak Republic currently consists of the following taxes:

**Direct taxes**

► 19% and 25% personal income tax

► 22% corporate income tax

► local taxes including:
  ► real estate tax
  ► dog tax
  ► tax on the use of public space
  ► accommodation tax
  ► vending machine tax
  ► non-gambling slot-machine tax
  ► tax on the entry into and parking of a motor vehicle in a historical part of the city, and
  ► nuclear facility tax

► fees on municipal waste and small construction waste

► motor vehicle tax

► local fees for development (law will enter into force on 1 November 2016, the first municipalities may impose these fees starting January 2017)

The following taxes were abolished:

► dividend tax

► gift tax

► inheritance tax

► real estate transfer tax
The Slovak Republic does not apply any special import or export taxes or taxes applying to transfer of assets.

**Indirect taxes**

- value-added tax (VAT)
- excise taxes (alcoholic beverages, tobacco, mineral oil, electricity, coal, natural gas)

**Direct taxes**

### Personal income tax

Personal income tax rates are currently 19% and 25% depending on the amount of income. The tax liability of an individual is derived from their taxable income. The Slovak tax residents are subject to the personal income tax on their worldwide income, subject to the provisions of the applicable double taxation agreements. The Slovak tax non-residents are taxed only on incomes from Slovak sources, including the Slovak sourced salaries, rent, interests or dividends (to the extent such dividends arise from the profits earned prior to 1 January 2004).

According to the Slovak tax legislation, an individual is considered to be a Slovak tax resident (i) if the individual is domiciled in the Slovak Republic (in Slovak: trvalý pobyt) or (ii) if the individual resides for more than 183 days during the calendar year in the Slovak Republic.

### Corporate income tax

The corporate income tax rate is currently 22%. The corporate income tax is levied on legal entities and on entities not qualifying as natural persons, having (i) their seats, or (ii) their place of effective management (place where managerial and business decisions of statutory and supervisory bodies of such an entity are adopted) in Slovakia. Such entities, considered thus to be the Slovak tax residents, are liable to pay tax on the income derived from Slovak sources and also on the income derived from sources abroad. Other legal entities are liable to pay the Slovak corporate income tax on incomes derived from Slovak sources only.

There is no tax on dividends, regardless of whether received from a resident or non-resident company. Thin capitalisation rules were introduced in the Slovak Republic on 1 January 2015. The limitation of tax deductible interest from loans, provided by foreign and local related parties, is currently at 25% of EBITDA (earnings before interest, taxes, depreciation and amortisation). Carry-overs are not allowed under these provisions. These rules do not apply to financial institutions, leasing companies and entities administrating collective investment schemes.

### Transfer pricing

The Slovak tax law contains the transfer pricing rules which are largely based on the OECD principles (especially OECD Transfer Pricing Guidelines), which permit the authorities to adjust prices charged between any foreign related parties that are not in accordance with the arm’s length principle ensuring fair market value. The pricing methods (comparable uncontrolled price method, resale price method and cost plus method) and profitability methods (profit split method and transactional net margin method) are allowed on this basis. The transfer pricing rules for transactions have, since 1 January 2015, also been extended to domestic entities. Therefore, any controlled (or related) legal entities, regardless whether they are domestic or foreign, are obliged to keep documentation on the transfer pricing method used between them. Upon a request of the tax or finance authority, the entity is obliged to submit the aforementioned documentation within 15 days from the date of delivery of the request from the authority.

### Local taxes

#### Real estate tax

Real estate tax is the municipal tax paid by the owners of buildings (including private and weekend houses), apartments and land, or by tenants of land, registered with the Cadastral Register, and is determined by the size, location and the type of those buildings, flats and land. The Real Estate Tax includes:

- tax on land
- tax on constructions (buildings)
- tax on apartments and non-residential premises in an apartment house
Fees on municipal waste and small construction waste

The local municipal waste fee is paid for municipal waste (with the exception of electro-waste and biodegradable kitchen and canteen waste) and minor construction waste originating on the territory of the municipality.

Motor vehicle tax

The motor vehicle tax is levied only on specific road motor vehicles and trailer vehicles used for, or in connection with, the business activities. The tax also applies to those taxable persons who use motor vehicles for both private and business purposes. The motor vehicle tax is determined by the total volume of the cylinders in the engine or by the total / maximum permissible total weight in tonnes and number of taxes.

Local fee for development

The local fee for development is optional, which a municipality may establish in its territory, its individual parts or individual cadastral area, by means of issuing of a generally binding regulation. Subject to the fee will be buildings located in the municipality for which valid building permits, authorising the construction, have been issued. Excluded are small buildings with floor areas up to 25 m², family houses with floor areas of up to 150 m², buildings for state defence, medical buildings, buildings for parking, buildings which serve the purpose of museums, libraries, galleries, cultural centres, religious practice, social service, social housing, kindergarten, primary, secondary or higher education, etc. This law does not apply to municipalities, self-governing regions and the state conducting constructions on their territories. The amount of the fee is subject to the discretion of the municipality and can range from 10 up to €35 per m² of the respective floor area of the part of the building above ground. The law will enter into force on 1 November 2016.

Indirect taxes

VAT

Act No. 222/2004 Coll. on VAT (VAT Act) complies with Directive 2006/112/EC. Since Slovakia's accession to the European Union on 1 May 2004, the Slovak VAT Act has complied with the EU 6th Directive.

The Value Added Tax in the Slovak Republic includes one tax rate of 20% which applies to almost all taxable supplies except of those stated in the annex 7 of the VAT Act. The supplies, including certain medical products and medical equipment as well as books, brochures and leaflets (except of those where advertisements represent more than 50 % of their content), meat, milk, bread and butter are taxed at 10%.

Excise taxes

Excise taxes add duty to the following: beer, wine, spirits, tobacco products, mineral oil, liquid petroleum gas and methane, natural gas, electricity, and coal.

Dispute resolution

Judiciary - overview

According to the Constitution of the Slovak Republic, the judiciary is divided into two branches: the first represented by the Constitutional Court and the second by general courts.

The Constitutional Court reviews the conformity of law and by-laws with the Constitution. The Constitutional Court also has the jurisdiction to review the conformity of the general courts’ decisions with the Constitution. The role of the Constitutional Court is limited to checking the compatibility of effects of interpretation of legal acts by general courts with the Constitution or qualified international treaties.

General courts

General courts are divided into three types: district courts, regional courts and the Supreme Court. Except for a very limited number of cases (e.g. tax litigation), district courts are the courts of first instance for all cases, and regional courts act as courts of appeal. The Supreme Court reviews (i) the appeals from first-instance decisions of regional courts, (ii) appeals against appellate decisions by regional courts and specialised criminal courts, and (iii) cases by the Supreme Court itself.

The Judicial Council is in charge of the most serious decisions regarding of courts, e.g. selection of judges, election of the Chairman of the Supreme Court (Chief Justice), and promotion of the judges to higher courts.
There is no trial by jury, but laypeople participate in the administration of justice by sitting as judges in judicial panels in criminal cases in district courts (i.e. for less serious offences). Laypersons are elected by local councils. Two lay judges sit with a professional judge, hearing non-specialised cases in the first instance. Appellate and Supreme court panels are composed of professional judges only.

Slovakia has a system of career judiciary, i.e. most judges do not have any other professional experience before joining the judiciary. The judges are appointed for life by the president of the Slovak Republic upon proposal by the Judicial Council, and can be only removed following disciplinary proceedings conducted by a special panel composed of senior judges.

Decisions of the Courts are systematically published.

**Arbitration / Alternative Dispute Resolution (ADR)**

Alternative dispute resolution methods are stipulated by law, but used very rarely. The exception is the use of arbitration for the settlement of disputes arising from commercial relations. Since February 2016, a new method of alternative dispute resolution has been introduced which enables the consumer to choose any subject of ADR from the official list of subjects, in the event the seller/trader fails to respond to the claims/complaints. Any contractual restrictions which would interfere with this right are void. The Subject of ADR should generally resolve the case within 90 days after the commencement of the proceeding. In cases where the seller/trader is uncooperative, penalties may be incurred. However, the outcome of proceedings is, without the agreement of both parties to the dispute, only a non-binding opinion of the Subject of ADR. Customers having problems with something they bought online can also use the online dispute resolution site, if they live in the EU and the seller/trader is also based in the EU. Submission of their complaint is made online directly on the platform.

**Competition**

**Competition control**

The pressure of competition is an essential mechanism of effectively working market economy. Consumers benefit from a properly working market with lots of competition. If entrepreneurs in the market face pressure from competition, they are naturally motivated to improve the efficiency and quality of production and distribution - prices decrease, quality improves, and the sellers work hard to refine their products and services. Thus, the consumer receives the best result comparing the quality and price of products and services.

Effective competition enables the common European market to function well, for the free flow of products, jobs, services and capital. The aim of Slovakia's competition protection policy is to protect the competition and to contribute to the development of conditions favourable for competition. The competition policy also creates attractive surroundings for investments and extended jobs, so ensuring the sustainable increase of the Slovak economy and its ability to compete now and in the long term.

The central governmental authority, the Antimonopoly Office of the Slovak Republic (Office), was established in 1990. Its role is to prohibit competition restriction by entrepreneurs – it intervenes in agreements restricting competition, any abuse of dominant position, and takes preventive control over the market structures through the assessment of concentrations. Upon entry to the European Union, the European dimension of competition legislation application in the Slovak Republic was strengthened and the Office became a part of the structure of European competition authorities.

**Concentration** is the process of the economic combination of businesses, which may arise as a consequence of business mergers, acquisition of control over all activities of a business, acquisition of control over a part of the activities of a business, or establishment of a joint venture by several businesses. Not all transactions between businesses are subject to supervision by the Office. Businesses are required to report only significant concentrations that meet the turnover criteria set by the economic competition legislation, e.g. Act No. 136/2001 Coll. on Protection of Competition (Competition Act).

Under respective provisions of the Competition Act, a concentration is subject to control by the Office if:

- the combined aggregate turnover of all parties in the concentration, on the market in the Slovak Republic during the accounting period preceding the establishment of the concentration, exceeded €46 million, and the turnover of each of at least two of the parties in the concentration, on the market in the Slovak Republic during the last accounting period preceding the establishment of the concentration exceeded €14 million or
the turnover on the market in the Slovak Republic during the last accounting period preceding the establishment of the concentration by:

- at least one merging party
- the party being acquired or
- at least one of the parties creating joint venture

exceeded €14 million and, at the same time, the combined aggregate turnover of another party to the concentration achieved during the last accounting period preceding the establishment of the concentration exceeded €46 million.

It is important to note that, in the company over which the control should be obtained, the turnover taken into account is the turnover achieved in the Slovak Republic only. This significantly reduces the number of mandatory concentration notifications, because of exclusion of the of concentrations which only meet the global turnover criteria and do not have an essential impact on competition in the Slovak Republic.

The agreements restricting competition are prohibited, unless the Competition Protection Act stipulates otherwise. These agreements can be horizontal or vertical agreements, as well as concerted practices between undertakings, or decisions of their associations, with the objective or effect of restricting competition.

Besides the most serious violations in the field of agreements - cartels - our legal code prohibits any restriction in the relations of businesses that are not mutual competitors, but that are, for example, in the supplier-customer relationship (i.e. they operate at different levels of the distribution chain). This may, for example, concern agreements whose conclusion is conditional upon the acceptance of other obligations that through their nature or in the context of business customs are unrelated to the subject matter of these contracts.

In principle, the definition of the term "abuse of dominant position" derives from the fact that a business has a dominant position if it has space for independent behaviour on the market in relation to competitors, customers, and consumers that enables it to influence the market parameters such as price, outputs, innovations etc. A business’s market share in the relevant market is used as a basis for determining dominance. Other factors used to decide whether a business has a dominant market position include the marginal distribution of market shares, maintenance of market shares, or the strength of customers / suppliers. A dominant position is not prohibited per se. However, the Competition Protection Act does explicitly prohibit the abuse thereof.

**Intellectual property**

In Slovak legislation, intellectual property rights are divided into two sections, namely, the copyright which is subject to copyright law, and industrial rights including, but not limited to, the rights arising from patents, design, trademark, and also the rights of the holders of protected designation of origin or the protected geographical identification of a product, rights of breeders of plant varieties, rights of breeders of animal breeds, of which some are presented below in more detail.

**Copyright Law** defines, in general, the subject matter of a copyright as: literary or any other work of art, scientific work or artistic performance that represents the result of the author’s own creative intellectual activity. The substance of the copyright is an exclusive personal right that cannot be waived by the author and is not transferable. It expires upon the author’s death. Another component of the copyright is the author’s exclusive property right, which does not expire upon the author’s death and is subject to inheritance. In general, in accordance with Copyright Law, every use of a work requires the consent from its author. Any infringement of the copyright results into the two types of penalties: under civil law, financial compensation for the incurred damage, or under criminal law, where legislation also allows for imposing penalties in the form of imprisonment.

**Patent**, as a industrial right, is a protection document which gives an exclusive right to its holder to use an invention during a certain period of time. Patents are granted for inventions that are new; they include the inventor’s activity and have industrial applicability. The holder may grant consent to other persons for the use of the patent. The consent to use the patent is granted by a licence agreement. The patent may also be sold or transferred to a third party, either an individual or a corporation. A patent is valid for 20 years.

**Design rights** protect the external appearance of a product. The design may be subject to protection if it is new and has a special character. The owner of any registered design has an exclusive right to use the design, to give consent for the use of
the design by other persons or to transfer the design to them. The consent to use the design is granted by a licence agreement. The protection of a design is provided for a period of five years, with the possibility of prolonging the protection four times for periods of five years (maximum 25 years).

The designation creating a trademark means any designation that may be graphically depicted consists mainly of words, letters, figures, drawings, or the form or packaging of the goods, or any combination thereof, if such designation is capable of making the goods or services of one person distinctive from the goods or services of another. The trademark holder has an exclusive right to use the trademark in connection with the goods or services for which it is registered in the register and to use, together with the trademark, the ® mark. The trademark may be transferred by the holder thereof under a written contract to another person for some, or all, of the goods or services for which it is registered. The registration of a trademark is valid for 10 years with the possibility of prolonging it for another 10 years.

Protected designation of origin or protected geographical indication may serve as a protection of agricultural products and foodstuffs, wine, liquors, mineral waters, craft products and other products, the final quality or properties of which are influenced by natural conditions or which are connected with certain specific geographical areas through tradition, reputation or good name, and that may be attributable to the given specific geographical area of their origin. No consent may be given under a licence agreement for the use of the registered designation of origin or geographical indication, no pledge may be established over it, nor can it be the subject of transfer. The duration of the right to protection of the registered designation of origin or geographical indication is indefinite.

Protection of plant varieties is governed by Act No. 202/2009 Coll. and supports breeders in developing new, and maintaining already existing, plant varieties. A breeder (or his legal successor) has the right to be awarded with a Breeder’s Certificate when his newly bred variety passes the so called “DUS-Tests” and meets the criteria for plant variety protection. Breeder’s Certificates are issued only for varieties which are new, distinct, uniform, stable and marked with a suitable name. Community plant variety rights, which were granted by the CPVO are valid in the whole EU-Community, thus also in the Slovak Republic. The protection lasts 25 - 30 years, depending on the plant species. However, even when the plant variety is protected, the crops may be recognized and placed on the market only when the variety is also listed in either the EU common catalogue of varieties or in the Slovak national catalogue of varieties. In Slovakia, a variety is only listed when it meets further criteria, mainly connected to value for cultivation and use, which is determined by the passing of the VCU-Tests. A supplier which delivers the seeds and/or places them on the Slovak market needs to be listed in the register of suppliers.

Marketing agreements

Procurement agreements are governed by the Commercial Code, which regulates so-called agency agreements, mandate agreements, commission agency agreements, and commercial representation agency agreements.

The function of an agency agreement is to procure the conclusion of an agreement for the client. This could, for example, mean that the agent will find a partner who is willing to enter into an agreement with the client. Consequently, the agent will arrange introduction of the future contractual partners, will act in negotiating the matter and will prepare execution of the agreement. Unlike, for example, the agreement on procurement of sale of property, the client executes the agreement by himself in accordance with the agency agreement, and the agent only assists in the conclusion thereof. A characteristic feature of an agency agreement is not only that the conclusion is brokered by the agent in the manner described above, but also that the result is achieved through the agent’s intentional action.

Similar to an instruction agreement, governed by Act No. 40/1964 Coll. Civil Code (Civil Code) is the so-called mandate agreement, governed by the Commercial Code for the purposes of business entities. The main difference between these two types of agreements is their subject matter which, in the case of a mandate agreement, is the procurement and / or arrangement of a certain business matter.

A commission agency agreement represents the procurement of certain business matters, i.e. not only the sale but also the purchase of certain property. The procurement is conducted in the name of the commissioner procuring the business matter, even if economically to the account of the client.

A commercial agency agreement represents on-going activities performed by the agent, who undertakes to perform activities leading towards the conclusion of certain type of contracts or negotiation and conclusion of trades on behalf of, and on the account of, the represented principal. The subject matter of the commercial agency agreement represents repeated or permanent activity of the agent.
Although there is no special act on franchising or distribution agreements, this area of law is regulated by the respective provisions of the Civil and Commercial Codes. Certain regulations on cartel law, including the EU legislation, are also of relevance.

E-commerce

The Slovak Republic has extensively harmonised the law regarding E-commerce with EU legislation by adopting the respective Directives, in particular, through Act No. 22/2004 Coll. on Electronic Commerce. In accordance with this regulation, the internet vendor is obliged to provide to the potential customers certain specified, easily and permanently accessible, identification data.

This area of law is also regulated by the law on consumer protection. Thus, Act No. 102/2014 Coll. on Consumer Protection related to selling or the provision of services based on a distance contract or on a contract concluded outside the operational premises of the seller, provides the general requirements applicable to consumer protection in mail-order sales. In accordance with that legislation, prior to entering into a contract on a remote basis and simultaneously with the offer of goods or service, the internet vendor is obliged to provide the consumer with certain facts and information.

Special legal regulations of electronic commerce are also applied to mail-order shipments of medical products and medical aids, providing financial services by the supplier via remote communication under a remote contract, and conclusion of a contract at a distance.

Furthermore, the area of law regarding the electronic signature has also been harmonised with EU legislation by adopting Act No. 215/2002 Coll. on Electronic Signature. This act regulates the rights and obligations of individuals and legal entities in use of the electronic signature as well as the authenticity and protection of electronic documents signed thereby. It also provides the possibility of replacing paper communication with the safer and more dynamic form of electronic data exchange between the business sector and governmental authorities, as well as individual business entities. The Slovak National Security Office is the central governmental body for electronic signature.

Data protection

The right to protection of personal data is enforced by a high level of legal protection, as stipulated in the Constitution of the Slovak Republic in the chapter named "Fundamental Human Rights and Freedoms".

In accordance with Article 19(3) of the Constitution of the Slovak Republic, everyone is entitled to protection against unauthorised collection, publication or any other misuse of his / her personal data.

Data protection is regulated by Act No. 122/2013 Coll. on Personal Data Protection.

With the consent of the person involved, it is generally possible to process such personal data in accordance with legal regulations governing the personal data protection. The processing of personal data is supervised by the Personal Data Protection Office of the Slovak Republic which, in addition to other activities in this area: regularly monitors the status of personal data protection, the registration of information systems, and keeps records on information systems; and makes recommendations to the operators of certain measures for ensuring personal data protection in the information systems. For the last purpose, the Office publishes recommendations for operators, and in cases of suspected violation of those obligations, the Office may summon the operator or the agent (audited person) to provide explanations. It can also control the processing of personal data in information systems, and impose penalties in cases of discovered violations of obligations set forth in this law. For such purposes, the representatives of the Office are authorised, inter alia:

► to enter any land, buildings or rooms of the operator’s or agent’s operations and facilities

► to request the operator, agent and their employees to provide to them (within a certain determined time period) any documents, other written papers, statements and information, electronic data media (including technical data media), statements and source codes of programs, if owned by the operator, and other material required for control, the originals or copies thereof and

in specific cases:

► to take copies outside the premises of the audited person
to require the audited person to provide, within a reasonable period, complete and true oral and written information, statements and explanations to the audited and related facts and eventually to the discovered defects

to require assistance of the audited person to access the information systems up to the system operator level in the extent required for the audit and

to verify the identity of the audited persons and individuals acting on behalf of the audited person

The operator is obliged to notify the Office about the used information systems, request special registration of the information systems or to keep records on the information systems in the extent and under the conditions set forth in the Data Protection Act.

The national legislation has been harmonised with EU legislation by transposing European Parliament and Council Directive 95/46/EC on the protection of individuals with regard to processing of personal data and on the free movement of such data.

Product liability

There are general and specific regulations concerning product safety which allow consumers to raise claims if an unsafe product has been placed on the market.

Liability for damages caused by a defective product is regulated by Act No. 294/1999 Coll. on the Liability for Damage caused by a Defective Product. This area of law has been strongly influenced by the respective EU legislation.

Thus, the manufacturer is liable for any damage to the health or life of the consumer caused by a defective product, or to any property other than the defective product, provided that such damaged product had been for private use.

The manufacturer’s liability is in principle objective (strict liability) and the consumer has no obligation to prove the manufacturer’s fault. However, the manufacturer has certain defences including, but not limited to, the following: (i) the product was not launched into circulation by the manufacturer, or (ii) in view of the circumstances preceding the damage, it may be presumed that the product was not defective at the time of its launching into circulation.

Under certain conditions, the manufacturer of a component or a part of a product can be released from its liability for damage caused by a defective product as well.

With respect to indemnification in the event of death or injury of more consumers, the national legislation stipulates the maximum amount thereof as approximately €116,179 Mio. The maximum amount of indemnification with respect to the manufacturer’s liability for other damages (property damage) is not stipulated by law.

Bribery and corporate crime

In 2010, the obligations of European law concerning new regulations on punishment for corporate criminal activities of legal entities were implemented in Slovak legislation. Although the international public (e.g. the Organisation for Economic Cooperation and Development) welcomed the implementation of punishment for corporations, in practice many questions remain unanswered.

The basis of the legislation is that criminal offences of a legal entity are committed in connection with its business activities. However, Act No. 300/2005 Coll. Criminal Code provides for the imposition of a sentence on a legal entity for a criminal offence, without making it subject to simultaneous legal liability for the criminal offence of an individual acting on its behalf; i.e. it is not required to prove that the given criminal offence was committed by the individual or to sentence that individual. Therefore, it is now possible to prosecute the legal entity in criminal proceedings, even when the offender responsible for the offence can not be found within the frequently complicated structures created through the decision-making processes and management of corporations. At the same time, such legislation represents an effort to prevent any potential circumvention of the law.

Subject to the satisfaction of certain conditions, all possible criminal offences are subject to punishment, if committed in connection with performance of business activities. Specifically, the law allows the imposition of a protective injunction on a legal entity if a criminal offence has been committed or attempted in connection with acting on behalf of the legal entity, adoption of decisions or performance of audit and supervision of the legal entity.
The law allows the imposition of a protective injunction to seize monetary amounts between €800 and €1,660,000, or seizure of the company assets. Additionally, company assets may be seized if they originate from criminal activities or were acquired from income derived from criminal activities. The above measures may not be combined.

Recently, a new Act, No. 91/2016 Coll. on the criminal liability of legal persons, was passed and will enter into force on 1 July 2016. The legal act contains a taxative enumeration of criminal offences which can be committed by a legal person. Furthermore, it also governs criminal penalties which may be imposed on a legal person, namely: winding-up of the legal person, forfeiture of property, forfeiture of assets, financial penalties, prohibition of certain activities, prohibition from receiving grants and subsidies or EU funds, prohibition from participating in public procurement and publication of the conviction and sentence therefor. Under certain circumstances, a legal entity may be exonerated, such as when the acts of an employee, which constituted the criminal responsibility of the legal entity, have been caused exclusively as a consequence of failed supervision and control over staff.

The prevention and combating of money laundering is regulated by Act No. 297/2008 Coll. on Protection against legalisation of the income derived from criminal activities and terrorism financing. By adopting this Act, the Slovak Republic fully harmonised its legislation with applicable EU legislation applicable in this area.

Real estate

Generally, there are no restrictions for the foreigners related to the ownership of real estate.

The only restriction of this ownership right regards the ownership of agricultural land outside the built-up area of a municipality. Act No. 140/2014 Coll. on Acquisition of the Ownership of Agricultural Land states several conditions, under which a natural person or a legal entity (person) can obtain an ownership of agricultural land.

Since 1 June 2014, only a person conducting its business activities in agriculture for at least three years in the municipality where the objective agricultural land is located is entitled to acquire the ownership to that land. Another person is entitled to acquire the agricultural land under the following cumulative conditions only:

► any of the abovementioned persons are not interested in the purchase of the objective agricultural land
► that other person has conducted its business activities in agriculture for at least three years
► has his / her permanent residence or registered seat in the Slovak Republic for at least 10 years
► the seller published the offer to sell the objective agricultural land on the website of the Slovak Ministry of Agriculture and Rural Development and also on an official noticeboard for at least 15 days. Persons from neighbouring municipalities will be preferred in such a case.

In the Slovak Republic all real estate and the interests thereto (ownership, co-ownership, joint ownership of spouses, mortgages, easements and pre-emptive rights) are registered with the Cadastral Register under the provisions of the Cadastral Act.

The most common types of agreements through which ownership of real estate is transferred are Purchase Agreements, Exchange Agreements and / or Donation Deeds (jointly Transfer Agreements). A Transfer Agreement becomes valid and effective upon execution by the parties involved, unless agreed otherwise. The will of the parties must be contained in one deed and the signatures of the transferors must be notarised. The transfer of the ownership title is perfected upon the registration of the ownership title (in most cases evidenced by a Transfer Agreement) with the Cadastral Register.

Types of interest in land

The Slovak Civil Code classifies assets as movable assets and non-movable assets (i.e. real estate - land and buildings - and premises in buildings). Generally, ownership of all non-movable assets is registered with the Cadastral Register. As already mentioned, ownership of real estate is acquired through registration with the Cadastral Register. Buildings are considered to be immovable property, assuming they are connected to the ground by fixed foundations.

Ownership is defined as the right of the owner to: (i) hold the object of his ownership; (ii) use the ownership object; (iii) consume its proceeds; and (iv) to dispose of the object.
The Constitution of the Slovak Republic provides that mineral resources, caves, ground waters, natural healing sources and watercourses are under the exclusive ownership of the Slovak Republic.

Note that land and buildings constructed on land are considered as two separate objects (the owner of building may differ from the owner of the land that it is constructed on, so the principle superficies solo credit currently does not apply in Slovak law).

Ownership

According to Slovak law there are three types of ownership of real estate:

Exclusive ownership

One person is the exclusive owner of specific real estate property (e.g. land and / or structure(s) built on land).

Co-ownership

The real estate is owned by two or more co-owners (the number of co-owners is not limited). The co-ownership share of the co-owners can be divided in any proportion and is defined with fractions (e.g. in case of four co-owners the shares could be defined as follows: 1/2, 1/4, 1/8, 1/8).

Joint co-ownership of spouses

Joint co-ownership of spouses may arise only between spouses, and thus is dependant on the existence of marriage. The spouses do not have shares specifying the exact part of the ownership right to a common property. Joint property of spouses consists of all property that is acquired by spouses during the marriage, with the exceptions of: (i) succession and / or donation; (ii) property which by its nature serves a personal use or is for the exercise of the profession of only one spouse; (iii) property surrendered to one of the spouses within the framework restitution laws (i.e. the spouse owned the property before entering the marriage or he / she is the legal successor of the previous owner).

Other interests in real estate property

Mortgage

A right over real property, securing re-payment of a loan, usually for the specific real property secured.

Easement

Easement includes various limitations of the ownership rights to real property in favour of a third person. Easements restrict the owner in favour of a third person, so that the owner of the real property has to: (i) suffer something (patii) – e.g. a right of passage; (ii) omit something (ommittere); or (iii) do something (facere).

The rights corresponding to easements can be connected with the ownership of certain real property (easement in rem), e.g. the right of passage to a neighbouring plot, or belong to a certain person (easement in personam), e.g. the right of habitation.

Pre-emptive right

If seller wishes to sell a real property, he / she is obliged to offer the sale of land to a person having a pre-emptive right, if applicable. Pre-emption rights may be created by an agreement between the parties. However, Slovak law states statutory pre-emptive rights in favour of co-owners of a real property.

Existing law is stated as it applied in May 2016.
## Useful contacts

### STATE'S INSTITUTIONS

<table>
<thead>
<tr>
<th>Institution</th>
<th>Website</th>
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<tbody>
<tr>
<td>National Council</td>
<td><a href="http://www.nrsr.sk">www.nrsr.sk</a></td>
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<tr>
<td>President of the Slovak Republic</td>
<td><a href="http://www.prezident.sk">www.prezident.sk</a></td>
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<tr>
<td>Ministry of Economy</td>
<td><a href="http://www.economy.gov.sk">www.economy.gov.sk</a></td>
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<td>Ministry of Foreign Affairs</td>
<td><a href="http://www.foreign.gov.sk">www.foreign.gov.sk</a></td>
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<td>Ministry of Interior</td>
<td><a href="http://www.minv.sk">www.minv.sk</a></td>
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<td>Ministry of Environment</td>
<td><a href="http://www.enviro.gov.sk">www.enviro.gov.sk</a></td>
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<tr>
<td>Ministry of Labour, Social Affairs and Family</td>
<td><a href="http://www.employment.gov.sk">www.employment.gov.sk</a></td>
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<tr>
<td>Ministry of Transportation, Post and Telecommunications</td>
<td><a href="http://www.telecom.gov.sk">www.telecom.gov.sk</a></td>
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<td>Ministry of Justice</td>
<td><a href="http://www.justice.gov.sk">www.justice.gov.sk</a></td>
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<td>Ministry of Culture</td>
<td><a href="http://www.culture.gov.sk">www.culture.gov.sk</a></td>
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<td>Ministry of Defence</td>
<td><a href="http://www.mosr.sk">www.mosr.sk</a></td>
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<td>Ministry of Agriculture</td>
<td><a href="http://www.mpsr.sk">www.mpsr.sk</a></td>
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<td>Ministry of Health</td>
<td><a href="http://www.health.gov.sk">www.health.gov.sk</a></td>
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<td>Ministry of Education</td>
<td><a href="http://www.minedu.sk">www.minedu.sk</a></td>
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### OTHER PUBLIC WEBSITES

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<tr>
<td>National Bank</td>
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<td>Slovak Business Agency</td>
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<td>Slovak Investment and Trade Development Agency</td>
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<td>Slovak Innovation and Energy Agency</td>
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<td>Slovak Tourist Board</td>
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<td>Antimonopoly Office</td>
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<td>National Tax Directorate</td>
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<td>National Labour Inspectorate</td>
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### OTHER PUBLIC WEBSITES

Geodesy, Cartography and Cadastre Authority: [www.geodesy.gov.sk](http://www.geodesy.gov.sk)

National Procurement Office: [www.uvo.gov.sk](http://www.uvo.gov.sk)

Industrial Property Office: [www.indprop.gov.sk](http://www.indprop.gov.sk)

Statistical Office: [www.statistics.sk](http://www.statistics.sk)

### Further information

Noerr s.r.o.

AC Diplomat

Palisády 29/A

81106 Bratislava

Slovakia

Telephone +421 2 59101010

Fax +421 2 59101011

### Contact Partners

#### MANAGING PARTNERS

<table>
<thead>
<tr>
<th>Name</th>
<th>Telephone</th>
<th>Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prof. Dr. Jörg K. Menzer</td>
<td>+421 2 59101010</td>
<td><a href="mailto:joerg.menzer@noerr.com">joerg.menzer@noerr.com</a></td>
</tr>
<tr>
<td>Partner</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Head of CEE Offices</td>
<td></td>
<td></td>
</tr>
<tr>
<td>JUDr. Pavol Rak, PhD.</td>
<td>+421 2 59101010</td>
<td><a href="mailto:pavol.rak@noerr.com">pavol.rak@noerr.com</a></td>
</tr>
<tr>
<td>Partner</td>
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<tr>
<td>Head of Bratislava Office</td>
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#### COMMERCIAL & REAL ESTATE

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<tr>
<td>Tomáš Zaborsky</td>
<td>+421 2 59101010</td>
<td><a href="mailto:tomas.zaborsky@noerr.com">tomas.zaborsky@noerr.com</a></td>
</tr>
<tr>
<td>Advokát (SK)</td>
<td></td>
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<tr>
<td>Michal Bunda</td>
<td>+421 2 59101010</td>
<td><a href="mailto:michal.bunda@noerr.com">michal.bunda@noerr.com</a></td>
</tr>
<tr>
<td>Legal advisor (SK)</td>
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<tr>
<td>Martin Tupek</td>
<td>+421 2 59101010</td>
<td><a href="mailto:martin.tupek@noerr.com">martin.tupek@noerr.com</a></td>
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<tr>
<td>Advokát (SK)</td>
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<tr>
<td>Michal Baloga</td>
<td>+421 2 59101010</td>
<td><a href="mailto:michal.baloga@noerr.com">michal.baloga@noerr.com</a></td>
</tr>
<tr>
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<tr>
<td>Martin Stelcl</td>
<td>+421 2 59101010</td>
<td><a href="mailto:martin.stelcl@noerr.com">martin.stelcl@noerr.com</a></td>
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DOING BUSINESS IN SPAIN
Introduction and legal system

Spain occupies the greater part of the Iberian Peninsula. Its territory also includes the Balearic Islands, Canary Islands and two small exclaves in Morocco, the cities of Ceuta and Melilla (North Africa). It has a population of 46.6 million people (July 2014), the fourth largest in Europe and has been a member of the European Union since 1986 and a member of the Eurozone since 2002.

There are several languages used in Spain but the official language is Castilian Spanish, which is often thought of as just Spanish. Spanish coexists with other regional languages which are official in their respective Autonomous Communities (Regions), such as Catalan, Basque and Galician.

Political structure

Spain is a parliamentary monarchy. The King is the head of the State; his most important function is to arbitrate and moderate the country’s institutions in accordance with the Constitution. He also formally ratifies the appointment or designation of the highest holders of public office.

The 1978 Constitution split power into three categories: legislative power to be executed by the Parliament (Cortes Generales), executive power to be executed by the Government and judicial power to be carried out by judges and magistrates.

Furthermore, Spain is organised into 17 Regions, each of which was granted its own “Statute of Autonomy” within Spain. The Constitution granted each Region certain faculties and powers. Thus, the Constitution guarantees financial autonomy of all Regions, making Spain one of the most decentralised countries in Europe.

Legal system

In line with the other jurisdictions of continental Europe, the Spanish legal system is a civil law system based on comprehensive legal codes and laws derived from Roman law. Another characteristic of the Spanish legal system is the high degree of decentralisation resulting from the sustained devolution of authority and legislative powers to regional institutions as pointed out above.

The Spanish market

It is no secret that the crisis of the Eurozone in 2011-2013 has had a significant impact on Spain which, in combination with a harsh double-dip recession in the period 2009-2013 and certain country-specific factors such as the high unemployment rate, has seriously damaged market confidence in the country’s public finances and its financial system as a whole, epitomised in rating downgrades and shockingly high government bond yields at the end of 2012 and beginning of 2013.

However, Spain continues to boast the traits that made it an attractive market for investments in the last two decades, including its developed infrastructure, its young and highly qualified labour force and competitive costs and significant levels of trade of goods and services with international markets. It is therefore to be hoped that, once the turbulence in the markets settles down, Spain will recover its place as a pool of investment opportunities. In fact, despite the severe recession, signs of economic recovery have started to appear. According to information published by the Spanish Ministry of Economy and Competitiveness (Ministerio de Economia y Competitividad), during 2013 the gross foreign investment in Spain (excluding investment in financial assets) had increased by 8.8% when compared with 2012 (increasing up to 15,812 million euros). The net foreign investment for this period amounts to 15,398 million euros, compared with the negative balance of 3,091 million euros decrease of 2012. At the sectoral level, foreign investment during 2013 was mainly concentrated in the following four sectors: (i) financial and insurance services (3,140 million euros), (ii) manufacturing industry (2,641 million euros), (iii) Real estate (1,787 million euros) and (iv) construction (1,437 million euros). These four sectors represent 57% of the total foreign investment during 2013. The countries from the OECD were the main investors in Spain during 2013 (90.5%).

The good performance of disinvestments during 2013, compared with 2012 should be noted. During 2013, disinvestments amounted to 4,085 million euros, compared with the 22,720 million euros of disinvestment for 2012.

Spain also offers foreign investors the possibility of operating in third-country markets using Spain as a base; it belongs to the European Union and operates as a gateway to North Africa and Latin America (due to its strong economic, historic and cultural ties with those countries).
Spain has developed a wide network of double tax treaties, in particular with EU countries (due to the application of the rules of the EU internal market), and with Latin American countries, with a very favourable regime for investments.

The Spanish market benefits from numerous incentives and tax benefits for activities carried out in certain industries which are considered to be priority sectors in view of their growth potential and their impact on the nation’s overall economy (e.g. activities in the agricultural and food industry, energy, mining, technological development, research and development, etc.), and for investment in specific regions. Furthermore, EU incentives may also be available when investing in Spain.

There are various ways in which to make an investment, including setting up a new business, entering into a partnership with an existing business, or entering the Spanish market by using various forms of distribution agreements. Each of these forms offers different advantages although these should be balanced against their particular characteristics and considered from tax and legal perspectives.

**Foreign investment policy**

In general, foreign investors can be non-resident individuals, legal entities with registered offices abroad and public agencies of foreign states. However, a Spanish company in which foreign shareholders have a majority holding is not deemed to be a foreign investor. In this sense, it should be noted that a change of registered office of legal entities or a change of residence of individuals is enough to change the classification of an investment as a Spanish investment abroad or a foreign investment in Spain.

Spanish rules have deregulated practically all transactions of foreign investments, eliminating the requirement for prior approval by a state body and, as a general rule, foreign investments are subject only to notification after the investment has been made - mainly for statistical purposes to calculate the Spanish balance of payments and to maintain statistical control of monetary flow from abroad.

This obligation to notify only affects certain regulated investments such as participations in Spanish companies, branches, marketable debt securities issued by Spanish resident businesses, mutual funds, joint ventures, not for profit organisations, economic interest groupings, cooperatives and joint-property entities and Real estate located in Spain, in each case valued at more than €3,005,060.

However, certain investments are also subject to a prior notification, such as those investments originating from a tax haven (regardless of the amount) or to a prior approval, such as, certain activities related to national security.

Debit and credit transactions posted to bank accounts held in Spain by non-residents which exceed €600,000 are, in general terms, also subject to a notification regime. Furthermore, as from 1 January 2013, any transaction with non-residents is subject to notification, regardless of the amount. However, transactions under the threshold of €1,000,000 need only be notified upon prior request from the relevant authority.

Foreign investments not included in above, are unregulated, and no notice is required.

Exchange controls and capital movements are unregulated and there is a complete freedom of action in relation to payments or receipts from abroad.

**Types of business vehicles**

**Forms of business vehicle**

There are several choices when establishing a business in Spain, including both the establishment of a business by the investor itself (either through the incorporation of a company or the opening of a branch) or through a joint venture with other enterprises already established in Spain. Other channels for conducting business without a physical presence, such as distribution, agency, commission and franchising agreements should also be considered.

The main forms of entities which might be used as a business vehicle include the following:

- Corporation (Sociedad Anónima, abbreviated as **S.A.**) and
- Private Limited Liability Company (Sociedad de Responsabilidad Limitada, abbreviated as **S.L.** or **S.R.L.**)
Traditionally, the corporation (S.A.) has been by far the most commonly used form. However, the limited liability company (S.L.) has gained popularity because, among other reasons, its minimum capital requirement is lower than that for an S.A. In this sense, S.L.’s are more private and simple system companies, which are less costly and more flexible, while S.A.’s are more rigid and costly companies. As far as the transfer of shares are concerned, the member of an S.L. must give written notice to the administrators, stating the number of shares and characteristics of the quotas it intends to transfer, the identity of the acquirer and other terms and conditions of the transfer. The transfer will be subject to the consent of the company, and the rest of the members will have a pre-emptive right of acquisition. If more than one attending member is interested in acquiring the quotas, they will be distributed among all of them pro rata to their interests in the company's capital. In general, the transfer of shares of an S.A. is not limited by law, unless it is an S.A. subject to supervision of any Spanish authorities (such as insurance entities, etc.). However, the S.A.’s by-laws may establish certain limitations to the transfer.

Furthermore, the implementation of European legislation into national law has allowed the creation of a European Company domiciled in Spain, under the form of European Public Limited liability Company (Sociedad Anónima Europea). The European company allows companies operating in various Member States the option of being established as a single company under certain aspects of EU law and being able to operate throughout the EU with mixed regulation in which national and EU rules coexist, and a unified management and incorporation and operation system. For companies acting in different EU Member States, the European Company offers the possibility of reducing their administrative costs with a legal structure adapted to EU Regulation.

In addition to the S.A. and S.L., we have (i) the new limited liability company (S.L.N.E.) as a variation on the S.L. specifically intended for small and medium-sized companies with a simplified regime for its establishment; and (ii) the professional services firm (S.P.) the purpose of which is to cater for professional services firms.

In relation to the corporate forms available in Spain, it should be noted that, in many instances, the law provides only minimum standards or general rules, leaving to the founders of a business a great deal of flexibility in tailoring the structure to their specific needs through inclusion of certain clauses in the bylaws.

The main characteristics of the above-mentioned forms of business vehicle are as follows:

**Corporation (Sociedad Anónima or S.A.)**

The minimum capital required to set up a Corporation is €60,000, of which at least 25% must be paid upon incorporation. A corporation's capital is represented by shares. Contributions may be made in cash or in kind, based on an independent expert’s report which justifies the valuation of such contributions in kind.

No minimum number of shareholders is needed to incorporate a S.A.. The liability of the shareholders will be limited to the total nominal value of their stake in the Corporation. There are no restrictions on foreign shareholders.

Shares may be freely transferred, unless the company’s by-laws state otherwise.

Shareholders are the ultimate decision makers in a S.A.. The shareholders have powers of decision in relation to the important matters of a S.A. (e.g. the approval of the annual accounts, the allocation of profits and approval of corporate management; the appointment and removal of the directors; the amendment of the by-laws; the increase and reduction of the company's capital; the acquisition, sale or contribution to other company of essential assets (i.e. those assets which value represents over 25% of the current Company assets as per the latest approved balance sheet)).

There are numerous possible management structures: one or two directors (acting jointly) or a board of directors, who need not be shareholders or Spanish nationals. In principle, the managing body is not liable for the company’s debts but it may be liable to the company, the shareholders and the creditors of the company for any damage they cause through acts or omissions contrary to the law or the by-laws, or carried out in violation of the duties inherent in their office. Every director will be jointly and severally liable in such circumstances although insurance can be obtained against certain civil liabilities.

**Limited Liability Company (Sociedad Limitada or S.L.)**

Generally, the minimum capital required to set up a limited liability company is €3,000 and it must be fully paid at the time of incorporation. However, a limited liability company successively formed (Sociedades de Responsabilidad Limitada en Régimen de Formación Sucesiva) may be set up with a share capital less than the minimum legal amount required (i.e. €3,000) provided that, until the company reaches the minimum legal amount required, specific provisions apply (e.g. amounts to be allocated to legal reserves and limitation to distribution of dividends to shareholders). The share capital will be divided
into participation units (participaciones). Unlike a S.A., no appraisal/valuation from an independent expert is required for non-cash contributions.

There is no minimum number of unit holders needed to incorporate a S.L. The liability of the unit holders will be limited to the total nominal value of their stake in the company. There are no restrictions on foreign unit holders.

S.L.’s participation units cannot be transferred (with some limited exceptions including to other unit holders or companies in the same group) unless the by-laws establish otherwise.

As with an S.A., the unit holders are the ultimate decision makers and have authority to appoint and remove the directors of the S.L.

There are numerous possible management structures: one or multiple directors (acting jointly or severally) or a board of directors, who need not be shareholders or Spanish nationals. In principle, the managing body is not liable for the company’s debts but it may be liable to the company, the shareholders and the creditors of the company for any damage they cause through acts or omissions contrary to the law or the by-laws, or carried out in violation of the duties inherent in their office. Every director will be jointly and severally liable in such circumstances.

Legal formalities required to establish a Spanish company

The following formalities will generally apply to any type of Spanish company, without prejudice to certain special requirements which apply to certain types of companies.

The formation of a company is effected by a public deed of incorporation, which must be executed before a Notary Public and must be registered with the Commercial Registry.

In particular, the public deed of incorporation must include at least the following: the identity of all the parties executing the public deed; the intention to establish a company and an indication of the type of company being incorporated; the contributions of each founder and the number of shares or participation units allotted; the by-laws; and the identification of the members of the administration body. If the founder or any member of the administration body, legal or natural person, is not a Spanish national prior to the incorporation it needs to have a Spanish fiscal identification number.

Furthermore, before the granting of the public deed of incorporation, the following general steps must be carried out:

► a Certificate of Clearance of Use of a corporate name must be issued by the Commercial Registry
► powers of attorney for the incorporation must be granted, if applicable so that, for example, corporate shareholders can be represented by a person at the execution of the public deed of incorporation
► an agreement of intent to set up the new company must be executed by future shareholders, if applicable
► a provisional Tax Identification Number (CIF) must be obtained
► a bank account must be opened in the name of the company and funds to be contributed to the company must be transferred to it
► a certificate of deposit of initial capital must be obtained from the relevant bank
► the type of administration body shall be determined by shareholders/unit holders and
► the company’s by-laws, including all the mandatory basic references, shall be drafted

Once the public deed of incorporation has been granted, the company must:

► file a tax return
► register with the Companies Registry
► obtain a definitive Tax Identification Number (CIF)
• declare the foreign investment at the Foreign Investments Registry (for statistical purposes only), if applicable and
• legalise the minutes book, the shareholders’ register book and the book of contracts with sole shareholder, if applicable

As a general rule, it takes between six and eight weeks to incorporate an S.A. or S.L. However, due to the recent regulation modifications, an S.L., which fulfills certain requirements, may be incorporated by electronic means in two or three days.

Once these requirements have been met, the company will be legally incorporated, although, before opening for business, the company will have to complete other formalities with the tax and social security authorities, as well as at the Ministry of Labour and the relevant Municipal Council.

Branch office
To open a branch, a public deed must be signed and registered with the Commercial Registry. Under Spanish foreign investment legislation, a certain amount of capital must be allocated to the branch, although there is no minimum capital required as it does not have a separate legal identity from its establishing company.

The branch must have a legal representative with authority to manage its affairs. It does not have any formal managing or administrative bodies as such, and it largely operates as if it were a company in its commercial dealings with third parties.

Broadly speaking, the tax, employment law and social security formalities for opening a branch are very similar to those for forming a subsidiary company.

Representative office
A representative office also does not have separate legal personality from its parent company, and it does not have any formal managing body, since management duties are delegated to the office's representative. In principle, a representative office cannot trade and its business activities are essentially coordination and assistance, etc.

The non-resident company is liable for the debts incurred by its representative office.

In general, opening a representative office does not require any legal formalities, although for tax, employment law and social security purposes, a public deed (or a document signed in the presence of a foreign notary, and duly legalised with the Hague Apostille or any other applicable legalisation system) might need to be signed, placing on record the opening of the representative office, the allocation of any funds, the identity of its tax representative (an individual or legal entity resident in Spain), and the representative's authority. The opening of a representative office is not registered at the Commercial Registry.

The formalities regarding Tax and Social Security Authorities are very similar to those mentioned above for the incorporation of a company.

Reporting requirements
The reporting requirements for each form of investment will vary depending on the circumstances (for example, the turnover, employees and amount of the investment).

A company's books (including, but not limited to, the minutes book and the shareholders' register book) must be annually legalised by telematics means before the Commercial Registry and annual financial statements (audited or not, if applicable) should be registered with and filed each year with the Commercial Registry.

Stock exchanges
The Spanish market for equity securities consists of the four Spanish Stock Exchanges located in Madrid, Barcelona, Bilbao and Valencia and the Automated Quotation System (AQS), also known as “Sistema de Interconexion Bursatil,” “Mercado Continuo” or SIBE. The AQS links the trading of the shares of the companies with the largest trading volume in the Spanish national economy.

The AQS links the Spanish Stock Exchanges, providing the securities listed on it with a uniform continuous market that eliminates certain of the differences among the local exchanges. The principal feature of the system is the computerised matching of buy and sell orders at the time of entry of the order. Each order is executed as soon as a matching order is entered, but can be modified or cancelled until executed. The activity of the market can be continuously monitored by
investors and brokers. The AQS is operated and regulated by Sociedad de Bolsas, S.A., a corporation owned by the companies that manage the stock exchanges. All trades on the AQS must be placed through a brokerage firm, a dealer firm or a credit entity that is a member of any of the Spanish Stock Exchanges.

Transactions carried out on the AQS are cleared and settled through Sociedad de Gestión de los Sistemas de Registro, Compensación y Liquidación de Valores, S.A.U. (Iberclear). Only entities which are members of the system (entidades participantes) are entitled to use it, and the ability to become a member entity is restricted to authorised members of the AQS; the Bank of Spain (when an agreement, approved by the Spanish Ministry of Economy, is reached with Iberclear) and; with the approval of the CNMV, other brokers who are not members of the Spanish Stock Exchanges, banks, and foreign settlement and clearing systems. Iberclear is owned by Bolsas y Mercados Españoles, Sociedad Holding de Mercados y Sistemas Financieros, S.A., a holding company which holds a 100% interest in each of the Spanish official secondary markets and settlement systems. The clearance and settlement system and its members are responsible for maintaining records of purchases and sales under the book-entry system.

Shares of listed Spanish companies are held in book-entry form. Iberclear, which manages the clearance and settlement system, maintains a registry reflecting the number of shares held by each of its member entities on its own behalf as well as the number of shares held on behalf of third parties. Each member entity, in turn, maintains a registry of the owners of such shares. Spanish law considers the legal owner of the shares to be: (i) the member entity appearing in the records of Iberclear as holding the relevant shares in its own name; or (ii) the investor appearing in the records of the member entity as holding the shares.

As a general rule, obtaining legal title to shares of a company listed on any of the Spanish Stock Exchanges requires the participation of a stockbroker, broker dealer or other entity authorised under Spanish law to record the transfer of shares. To evidence title to shares, at the owner's request the relevant member entity must issue a certificate of ownership. If the owner is a member entity, Iberclear is in charge of the issuance of the certificate with respect to the shares held in the member entity's name.

**Employment**

**Employee relations**

Spain is still going through a period of structural change in order to overcome the effects of the recent economic downturn, adopting measures contributing to the reduction of unemployment (including benefits and Social Security rebates and discounts to encourage employers to hire workers) and to increase of productivity of businesses.

Notwithstanding the above, the labour market is characterised by stable and well structured relationships with employees and unions, creating an environment of extrajudicial resolution of conflicts whenever necessary and a strong presence of non-governmental rules, mainly collective bargaining agreements (in which the parties, usually the legal or union representatives of the employees and the representatives of the employers (not strictly a single company), define the minimum labour conditions).

**Relevant labour and employment laws**

The basic law is found in the Worker’s Statute (Legislative Royal Decree 1/1995), which defines the respective rights of employees and employers, the basic terms of employment contracts (both written and oral contracts), procedures for dismissal and collective bargaining rules, and other key aspects of labour relations. As a result of and to compliment the presence of unions within the workforce in most of the main nation-wide economic sectors, there are collective bargaining agreements regulating minimum labour conditions. These may be negotiated at a company level or by industries at a state level.

In addition to the Worker’s Statute, the following regulations create the landscape of labour law in Spain:

- Act of Professional Hazards Prevention (Act 31/1995)
- Social Security general regulation (Legislative Royal Decree 1/1994)
- Statute for the services of self-employed workers (Act 20/2007)
Act of Labour Infractions and Sanctions (Legislative Royal Decree 5/2000) and

Regulations of the procedures for collective layoffs suspensions of employment contracts and reductions of working hours (Royal Decree 1483/2012)

Individual contracts

When hiring new employees, Spanish law can be considered as very flexible since, in general, there is no need to enter into a written employment contract (except under some specific circumstances). Nevertheless, all unwritten contracts are presumed to be for an indefinite term.

All temporary contracts must be written in order to prove that they are to run other than for an indefinite term.

Additionally, despite the content of any agreement, the relationship between employer and employee is also governed by collective bargaining agreements, taking into account that these agreements apply as a minimum standard of the employment relationship, whereas the parties may agree on more beneficial terms of employment at any time. Therefore, individual employment contracts are subjected to numerous mandatory provisions which govern labour relationships such as detailed regulations affecting working hours and occupational health and safety.

Employees’ representation

Unions collectively represent employee’s interests both in particular geographical areas and in specific industries. Various employers’ associations also exist.

In addition to unionised representation, Spanish law allows legal representation through Worker’s Committees constituted in each place of business depending on the number of employees; thus, in businesses with more than ten workers, there is a right to elect employee representatives (although it is not obligatory to do so).

The right to elect representatives in businesses that have between six and ten employees can be exercised if all the employees (by majority) choose to do so. However, the right of employees to be represented within the management of the businesses is not currently acknowledged by the law; although employees do have certain information and consultation rights in relation to substantial modifications of labour conditions, dismissals, geographical modifications, mergers, and other relevant decisions of the employer that might have a material effect on the workforce.

Amongst the main functions of employees’ representatives is the monitoring of compliance with labour law and regulations. They are also entitled to receive information, on, amongst other things, the performance of the economic sector to which the enterprise belongs; on the economic situation of the enterprise, the recent and likely evolution of its activities and on compliance with equality obligations and other matters that may affect employment. Representatives also issue reports on certain labour issues, for instance redundancy procedures and other collective measures or, in case of mergers or changes in the legal form of the company, if they affect employment levels.

Termination of labour contracts, individual and collective redundancies

An employment contract may be terminated for certain reasons which normally do not give rise to a dispute, such as mutual agreement, expiration of the contract term, death or retirement of the employee or of the employer (when the employer is a natural person instead of a company), and so on.

Nevertheless, if the termination is unilaterally decided by the employer, it must have legal grounds. In this regard, the law stipulates that collective redundancies, individual objective causes (mainly technical, economic, organisational or productive grounds) and disciplinary actions are valid reasons to terminate employment contracts. The last amendments to the Workers Statute have introduced a more flexible interpretation of the legal grounds to be applied to individual objective termination and collective redundancies.

We summarise below the main causes and implications of each type of termination:

Disciplinary dismissal: a serious and wilful breach of contract by the worker. The employee must be given written notice of dismissal, stating the causes and effective date of dismissal. No prior notice is required. If it is deemed a fair dismissal, no severance payment is due. Where a dismissal is declared to be unfair, the employer must choose between reinstating the employee or paying statutory severance. Said statutory severance has been reduced by Act 3/2012 from 45 days of salary
for each year of employment up to a maximum of 42 months’ salary to 33 days of salary per year worked up to a maximum of 24 months’ salary

Nevertheless, the abovementioned reduced statutory severance for unfair dismissal will only apply to contracts executed after the entry into force of the Act 3/2012 (12 February, 2012). For earlier contracts, severance will be calculated at 45 days of salary per year of service for the time worked up until the above date of entry into force, and at 33 days of salary per year of service for time worked after that date. The resulting severance cannot exceed 720 days’ pay, unless the calculation of the severance for the period prior to the entry into force of the Act 3/2012 already resulted in a higher figure, in which case that amount will be taken as the maximum amount of severance, which cannot under any circumstance exceed 42 months’ salary

Individual objective termination (due to, for example, job elimination due to economic, technical, organisation or production grounds): 15 days’ notice is required (or the payment of the salary corresponding to the prior notice not observed) and a severance amount of 20 days’ salary per year worked, up to a maximum of 12 months’ salary must be paid to the employee if the termination is considered as fair. On the other hand, if it is ultimately found to be unfair, the same severance amounts as apply to unfair disciplinary may become payable.

Collective redundancies must also be based on economic, technical, organisation or production causes, whenever these affect (in a 90-day period) a certain number of employees (to be determined depending on the size of the company). The procedure is based on negotiation with workers’ representatives for not more than 30 days (15 days in companies employing less than 50 workers) to try to reach an agreement. The statutory severance amount consists of 20 days’ salary per year worked, up to a maximum of 12 months’ salary or more if the agreement reached provides. The legal procedure has been recently modified by Royal Decree 11/2013. Consultations are to be carried out by a single negotiation committee and, although a relevant company may have several workplaces, negotiations will be limited to the workplaces affected by the relevant layoff procedure. The negotiating committee will be formed of a maximum of thirteen members representing each of the parties. The committee representing the workers must be formed before the employer serves notice of its commencement of the consultation period. To this extent, the company’s management must serve written notice to the workers, or to their representatives, of its intention to initiate a collective layoff procedure. Once the consultation period has elapsed, the employer has to inform the labour authority of the outcome of the consultation. If an agreement is reached, the employer must forward a full copy of the agreement. If no agreement is reached, the employer must forward to the workers’ representatives and the labour authority the final collective layoff decision adopted and the terms of the collective layoff. After an agreement is reached, or notice of the decision is served to the workers’ representatives, the employer is entitled to serve individual notice of dismissal to the affected workers. In any event, a term of at least thirty days should elapse between the date on which the notice of commencement of the consultation period is served to the labour authority and the effective date of the dismissal.

Employment of foreign employees

Organic Act 8/2000 (dated 22 December 2000) on the Rights and Freedoms of Foreigners in Spain and their Social Integration, and the Royal Decree 557/2011, on the same matter, regulate the administrative procedures regarding work and residence permits for foreigners in Spain, in an attempt to create a policy to ensure the integration of nationals from other countries who reside legally on Spanish soil.

Nationals from non-EU countries

Under Spanish labour legislation, non-EU nationals intending to work in Spain must obtain a work visa and a work and residence authorisation. The duration of initial ordinary authorisations for employed work and residence is one year. After the one-year period, initial authorisations can be renewed for a further two-year period. In the granting of Work authorisations the “National Employment Situation” in Spain (that is, the need for labour and the level of unemployment for the jobs offered) is taken into account.

However, there are certain situations which increase the chances of being issued a visa, such as foreigners who have ties with Spain, rejoined relatives, highly qualified professionals, employees in the staff of a company or group of companies in another country who intend to render services for the same company or group of companies in Spain, workers who assemble or repair imported machinery, or senior employees or managers. In these cases, the National Employment Situation does not have to be considered.

The Royal Decree 557/2011 has also introduced special rules to implement the European Union blue card (regulated by Directive 2009/50) for highly qualified professionals that are long term residents of other EU countries.
Moreover, the Decree regulates the Unit of Large Enterprises (Unidad de Grandes Empresas) that envisages the procedure for authorising foreigners to enter, reside, and work in Spain where their work is for: employment-related, economic or social reasons; reasons related to research and development; teaching; projects which require a high level of qualification; or for artistic performances of special cultural interest. These more flexible mechanisms for qualified workers and their relatives apply to large enterprises as well as to other small and medium businesses of economically strategic importance. Additionally, in these circumstances, the "National Employment Situation" is not a requirement.

The current period required to obtain residency permits varies depending on the circumstances and the relevant Immigration Authority (for instance, the above-mentioned Unit of Large Enterprises can take less than one month to grant a work permit). There are legal taxes which apply to a company for the grant of such a permit.

Nationals from EU Member States

Nationals from countries of the European Union, the European Economic Area and Switzerland do not need to obtain a work authorisation as employees or as self-employed workers, because EU legislation on the free movement of workers applies. They are entitled to perform any activity both as employees and as self-employed workers, on the same terms as Spanish citizens.

Nevertheless, citizens of the European Union that intend to remain in Spain for more than three months must apply in person for registration on the Central Register of Foreigners after their arrival. Accordingly, EU citizens must not apply for a resident foreigner identification card albeit that family members of EU citizens that are not themselves EU citizens must do so.

Economy and Government

Every four years, the members of the Parliament (Cortes Generales), that comprise the Senate (Senado) and the Lower House of Parliament (Congreso de los Diputados), are elected by universal suffrage. Their duties are to exercise the legislative power of the nation, approve the annual State budgets, control the actions of the Government and ratify international treaties. In this regard, it is the Cortes Generales itself that elects the President of the Government (Presidente del Gobierno), who, in turn, has the discretion to elect and remove the members of the Council of Ministers.

With regards to the economy, Spain has become one of the most de-centralised European countries thanks to its division into Autonomous Communities, and offers a wide variety of incentives for foreign investors to invest.

Restrictions / regulations

In general, there are no restrictions on foreign investment. However, in the case of a takeover, merger or acquisition of a stake of a company operating in certain regulated sectors, a prior authorisation or non-opposition declaration from the relevant regulatory bodies must be obtained. In particular, investment in the following sectors have specific regulation: public power, public order, security and public health, transport, radio, minerals, mining raw materials of strategic interest and mining rights, television, gambling, telecommunications and any activities related to National Defence.

Notwithstanding the above, any kind of foreign investment in Spain must be declared to the Spanish Ministry of Economy and Finance for administrative, statistical or economic purposes. Investments derived from territories or countries considered to be tax havens must be declared prior to the investment being made, except when the investment is to be made in tradable securities previously issued or offered publicly on an official secondary market.

Exchange control

Since Spain is an EU Member State, and the Euro is its currency, there is freedom of capital movement. The exchange rate is supervised by the European Central Bank.

Incentives

The Spanish central government and all other public authorities have developed and implemented a wide and comprehensive range of investment incentives, placing special emphasis on the fostering of long-term employment and on research, development and technological innovation.

Furthermore, as an EU Member State, potential investors are able to access European sponsored investment programs.

A brief summary of the main incentives available for investors are as follows:
Training and employment incentives

These incentives, which form part of the Government’s employment promotion policy can involve important savings in labour costs, and consist, mainly, of subsidies and credits to reduce social security costs.

State incentives for specific industries

The Central Government provides financial aid (non-refundable subsidies, interest relief on loans obtained by the beneficiaries, or combinations of the two) and tax benefits for activities carried out in certain industries which are considered to be priority sectors in view of their growth potential and their impact on the nation’s overall economy (e.g. activities in the agricultural and food industry, energy, mining, technological development and research and development etc sectors). Regional governments provide similar incentives for most of these industries.

In addition, there are programs for investment in specific regions, promoted by State and Regional governments.

Taxation

The Spanish tax system has both direct (corporate income tax or CIT, personal income tax or PIT and non-resident income tax or NRIT) and indirect taxes (value added tax and transfer and stamp tax). Other taxes include local taxes (e.g. tax on business activity), regional taxes (e.g. inheritance tax and wealth tax) and special taxes levied on the production of some goods, such as alcohol and tobacco.

The current tax system is under thorough reform which is expected to enter in force on January 2015. The summary is prepared based on the current wording of the tax reform project. Thus, all references to new regulations are provisional until its final approval.

A brief summary of each relevant tax that could affect an investment decision follows:

Corporate Income Tax (CIT)

Corporate income tax applies to entities that are tax resident in Spain. Tax-resident entities are taxed on their worldwide income.

An entity is considered resident in Spain for tax purposes if it has been incorporated under Spanish Law, or its registered office is located in Spain, or its effective management headquarters are in Spain.

In general: Tax base = income/loss per books ± certain non-accounting adjustments provided for in the Corporate Income Tax Law.

Spain’s standard corporate income tax rate is 30% for fiscal year 2014. The tax rate will reduce to 28% for fiscal year 2015 and 25% for fiscal year 2016 onwards. Special corporate tax rates apply in certain cases. In particular, financial institutions will continue to apply the 30% rate tax after the reform.

The tax principles governing the recognition of revenues and expenses generally correlate to accounting principles.

The tax authorities may, for corporate income tax purposes, value transactions between related entities at their normal market value regardless of the fact that the value agreed by the parties leads to lower taxation in Spain than that which would have been the case had the fair market value been used, or leads to deferral of such taxation.

Market value between related entities is determined by applying OECD methods. Advance pricing arrangements (APAs) can be agreed with the tax authorities.

The taxpayer is obliged to value its transactions with related parties at their normal market value, and it is compulsory, with certain exceptions, to keep (at the tax authorities’ disposal) certain relevant documentation supporting the valuation and other documents.

The tax deductibility of expenses depends on the fulfilment of certain requirements. Expenses that are not deductible include dividends (from 2015 onwards, this category will include the return on profit participating loans granted by group companies), expenses from accounting corporate income tax, gratuities, fines or penalties, and expenses incurred in transactions with persons or entities resident in tax havens (unless the payer can prove that the expense arose from a transaction effectively
It will not be sufficient for the payer to submit the relevant invoice or document justifying the expense; rather, the payer will also have to evidence, by any means admissible in law, that the expense was actually incurred.

The previous thin capitalisation rules which provided for a 3 – 1 debt-to-equity ratio have been replaced with a general rule that places a limit equal to 30% of the operating income for the period on the deduction on the borrowing costs for tax periods commencing on or after 1 January 2012. In any event, net borrowing costs for the tax period amounting up to 1 million Euros will be deductible.

The International “fiscal transparency” regime ("controlled foreign corporations" provisions) implies that taxpayers must include in their tax base certain types of “passive” income obtained by their non resident subsidiaries even if such income has not been actually distributed. The requirements are: (i) 50% or more holding in the non-resident subsidiary by the taxpayer (not applicable to a business resident in other EU countries, when the existence of valid economics reasons for its incorporation or EU Collective Investment Vehicles governed by the EU UCITS Directive is evidenced) and (ii) the amount paid by the non-resident on the attributable net income must be less than 75% of that which would have been payable under Spanish regulations. Likewise, all income (except for dividends and gains on shares) derived by a non-resident entity will be included in the taxpayers’ tax base provided that the controlled foreign corporation does not have the relevant human and material means and regardless of the fulfillment on the abovementioned requirements.

As for capital gains, gains on transfers of assets are treated as any other item of income. If certain requirements are met, a 12% tax credit can be taken on gains obtained on transfers of tangible fixed assets, intangible assets or long-term investments, effectively reducing the final tax rate to 18%. This tax credit will be removed from fiscal year 2015 onwards, and a new tax incentive will be approved. This new incentive is the so-called capitalisation reserve and consists in a reduction of the taxpayers’ tax base by 10% of the increase in their equity (limited to a 10% of the tax base) provided that (i) this increase is maintained over a period of 5 years and (ii) a reserve is set up for the amount of the reduction, duly separated and restricted over the 5-year period.

Other specific incentives and special tax regimes that investors may find attractive are:

- foreign-securities holding entities (ETVEs): also known as “Spanish holding companies”. The regime governing these entities is one of the most competitive in the EU, since, unlike other regimes, under certain circumstances, not only is a Spanish holding company not taxed on its foreign-source income and / or gains, but also it is not taxed on the income it distributes to its shareholders, or on the gains arising when a shareholder sells its stake in the holding company and
- reduction in revenues from certain intangible assets: a 60% reduction will be applied on the positive difference between revenues and certain expenses directly related to the licensed intangible asset, subject to certain requirements and limits. The reduction will also apply to the capital gain triggered on the transfer of the said intangible assets

**Taxation of individuals**

Personal income tax applies to individuals who are tax resident in Spain. Individuals are taxed on their worldwide income.

A taxpayer is considered to be a resident if he or she spends more than 183 days in Spain during a calendar year, or if his or her principal centre or the base of his or her business or professional activities are in Spain.

Taxable income is made up of a general base and a "savings base":

The general base consists of the balance resulting from adding together all income (salary income, income from business or professional activities, rental income, etc.), and / or the positive balance resulting from gains/losses not included in the savings base (e.g. gifts). There is a general scale and a regional scale of tax rates; the minimum combined rate for income up to €17,707.20 is 24.75%, (the minimum combined tax rate for income up to €12,450 will be 20% in 2015 and 19% from 2016 onwards), while the marginal combined rate for income of €300,000.20 and above is 51.90% (which could be higher depending on the legislation of the corresponding region). This maximum marginal combined tax rate applicable to income exceeding €60,000 will be 47% in 2015 and 45% from 2016 onwards (depending on the legislation of the region).

The “savings base” consists of the positive balance resulting from income from movable capital (basically dividends, interest - except those received from related entities, when certain conditions are not fulfilled - and the monetary return or payment in kind on capitalisation transactions and life or disability insurance contracts) and the positive balance resulting from capital gains/losses deriving from the transfer of assets. The savings base is taxed as follows:

<table>
<thead>
<tr>
<th>TAX BASE (€)</th>
<th>TAX RATE 2014 (%)</th>
<th>TAX RATE 2015 (%)</th>
<th>TAX RATE FROM 2016 ONWARDS (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 6,000.00</td>
<td>21.00</td>
<td>20.00</td>
<td>19.00</td>
</tr>
<tr>
<td>From 6,000.00 to 24,000.00</td>
<td>25.00</td>
<td>22.00</td>
<td>21.00</td>
</tr>
<tr>
<td>From 24,000.00 onwards</td>
<td>27.00</td>
<td>24.00</td>
<td>23.00</td>
</tr>
</tbody>
</table>

There are tax incentives for income and / or gains obtained in the cities of Ceuta and Melilla, for investments in and expenses in respect of assets of cultural interest, and for certain economic activities.

Workers assigned abroad: Spanish personal income tax legislation establishes a very large exemption for salary income earned by workers who work abroad, but remain tax resident in Spain. This exemption applies to up to €60,100 per year, provided that certain requirements are met.

**Taxation of non-residents**

Individuals and entities not resident in Spain are liable for non-resident income tax on the income and / or gains they obtain in Spain. The key to ascertaining how non-residents will be taxed lies in whether or not the non-resident has a permanent establishment (PE) in Spain:

- **With a permanent establishment:** Taxpayers obtaining income and / or gains through a PE in Spain are taxed on all the income and / or gains attributable to the PE. Broadly speaking, the PEs in Spain of non-resident individuals or entities are taxed on their net income just like companies resident in Spain, and are subject to the same tax rate (in general, 30%, although the tax rate will be 28% in 2015 and 25% from 2016 onwards). There is an additional 21% tax (20% in 2015 and 19% from 2016 onwards) on amounts transferred abroad out of income obtained by PEs of non-resident entities, although there are exceptions.

- **Without a permanent establishment:** Taxpayers obtaining income and / or gains without the intermediation of a PE are taxed separately on each full or partial accrual of income and / or gains obtained in Spain. There are certain exemptions, including (amongst others):
  - Interest and other income from the transfer of their own capital to third parties, as well as capital gains from movable assets (except from Real estate companies), obtained without the involvement of a PE by residents of other EU Member States (except tax havens).
Dividends distributed by a Spanish subsidiary to its EU parent company in certain cases (domestic exemption implementing the EU Parent-Subsidiary Directive)

Income paid as a result of the international sale of goods and

Royalties paid by a Spanish resident company (or by a permanent establishment in Spain of a company resident in another EU Member State) to an “associated” company resident in another EU Member State (or to a permanent establishment of an EU resident company in another Member State)\(^\text{14}\)

The tax rates applicable to non-residents without a PE are as follows (notwithstanding the tax treaties signed by Spain and certain special rules where the non-resident resides in an EU country):

<table>
<thead>
<tr>
<th>TYPE OF INCOME</th>
<th>RATE 2014 (%)</th>
<th>RATES 2015-2016 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>General (including royalties)</td>
<td>24.75</td>
<td>24 or 20-19 (EU and EEA residents)</td>
</tr>
<tr>
<td>Dividends</td>
<td>21</td>
<td>20-19</td>
</tr>
<tr>
<td>Interest</td>
<td>21</td>
<td>20-19</td>
</tr>
<tr>
<td>Gains from transfer or redemption of units/shares in the capital or equity of collective investment institutions</td>
<td>21</td>
<td>20-10</td>
</tr>
<tr>
<td>Income from reinsurance transactions</td>
<td>1.5</td>
<td>1.5</td>
</tr>
<tr>
<td>Income from air or maritime shipping entities</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Capital gains</td>
<td>21</td>
<td>20-19</td>
</tr>
<tr>
<td>Seasonal foreign workers</td>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

These rates could be affected by Tax Treaties signed by Spain. Countries that have signed a tax treaty with Spain with an exchange of information clause are detailed in the following table:

| LIST OF COUNTRIES THAT HAVE A TAX TREATY WITH SPAIN WITH AN EXCHANGE OF INFORMATION CLAUSE\(^\text{15}\) |
|--------------------------|----------------|----------------|
| Germany                  | USA            | Moldavia       |
| Albania                  | El Salvador    | Norway         |
| Saudi Arabia             | Estonia        | New Zealand    |
| Algeria                  | The Philippines| Netherlands    |
| Argentina                | Finland        | Panama         |
| Armenia                  | France         | Pakistan       |
| Australia                | Georgia        | Poland         |
| Austria                  | Greece         | Portugal       |

\(^{14}\) This exemption applies as of July 1st, 2011.

\(^{15}\) At the time of writing of this document, tax treaties with an exchange of information clause are currently being processed with the following countries: Bahrein, Belarus, Cabo Verde, Qatar, Montenegro, Namibia, Nigeria, Oman, Peru, Senegal, Syria and Uzbekistan.
<table>
<thead>
<tr>
<th>Country</th>
<th>Country</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>Azerbaijan</td>
<td>Hong Kong</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>Barbados</td>
<td>Hungary</td>
<td>Dominican Republic</td>
</tr>
<tr>
<td>Belgium</td>
<td>India</td>
<td>Romania</td>
</tr>
<tr>
<td>Bolivia</td>
<td>Indonesia</td>
<td>Russian Federation</td>
</tr>
<tr>
<td>Bosnia-Herzegovina</td>
<td>Iran</td>
<td>Serbia</td>
</tr>
<tr>
<td>Brazil</td>
<td>Ireland</td>
<td>Singapore</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Iceland</td>
<td>South Africa</td>
</tr>
<tr>
<td>Canada</td>
<td>Israel</td>
<td>Slovakia</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Italy</td>
<td>Sweden</td>
</tr>
<tr>
<td>Chile</td>
<td>Jamaica</td>
<td>Switzerland</td>
</tr>
<tr>
<td>China</td>
<td>Japan</td>
<td>Thailand</td>
</tr>
<tr>
<td>Colombia</td>
<td>Kazakhstan</td>
<td>East Timor</td>
</tr>
<tr>
<td>South Korea</td>
<td>Kuwait</td>
<td>Trinidad and Tobago</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>Latvia</td>
<td>Tunisia</td>
</tr>
<tr>
<td>Croatia</td>
<td>Lithuania</td>
<td>Turkey</td>
</tr>
<tr>
<td>Cuba</td>
<td>Luxembourg</td>
<td>Former Republics of the USSR</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Macedonia</td>
<td>Venezuela</td>
</tr>
<tr>
<td>Ecuador</td>
<td>Malaysia</td>
<td>Vietnam</td>
</tr>
<tr>
<td>Egypt</td>
<td>Malta</td>
<td>Uruguay</td>
</tr>
<tr>
<td>United Arab Emirates</td>
<td>Morocco</td>
<td></td>
</tr>
<tr>
<td>Slovenia</td>
<td>Mexico</td>
<td></td>
</tr>
</tbody>
</table>

Non-residents must appoint a Spanish-resident individual or legal entity as their tax representative in certain cases.

**Tax regime for inbound expats**

Individuals who become tax resident in Spain as a result of their assignment there can elect to be taxed either under the personal income tax rules or under the non-resident income tax rules during the tax period in which their tax residence changes and for the next five tax periods provided certain circumstances are met. If they choose the latter, expatriates are only taxed on income and / or gains considered to have been obtained in Spain, at a standard rate of 24.75%. The tax reform modifies this tax regime. As from fiscal year 2015, certain professional sportspeople will not be able to apply this tax regime and the applicable tax rates will be modified as follows:

- **For salary income:** the tax rate will be 24.00% up to €600,000.00 and the excess will be taxed at a 45% tax rate (47% for fiscal year 2015)

- Dividend, interests and capital gains will be subject to the following tax rates:

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15 The tax treaty signed between Spain and Russia now applies to Belarus, Kirghizstan, Tajikistan, Turkmenistan and Ukraine
TAX BASE (€) | TAX RATE 2015 (%) | TAX RATE FROM 2016 ONWARDS (%)
--- | --- | ---
Up to 6,000.00 | 20.00 | 19.00
From 6,000.00 to 50,000.00 | 22.00 | 21.00
From 50,000.00 onwards | 24.00 | 23.00

Other income obtained in Spain will be subject to the abovementioned non-resident income tax general rates.

Value Added Tax (VAT)

The standard rate is 21% and applies to most supplies of goods and services. There is a reduced rate of 10% applicable to certain supplies of goods and services. There is also a “super-reduced” rate of 4% that applies, for instance, to essential food items, certain books, newspapers and magazines, or certain government-subsidised housing.

Certain transactions are exempt from VAT (for example, financial and insurance transactions, medical services or educational services).

VAT does not apply in the Canary Islands, Ceuta or Melilla (special taxes apply).

In addition, certain groups of companies may be taxed under a consolidated tax regime for VAT purposes. To qualify for the regime, the parent company must have a holding (direct or indirect) in its subsidiaries of at least 50% and an economic and organisational link.

Transfer and Stamp Tax

This tax is levied on a limited number of transactions, including most notably (many differences may apply in relation to each Region):

<table>
<thead>
<tr>
<th>TYPE OF TRANSACTION</th>
<th>APPLICABLE RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corporate transactions, such as the formation of companies, capital increases or reductions of companies, contributions made by shareholders that do not imply a capital increase, etc. (^{17})</td>
<td>1%</td>
</tr>
<tr>
<td>Transfers of Real estate</td>
<td>6%</td>
</tr>
<tr>
<td>Transfers of movable property and administrative concessions</td>
<td>4%</td>
</tr>
<tr>
<td>Certain rights in rem</td>
<td>1%</td>
</tr>
<tr>
<td>Certain notarial deeds</td>
<td>0.5%</td>
</tr>
</tbody>
</table>

Transfers of shares in Spanish companies do not usually attract indirect taxation, unless more than 50% of the capital stock is transferred (or a stake in an entity is increased when the acquirer already has more than 50%) and more than 50% of the assets, (as defined in the applicable law) of the company consists of Real estate in Spain which is not devoted to business activities. In this case, the transaction will be treated, for indirect taxation purposes, as a transfer of Real estate and could be subject to the transfer tax rate determined by the regional government where the asset is situated, unless the transaction is subject to VAT.

\(^{17}\) Starting on December 3, 2010, the formation of companies, the increase in their capital, the contributions made by shareholders which do not entail a capital increase and the relocation to Spain of the company’s place of effective management or of the registered office where neither one nor the other had previously been located in an EU Member State, are exempt from transfer tax under the “corporate transactions” heading.
Social security

Social Security levies are paid between an employer and an employee. Self-employed workers are also subject to the regime.

In 2013, the general employer contribution is 28.30%, while the employee contribution is 4.70%. These rates apply subject to certain minimum and maximum thresholds (depending on the worker's occupation category), with the maximum threshold being €3,425.70.

Dispute resolution

Court process

There are four different types of jurisdictions in Spain: contentious-administrative, labour, criminal and civil. They are subject to different procedural rules. However, the rules of civil procedure apply in the absence of provision in the laws regulating contentious-administrative, labour and criminal proceedings. Within the civil jurisdiction there are specialised civil courts with jurisdiction over specific commercial matters such as insolvency law, company law, Intellectual property law, maritime and transport law and competition law.

The Spanish Civil Procedural Law mainly regulates two different types of civil proceedings: “ordinary” and “verbal” proceedings. Some other specialised procedures are also undertaken (e.g. eviction or payment order proceedings).

“Ordinary” proceedings normally involve cases where the dispute is worth €6,000 or above. There are some specific matters (e.g. unfair competition) that will always follow ordinary proceedings, regardless of the amount in dispute. “Ordinary” proceedings commence with the filing of the statement of claim together with documentary evidence by the claimant. The defendant will only have twenty working days from the date of service to file his statement of defence. In this twenty day period, the defendant will also have to file a counterclaim if it has a claim against the claimant related to the dispute. No extensions of time will be granted. Suspending this period will only be possible in very limited cases such as challenging of jurisdiction.

The court will then call for a preliminary hearing where the parties will be asked by the judge whether an agreement is possible. If not, and after any procedural issues are resolved, the parties will propose the evidence on which they wish to rely at the trial. The court will decide which evidence is admissible and will set a date for the trial. During the trial the parties will examine the evidence and present their closing submissions orally. After the trial, the court will pass its decision on the merits.

“Verbal” proceedings involve cases where the dispute refers to a claim of less than €6,000 or specific matters that according to the law, will always follow these proceedings regardless of the amount in dispute (e.g. eviction). “Verbal” proceedings commence in the same manner. However, in this case there is no written response by the defendant and no preliminary hearing will take place. After receiving the claim the court will set a date for the trial and the defendant will have to plead his defence orally at the trial. Evidence will be examined and the closing submissions will be presented at the same hearing. After the trial, the court will render its judgment on the merits.

Judgments rendered by Courts of First Instance (or commercial courts) are subject to appeal before the Court of Appeals, and are provisionally enforceable against the debtor. In certain circumstances, a further extraordinary appeal is also possible to the Supreme Court based on error of law, procedural or substantive.

Under Spanish law, the losing party will normally bear the litigation costs, including lawyer’s fees (which depend on the amount in dispute) unless the court considers that the case may pose serious de facto/or de jure issues and which lead to a different decision. If the claim is partially upheld or dismissed, each party bears its own costs, unless one party has litigated recklessly, in which case the tribunal may decide that such party should bear the costs of the other party.

Arbitration / Alternative Dispute Resolution (ADR)

All matters that can be freely disposed by the parties can be submitted to arbitration. There is a general trend towards the use of arbitration in Spain, especially after the enactment of the 2003 Arbitration Law, essentially based on the UNCITRAL Model Law. This Law establishes a single system; therefore, the same applies to domestic and international arbitrations.

Spanish courts have traditionally adopted a pro-arbitration approach. And recently, some measures have been taken from the public and private sectors in order to promote this mechanism of resolving disputes.
Spain is becoming the “natural” seat of many arbitrations involving interests in Latin America, and arbitration courts such as the Corte de Arbitraje de Madrid, Corte Española de Arbitraje, “CIMA”, and “TAB” are handling an increasing number of cases.

With regards to ADR, on July 2012, the Law 5/2012 on mediation in civil and commercial matters was enacted. This law transposed into Spanish law the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008. The law was later completed with the Royal Decree 980/2013, which was enacted on December 2013.

**Competition**

There are three main pieces of legislation in the area of Competition Law in Spain: Law 15/2007, of 3 July, of Defence of Competition, Law 3/2013, of 4 June, creating a sector-overcharging regulator, the National Markets and Competition Commission that replaced the National Competition Commission and the Royal Decree 261/2008, of 22 February, approving the Defence of Competition Regulation.

Spanish Competition Law can be subdivided into three areas:

- the prohibition of anti-competitive agreements
- the prohibition of abuses of a dominant position and
- merger control

**Prohibition of anti-competitive agreements**

Agreements between undertakings which lead to an appreciable restriction of competition are prohibited. Examples include agreements which:

- fix purchase or selling prices or other trading conditions
- limit production, markets, technical development or investment
- share markets or sources of supply between competitors or
- apply discriminatory conditions to companies that are not parties to the agreement putting them at a competitive disadvantage

However, a restrictive agreement may be exempted if it fulfils the following conditions:

- it improves the production or distribution of goods or promotes technical or economic progress
- it allows consumers a fair share of the resulting benefit
- the restriction of competition must be necessary to achieve the previously mentioned points and
- it must not eliminate competition for a substantial proportion of the products or services

The European Commission block exemption regulations specify how these conditions apply to certain categories of agreements. These Regulations also apply under Spanish Competition Law.

**Prohibition of abuses of a dominant position**

A company is deemed to be dominant if, among other factors, it holds a large share of the relevant market. Spanish Competition Law prohibits the abuse of a dominant position. Examples of abuses are:

- refusal to supply without any objective justification
- applying excessive prices
- charging very low prices designed to squeeze out competitors or bar new entrants from the market or
granting discriminatory advantages to some customers, unless there is an objective justification for such differentiation.

In addition, the National Markets and Competition Commission may also prosecute acts of unfair competition (such as abuses of economic dependence) if they (i) distort competition; and (ii) affect the public interest.

**Merger control**

Mergers, acquisitions and joint ventures have to be notified before the Competition Directorate of the National Markets and Competition Commission if (i) the turnovers of the undertakings concerned do not reach the thresholds set out in the European merger control regulation 139/2004; and (ii) the turnover or the market shares of the undertakings concerned reach the thresholds of the Law 15/2007, of 3 July, of the Defence of Competition; this is where the combined turnover of the parties to the concentration in Spain exceeds €240 million, and the individual turnover of at least two of the parties to the merger in Spain exceeds €60 million.

The alternative merger control market share threshold in the Spanish Competition Law is 30% or more unless the turnover in Spain in the preceding accounting period of the target or of the target’s assets being acquired does not exceed €10 million and the individual or combined market share of the parties does not amount to 50% or more in any ‘affected market’ in Spain or in any ‘defined’ geographic market within Spain. The threshold may even apply if the target company holds this share alone, despite the purchasing company not having assets / activities in Spain. A transaction in relation to which a notification must be made cannot be completed until clearance has been given.

The substantial test of the merger control proceedings follows the European merger control regulation 139/2004.

**Enforcement**

Businesses that engage in anti-competitive agreements or abuses of dominant position may face (i) fines of up to 10% of their annual turnover; and / or (ii) actions for damages. Any agreements falling foul of Competition Law are void.

The enforcing authorities in Spain are: (i) the recently established National Markets and Competition Commission which has jurisdiction to enforce all areas of EU and Spanish Competition rules in Spain as a whole; and (ii) the regional competition authorities which have jurisdiction in their respective regions concerning prohibition of restrictive agreements and abuses of dominant position under Spanish Competition Law only. Private enforcement by Spanish courts of both EU and Spanish Competition rules concerning prohibition of restrictive agreements and abuses of dominant position remains undeveloped at present, compared to other jurisdictions in the EU.

A cartel leniency program was introduced in 2008 along the lines of the European Commission’s model. The Spanish Competition Authority has adopted several fining decisions arising from leniency applications. In these decisions the ‘whistleblowers’ were treated leniently.

The National Market and Competition Commission’s main enforcement priority continues to be cartels.

**Intellectual property**

Spain has developed an Intellectual property system which provides protection for, amongst others, copyright, trade marks, patents, plant varieties, industrial designs, topographies of semiconductor products, etc.

Unlike the protection of copyright (which arises automatically, from the moment of creation of an original work), the protection of industrial property is based on the registration principle. Accordingly, an invention or a trade mark will not enjoy protection unless an application has been filed and registered with the corresponding IP Office. Spain, unlike the United States for example, follows the “first-to-file” system. According to this principle, the first person to apply for registration will have priority rights and, as a general rule, use will not provide protection against third parties except in the case of well-known marks.

Another fundamental principle of the Spanish system is the principle of territoriality, which entails that the registration of a trade mark or a patent in its country of origin does not confer automatic protection in Spain. Consequently, protection should be sought by applying for the registration of the relevant rights at the Spanish Patent and Trade Mark Office.

Despite their intangible nature, Intellectual property rights are assets and, like tangible goods, may be assigned, encumbered, licensed or transferred by any means provided by law.
Spain has ratified the main International Conventions in this area, which, with rare exceptions, allow non-Spanish nationals to protect their rights in Spain.

Spain's membership of the European Union has also helped the implementation of the guidelines laid down by the European Union Directives on Intellectual property. Spain is, therefore, in line with the rest of the EU Member States.

**Trademarks**

The fundamental goal of trademarks is to distinguish the goods and services of a business from those of others in the market place. Trademarks also play an important role in advertising and goodwill consolidation.

Since April 1996, a trademark can be obtained in Spain in various different ways:

**National trademarks**

National trademarks are registered with the Spanish Patent and Trade Mark Office. These marks can consist of a large number of signs capable of being represented graphically, using words, names or surnames, signatures, numbers and number combinations, slogans, drawings, sounds, colours and three-dimensional shapes, including their packaging.

Trademark registration is valid for ten years and can be renewed indefinitely for further ten-year periods; however the registration may lapse or be revoked if the trade mark is not renewed, if it is not effectively used during an uninterrupted five-year period, or if it becomes generic or misleading in connection with the goods and/or services it covers.

**International system**


Although known as “International”, this system does not provide an international registration, strictly speaking, but rather a system whereby various national registrations may be obtained through a unified administrative procedure. The applicant must designate the countries where they wish to obtain protection. WIPO then proceeds to notify the national offices of the designated countries and, if no oppositions are filed pursuant to the national laws of each of the countries concerned within one year (pursuant to the Agreement) or 18 months (pursuant to the Protocol), the trade mark will be registered.

This system can only be used by natural or legal persons who are domiciled or who have a real and effective establishment in a country signatory to one or both of the above conventions and may, on the basis of a registration or application at the Trade Marks Office of such State, obtain an international registration effective in all or some of the countries of the Madrid Union.

**Community Trade Marks**

The main feature of the Community Trade Mark (CTM) is its unitary character. A single procedure and a single registration provide the owner of a trademark with registered protection in the whole European Union, making a total of 28 Member States. The CTM covers a market of circa 500 million consumers with a single registration.

CTMs however do not replace trademark rights in each Member State. The national, international and Community trademark systems coexist and, in some areas, complement each other.

The adherence of the European Union to the Madrid Protocol connects the registration procedure of a CTM to the International trademark registration system, enabling any citizen based in an EU State to protect its trademarks as a CTM and also as an international registration in the Member States of the Madrid Protocol.

**Protection of inventions**

Inventions are fully protected under Spanish law through patents and utility models, which guarantee the exclusive exploitation by their owners or by authorised third parties.

**Patents**

Patents are used as a means to encourage boost investment in research and development and develop a country's technology. The State grants exclusive rights to the invention for a specific term (generally 20 years) on the understanding
that once this period has expired, the invention will become available for public exploitation for the benefit of society as a whole.

The patent owner may exploit the invention and prevent third parties from exploiting it, marketing it or employing it in their business without consent. For the lifetime of the patent, third parties may only exploit the invention where the necessary license has been granted.

Both inventions and procedures are patentable. Pharmaceutical products were made patentable in 1992.

Since Spain’s ratification of the Munich European Patent Convention (EPC) in 1973, Spain can be designated in a European patent application. European patents are administered by the European Patent Office, based in Munich. The EPC system allows the registration of a bundle of national patents enforceable in the countries designated by the applicant.

PCT - Patent Cooperation Treaty
Spain has also ratified the PCT, which simplifies and reduces the cost of obtaining international patent protection through a unified application and verification procedure (for example, in relation to obtaining search reports, which are necessary to determine the novelty of the invention and the inventive step). Filing one international patent application under the PCT allows simultaneous protection to be sought for an invention in over one hundred countries throughout the world. However, as opposed to the European patent, registration is granted by each of the relevant national offices.

The unitary patent
After years of discussion, the European patent with unitary effect (unitary patent) will enter into force once the Agreement on a Unified Patent Court is enacted, Spain and Italy are the only Member States not participating in the unitary patent system on account of its language regime, which only includes English, French and German. The remaining Member States were able to move ahead with the unitary patent through enhanced cooperation, which allows a group of at least 9 Member States to move ahead with an initiative when it proves impossible to reach an unanimous agreement within a reasonable time frame.

As the unitary patent will only have effect in the Member States which have joined through enhanced cooperation, therefore, it seems the long-awaited objective of ensuring uniform patent protection throughout the EU will not be a reality in Spain for the time being.

Utility models
This form of protection is intended for inventions which do not qualify for full patent protection for involving a lower level of inventiveness. They are granted for a non-extendable period of 10 years.

Industrial designs
Unlike patents and utility models, designs protect the aesthetic appearance of goods rather than their functional novelty.

Industrial designs are objects that may serve as prototypes for the manufacture of a product and that can be described in terms of their structure, configuration, decoration or representation. At present there are three procedures through which designs may be protected:

- National System. Amongst the most relevant features of this system is the so-called twelve-month “grace period” which allows the holder or authorised third party to disclose the design without destroying its novelty. This allows a proprietor the opportunity to determine whether seeking protection for a design is likely to be worth the time and cost

  Registration is granted for a period of five years from the date on which the application was filed, renewable for further five-year periods up to a maximum of 25 years. It is also important to emphasise that the owner of a design has the right to use the design and to obtain relief should any third party use it without consent after its registration is published

- Community System. The essential feature of the Community design system is the recognition of both registered and unregistered designs, provided these meet the requirements of novelty and individual character

  A Registered Community Design (RCD) is filed before the Office of Harmonization for the Internal Market (OHIM) and confers on its owner the exclusive right to use and prevent the use by unauthorised third parties of the design. Designs are protected for a period of five years; this can be renewed for further five-year periods up to a maximum of 25 years
The Unregistered Community Design (UCD) protects a design for a period of three years from the date on which the design was first made available to the public within the Community and gives the right to prevent the commercial use of the design only if the use results from copying.

International System. The Hague Agreement Concerning the International Deposit of Industrial Designs (WIPO administered treaty) gives the owner of an industrial design the possibility of protecting his design in several countries by simply filing one application.

A national of any contracting party may protect its designs in any Member State, filing a single international application with WIPO. Such application, however, shall be subject to the applicable national legislation of each of the designated Member States.

Copyright

Copyright is governed by Legislative Royal Decree Act 1/1996 of 12 April 1996. In addition, Spain is party to the Bern Convention for the Protection of Literary and Artistic Works and the rest of the most relevant international Copyright Conventions.

Copyright protection begins from the moment of the creation of the work, without a need for any further formalities. Therefore, ownership of rights does not depend on registering the works, irrespective of the fact that registration may subsequently be necessary for practical purposes.

The determining factor in the protection of works by copyright is their originality. All original literary, artistic or scientific works are protected by copyright, inter alia, books, music compositions, audiovisual works, projects, plans, graphics, computer programs and databases.

Copyright protection is granted for 70 years from the death of the author, where the author is a natural person. Where the author is a legal person, the term of protection is 70 years from January 1 of the year following that in which the work was lawfully published, or following the year of its creation, if the work was not published.

Apart from copyright, the Spanish Copyright Law also grants associated rights to performers, phonogram producers, producers of audiovisual recordings and broadcasting organisations.

Spain has approved a bill to amend Spanish Copyright Law. The bill is currently in its parliamentary proceedings and it is expected to enter into force on January 2015. Once of the main goals of this reform is to strengthen copyright protection on the Internet in Spain. The bill establishes an administrative body within the Ministry of Culture (Second Section of the Copyright Commission), providing an expedited hybrid procedure of administrative and judicial nature to fast-track action for copyright infringement on the Internet. The purpose of this amendment is to force Internet Service Providers (ISPs) to take down unlawful content and, in some cases, to shut down websites which openly violate copyright legislation.

Marketing agreements

Agency agreements


According to the Agency Act, an agent is a natural or legal person, obliged with a third person (the principal) in a continuous or stable manner in exchange for a remuneration, to promote commercial transactions on behalf of the principal as an independent intermediate, without assuming, unless expressly agreed, the risk of such transactions.

The Agency Act does not require any particular formality regarding the validity or effectiveness of an agency agreement. Thus, it can be written or verbal. Agency contracts may run for a specific or indefinite term, but for an agency agreement to be for a fixed period it must be expressly agreed by the parties, otherwise the contract will be considered for an indefinite term. Moreover, a contract with a fixed term that continues to be executed by both parties after the period initially agreed will be considered thereafter to be a contract for an indefinite term.
Parties are free to agree upon the rate remuneration. This can consist in a percentage of sales (commission), a fixed amount or a combination of both. Where this is not specified, the remuneration will be fixed in accordance with the commercial practices of the location where the agent performs its activity.

An agency contract for a fixed period may not be terminated by any of the parties except in the case of breach. An indefinite agency agreement can be terminated via prior written notice, which shall be one month for each year of duration of the contract up to a maximum of six months.

Upon termination of an agency contract, unless the termination is due to a breach of contract committed by the agent, the agent is entitled to goodwill compensation which cannot exceed the average annual amount to the remuneration received by the agent during the last five years of the contract, if (i) the agent has increased the number of clients or activity and (ii) the agent's activity continues to produce substantial commercial advantage to the principal.

Moreover, in case of termination of an indefinite contract, the agent is also entitled to claim compensation for the unredeemed part of the investments made.

In case of an unlawful termination of an indefinite agency contract, the agent would also be entitled to claim a compensation for losses and damages.

**Distribution agreements**

The Spanish Parliament received the new Draft on Distribution Contracts Act, which was published at the Official Bulletin of the Spanish Congress on 29 June 2011. However, the aforesaid draft has not been approved yet; hence, at the moment there is no regulation on distribution contracts in Spain. Until the Distribution Act is approved, distribution contracts will continue to be defined by Spanish case law as an agreement whereby a distributor agrees to purchase products, generally manufactured under a brand name of the principal, on certain terms and conditions in his own name and under his own risk, for the purpose of reselling them in a given territory.

Hence, whereas the agent promotes contracts on behalf of a third party, or promotes and closes contracts on behalf of third parties, in exchange for a fixed amount or commission, without assuming the commercial risk of such transaction, the distributor is a fully autonomous business person or company, acting on its own behalf, entering into contracts and assuming the risk inherent in the transactions it closes.

Distribution agreements are not subject to any specific formalities for them to be valid. For a distribution agreement to be exclusive it must be expressly agreed by the parties.

Parties are free to agree upon the duration of the contract. In case of lack of an agreement, it will be understood that the agreement is for an indefinite term.

Spanish case law holds that unilateral termination of indefinite distribution agreements may be effected if reasonable advance notice is served (six months) and if the termination is not arbitrary.

When a distribution agreement is unilaterally terminated, either by serving insufficient advance notice or in bad faith, damages may be payable.

**Franchise agreements**

Franchise agreements in Spain are governed by Article 62 of Law 7/1996 of Retail Commerce, as well as by its Regulation (Royal Decree 201/2010 of February 26th).

Under a franchise agreement, the franchisor grants to the franchisee, for a specific market and in exchange of a remuneration, the right to exploit its own franchise system to commercialise products or services already exploited by the franchisor.

Spanish regulation does not provide for any specific formalities regarding the validity or effectiveness of a franchise agreement.

The only requirements established by Spanish regulation are that the franchisor (i) must be enrolled in a specific register within 3 months of starting the activity and (ii) must submit certain information 20 days prior to the signature of the agreement.
or prior to any payment made by the franchisor (including identification of the franchisor, justification of ownership or license for the use of any trademark, general description of the area in which the franchise operates, experience of the franchise, content and characteristics of the franchise and its exploitation, structure and extension of its network in Spain and essential elements of the franchise agreement).

E-commerce

Law 34/2002 on E-Commerce and Information Society Services (LSSI), in force since October 12, 2002, transposes Directive 2000/31/EC of the European Parliament and of the Council, relating to certain legal aspects of the services of the information society, particularly e-commerce on the domestic market (i.e., the liability regime applicable to ISPs, the individuals’ informed consent to use devices for storage and recovery of data located in their computers, information to be disclosed on websites, etc.). Minor, serious and very serious categories of infringements are established due to failure to comply with the obligations imposed in the LSSI, with penalties of up to €600,000.

In order to ensure the technical security and legal certainty of business activities that are carried on electronically, the Electronic Signature Law 59/2003 was enacted. This Law aims to promote more widespread use of electronic signatures as an instrument that generates trust and security in electronic communications, thereby contributing to the development of e-commerce and of “e-government.”

Additionally, it is worth noting that Law 56/2007, of 28 December 2007, on Measures to Promote Information Society Services, modified, inter alia, the LSSI and the Law on Electronic Signatures, and included measures aimed at avoiding the excessive obligations applying to the provision of e-commerce and information society services.

Another important law in this regard is Law 25/2007, of 18 October 2007, on the keeping of data relating to electronic communications and to public communications networks. This establishes that operators that provide electronic communication services to the public or operate public communications networks must (i) keep the data generated or processed within the context of the service for a period of 12 months, a period which may be reduced or extended between 6 months and 2 years for certain categories of data; and (ii) disclose such data to authorised agents whenever so required by a judicial authorisation for the purposes of detecting, investigating and prosecuting serious criminal offences contemplated in the Criminal Code and elsewhere. However law 25/2007 has been modified by the General Telecommunications Act 9/2014 of May 9, 2014. According to the final disposition number 4 of the new General Telecommunications Act, Law 25/2007 has been amended adding that the transfer of personal data shall be limited to the information that is strictly necessary for the objective of prevention, detection or prosecution of serious offences.

Data protection

The Personal Data Protection Organic Law 15/1999 (LOPD) regulates the processing of an individual’s personal data obtained by public and private entities in the course of their duties. Personal data cannot be used indiscriminately and there are penalties, the severity of which depends on the seriousness of the breach (minor infringement €900 to 40,000; serious infringement €40,001 to 300,000; and very serious infringement €300,001 to 600,000). The LOPD applies to “personal data,” which covers any information concerning identified or unidentified individuals. It does not apply to data concerning individual entrepreneurs or individuals being the contact person of a legal entity where the personal data is used exclusively in a “B2B” framework and where such data is limited to the following: name and surname(s), functions or jobs performed, as well as the postal or e-mail address and professional telephone and fax numbers.

Also of note are the regulations implementing LOPD which were approved by Royal Decree 1720/2007 (Regulations). These Regulations include many of the standards and recommendations that the Spanish Data Protection Agency has issued on the practical application of, and ways to execute, the various principles that govern personal data protection in Spain. In this respect, the Regulations govern matters such as ways of obtaining consent, in particular where data is processed for marketing purposes, the outsourcing of personal data processing and the way in which data subjects can exercise their rights of access, cancellation, rectification and opposition. The Regulations also include a chapter on the security measures that must be taken by data controllers, regardless of whether the data is processed by automatic or manual means.

On 8 February 2012, Panel no. 6 of the Supreme Court (Appeal no. 25/2008), following the European Court of Justice judgement, declared null and void article 10.2.b) of the Regulations which provided the exception for the data that appeared in publicly accessible sources on the grounds that it was an additional requirement and not a form of legitimate interest exception as set forth in the European Data Protection Directive.
Product liability

Under Spanish Law three legal systems can be distinguished regarding product liability: the two general systems of contractual and tortious liability and the specific strict product liability system provided for in Royal Legislative Decree 1/2007 (Consumer Act), which merges the prior Consumers Protection Act with, among others, the 1994 Act on Civil Liability for Damages Resulting from Defective Products, which implemented Council Directive 85/374/ECC of July 25, 1985. Article 128 of the Consumer Act specifically provides that the strict liability system is to exist alongside the contractual and tortious liability systems.

For the application of the strict liability system three requirements must be met: (i) the product is defective (“the product does not provide the safety which a person is entitled to expect”); (ii) damage to property or personal injury must have occurred; and (iii) there is a causal link between the product’s defect and the damage. Therefore, the strict liability system does not require that the claimant proves any breach of contract, negligence or fault on the part of the producer. As regards who bears responsibility for the defect (manufacturer, distributor, retailer, etc.), Article 138 of the Consumer Act foresees different scenarios which depend on the facts.

The Consumer Act also regulates the contractual liability system, which would apply in cases of damages to the defective product itself. In this scenario, consumers are entitled to the remedies set out in the Consumer Act within the time limits provided for in Article 123. In addition, consumers may resort to general contractual law, such as the guarantee against hidden defects, provided for in the Civil Code.

Finally, tortious liability, which is regulated by Article 1902 of the Civil Code, will arise where the damage does not result from a breach of a contract but it is caused by negligent or wilful misconduct.

Bribery and corporate crime

Anti-bribery provisions

Spanish Law contains provisions to combat bribery both in the public and the private sector.

A private individual who offers or gives a payment or gift to a public official in order for the latter to perpetrate an act that is against the duties inherent to his office or an act inherent to his office, or in order for him not to carry out, or to delay an act or decision, or in consideration of his office or duty shall be considered a bribery offence in the public sector under the Spanish Criminal Code. A bribery offence in the private sector is committed when a person, directly or indirectly, promises, offers or gives an unfair benefit or advantage of any kind to executives, employees or collaborators of an enterprise or a company, association, foundation or organisation with a view to favouring the person who is so promised, offered or given, or favouring the receiver of such promise, offer or gift such that a benefit or advantage is expected (in relation to a specific matter). “Collaborators” are not employees or staff of the company, but those who render services under any kind of agreement. For a bribery offence to be committed, the conduct of the executives, directors, employees or collaborators constitute a breach of their duties in the sale or purchase of goods or in the course of professional services. The Spanish Criminal Code also makes it illegal to bribe foreign public officials or members of international organisations with a view to having them discharge a duty in order to obtain or to preserve a contract or any other unfair advantage in the conduct of international economic activities.

Moreover, if a person requests a payment, presents, gifts or any other remuneration from third parties, or accepts offers or promises to influence a public official taking advantage of any situation arising from his personal relationship with him or with another public officer or authority to obtain a resolution that may directly or indirectly generate a financial benefit for him or for a third party, shall be punished according to the Spanish Criminal Code.

Money laundering


All businesses must report suspicious transactions to the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC). Financial companies, insurance companies, investment agencies, lawyers/legal advisors, public notaries, public registrars, auditors and tax advisors among others must implement internal “know your customer” procedures and committees for the prevention of money laundering, and must establish monitoring systems.
Corporate crime

On December 23, 2010, the amended Criminal Code came into effect. Legal entities (not businesses themselves) may be held criminally liable in two different scenarios: (i) when a crime is committed by the business’s legal representatives or (de facto or de jure) directors for or on behalf of the business and to its benefit; or (ii) when the crime is committed in the course of corporate business on behalf of and for the benefit of the business by persons under the authority of the legal representatives or directors of the business who did not exercise proper control.

If a company designs, implements and enforces a criminal compliance programme, the Spanish Criminal Code considers such circumstances to be a mitigating factor when applied after the criminal offence has occurred (i.e. penalties will be reduced), and it is considered that it may exclude criminal liability if implemented prior to the commission of the offence.

Legal entities may face the following penalties: fines; winding-up of the legal entity; suspension of their business; closure of their premises; prohibitions on engaging in any of the business activities in which the crime was committed, prompted or concealed; disqualification from obtaining public aid and subsidies, entering into public sector contracts or taking tax or social security benefits or incentives; and Court supervision to safeguard the interest of employees and creditors.

Real estate

There are no general restrictions on investing in Real estate in Spain according to general European Union rules.

Types of interest in land

In Spanish law, there is only one type of ownership of land: freehold (derecho de propiedad).

However, the owner need not be the possessor of the land, as the possession can be let without the need of transferring the ownership of the land (i.e. by means of a lease agreement, a surface right, an usufruct, etc.).

Registration requirements upon acquisition of real estate

Real estate property may be acquired under a private contract (accompanied by handover of the possession of the property) or pursuant to a public deed granted before a Notary Public.

It is common practice to formalise the purchase and sale of a real estate property in a public deed granted before a Notary Public, which is the only valid procedure for the new ownership to be entered into the Property Registry and to be effective and binding against third parties. Before registration of the purchase/sale at the Property Register, relevant taxes must be paid.

Notwithstanding the above, a private contract is also a valid form of transfer from a real estate perspective, if the contract complies with Spanish law (mainly, consent of the parties, subject matter of the contract, and cause of the obligation) and provided it is accompanied by a handover of the possession of the property, as, otherwise, the private contract by itself would not transfer full title.

Tax payments on acquisition of real estate

The purchase of a real estate interest is subject to transfer tax or may also be a transaction subject to VAT, depending on the region and the kind of transaction, as explained in “Taxation” above. Stamp Duty also applies to the commonly used public deed documentation of property transfer, when the transfer is subject to VAT.

Additionally, during the ownership of real estate, the owner shall annually pay a municipal tax on the property subject to its parish value (including both land and construction) and the tax rates applicable by the relevant Town Hall. Upon the sale of the property, in addition to Capital Gains Tax, a municipal tax (IIVTNU) is also payable on the increase of the value of building land between the purchase and the sale of the property.

Ownership restrictions on foreign investments

Certain investments require authorisation or previous administrative verification – generally by the relevant Government Department (i.e. Economy, Defence, etc.), to which a written request must be addressed – or the fulfilment of certain formal requirements.
Limitations because of proximity to military interest areas: these limitations affect all investors, Spanish or foreign. The scope of the above-mentioned limitation extends to certain zones of interest for reasons of national defence and security of military installations. The Councils of Ministers is the competent authority which determines the zones affected by the prohibitions and limitations of use of Real estate and marine and aerial space.

Nationality limitations: ownership and other rights over certain strategic sites in Spain cannot be granted in favour of those investors who do not have Spanish nationality or to some of the countries members of the European Union.

Spanish law establishes certain zones of restricted access for foreigners, as well as the maximum of properties and other Real estate rights owned by such people or businesses. In the relevant zones a military authorisation is mandatory before acquiring the interest, to constitute, to transfer and to modify Real estate interests in favour of foreigners and for the execution of new works.

Existing law is stated as it applied in January 2015.

Useful contacts

**INVEST IN SPAIN**

C/ Orense, 58. 3ª planta, 28020 Madrid, Spain  
www.investinspain.org

**SPANISH ECONOMIC AND COMMERCIAL OFFICE IN LONDON**

66 Chiltern Street, 2nd Floor, London W1U 4LS  
londres@mcx.es / www.oficinascomerciales.es

**INSTITUTO ESPAÑOL DE COMERCIO EXTERIOR (ICEX)**

Paseo de la Castellana, 14-16, 28046 Madrid, Spain  
www.icex.es

**DIRECCIÓN GENERAL DE COMERCIO E INVERSIONES**

Paseo de la Castellana, 162, 28046 Madrid, Spain  
www.milyc.es

**DIRECCIÓN GENERAL DEL TESORO**

Paseo del Prado 6, 28014 Madrid, Spain  
www.tesoro.es

**CENTRO DE DESARROLLO TECNOLÓGICO INDUSTRIAL (CDTI)**

C/ Cid 4, 28001 Madrid, Spain  
www.cdti.es
Further information

Key contacts at Garrigues

**MANAGING PARTNER**

Fernando Vives  
+ 34 91 514 52 00  
fernando.vives@garrigues.com

**SENIOR PARTNER**

Ricardo Gómez  
+ 34 91 514 52 00  
ricardo.gomez@garrigues.com

**LONDON RESIDENT PARTNER (PRIMARY CONTACT)**

Ignacio Corbera Dale  
+44 (0)207 398 5820  
icd@garrigues.com

**ACCOUNTING LAW**

Juan Reig  
+34 91 514 52 00  
juan.reig@garrigues.com
# Doing Business in Europe

## Public Law

<table>
<thead>
<tr>
<th>Alfredo Fernández-Rancaño</th>
<th>+34 91 514 52 00</th>
<th><a href="mailto:alfredo.fernandez.rancano@garrigues.com">alfredo.fernandez.rancano@garrigues.com</a></th>
</tr>
</thead>
<tbody>
<tr>
<td>Lluis Cases</td>
<td>+34 93 253 37 00</td>
<td><a href="mailto:lluis.cases@garrigues.com">lluis.cases@garrigues.com</a></td>
</tr>
</tbody>
</table>

## Banking & Finance

<table>
<thead>
<tr>
<th>Rafael González Gallarza</th>
<th>+34 91 514 52 00</th>
<th><a href="mailto:rafael.gonzalez-gallarza@garrigues.com">rafael.gonzalez-gallarza@garrigues.com</a></th>
</tr>
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<tbody>
<tr>
<td>Guillermo Muñoz-Alonso</td>
<td>+34 91 514 52 00</td>
<td><a href="mailto:guillermo.munoz-alonso@garrigues.com">guillermo.munoz-alonso@garrigues.com</a></td>
</tr>
<tr>
<td>Gaspar Atienza</td>
<td>+34 91 514 52 00</td>
<td><a href="mailto:gaspar.atienza@garrigues.com">gaspar.atienza@garrigues.com</a></td>
</tr>
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## Corporate Law and Commercial Contracts

<table>
<thead>
<tr>
<th>Rocío Belda</th>
<th>+34 91 514 52 00</th>
<th><a href="mailto:rocio.belda@garrigues.com">rocio.belda@garrigues.com</a></th>
</tr>
</thead>
<tbody>
<tr>
<td>Javier Urbano</td>
<td>+34 91 514 52 00</td>
<td><a href="mailto:javier.urbano@garrigues.com">javier.urbano@garrigues.com</a></td>
</tr>
<tr>
<td>Íñigo Bastarreche</td>
<td>+34 91 514 52 00</td>
<td><a href="mailto:inigo.bastarreche@garrigues.com">inigo.bastarreche@garrigues.com</a></td>
</tr>
</tbody>
</table>

## Criminal Law

<table>
<thead>
<tr>
<th>Florentino Ortí</th>
<th>+34 91 514 52 00</th>
<th><a href="mailto:florentino.orti@garrigues.com">florentino.orti@garrigues.com</a></th>
</tr>
</thead>
<tbody>
<tr>
<td>Enric Carulla (Barcelona)</td>
<td>+34 93 253 37 00</td>
<td><a href="mailto:enric.carulla@garrigues.com">enric.carulla@garrigues.com</a></td>
</tr>
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## Data Protection

<table>
<thead>
<tr>
<th>Miguel Acosta</th>
<th>+34 93 253 37 00</th>
<th><a href="mailto:miguel.acosta@garrigues.com">miguel.acosta@garrigues.com</a></th>
</tr>
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<tbody>
<tr>
<td>Guadalupe Sampredo</td>
<td>+34 91 514 52 00</td>
<td><a href="mailto:guadalupe.sampedro@garrigues.com">guadalupe.sampedro@garrigues.com</a></td>
</tr>
<tr>
<td>Department</td>
<td>Name</td>
<td>Phone</td>
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</tr>
<tr>
<td>E.U. &amp; ANTITURST</td>
<td>Marcos Araujo</td>
<td>+34 91 514 52 00</td>
</tr>
<tr>
<td>ENERGY</td>
<td>Silvestre Arana</td>
<td>+34 91 514 5200</td>
</tr>
<tr>
<td>ENVIRONMENTAL</td>
<td>Antonio Baena</td>
<td>+34 91 514 5200</td>
</tr>
<tr>
<td></td>
<td>Jesús de la Morena</td>
<td>+34 91 514 5200</td>
</tr>
<tr>
<td>HUMAN CAPITAL SERVICES</td>
<td>Salvador Espinosa de los Monteros</td>
<td>+34 91 514 5200</td>
</tr>
<tr>
<td>INFORMATION TECHNOLOGY</td>
<td>Jose Ramón Morales</td>
<td>+34 93 253 37 00</td>
</tr>
<tr>
<td>INSURANCE</td>
<td>María Fernández-Picazo</td>
<td>+34 91 514 5200</td>
</tr>
<tr>
<td></td>
<td>Jorge Moreira</td>
<td>+34 91 514 5200</td>
</tr>
<tr>
<td></td>
<td>Ignacio Calvet (Barcelona)</td>
<td>+34 93 253 37 00</td>
</tr>
<tr>
<td>INTELLECTUAL PROPERTY</td>
<td>Joao Miranda</td>
<td>+34 91 514 5200</td>
</tr>
</tbody>
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**LABOUR AND EMPLOYMENT**

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone Number</th>
<th>Email Address</th>
</tr>
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<tbody>
<tr>
<td>Rosa Zarza</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:rosa.zarza@garrigues.com">rosa.zarza@garrigues.com</a></td>
</tr>
</tbody>
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**LITIGATION AND ARBITRATION**

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone Number</th>
<th>Email Address</th>
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<tbody>
<tr>
<td>Carlos de los Santos</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:carlos.de.los.santos@garrigues.com">carlos.de.los.santos@garrigues.com</a></td>
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**MARITIME AND TRANSPORTATION**

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<tr>
<th>Name</th>
<th>Phone Number</th>
<th>Email Address</th>
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<tbody>
<tr>
<td>Manuel Torres Salazar</td>
<td>+86 2 152 281 122</td>
<td><a href="mailto:manuel.torres.salazar@garrigues.com">manuel.torres.salazar@garrigues.com</a></td>
</tr>
</tbody>
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**MERGERS AND ACQUISITIONS**

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<tr>
<th>Name</th>
<th>Phone Number</th>
<th>Email Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>Álvaro López-Jorrín</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:jalvaro.lopez-jorrin@garrigues.com">jalvaro.lopez-jorrin@garrigues.com</a></td>
</tr>
<tr>
<td>José María Gil-Robles</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:jose.maria.gil-robles@garrigues.com">jose.maria.gil-robles@garrigues.com</a></td>
</tr>
<tr>
<td>Monica Martín de Vidales</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:monica.martin.de.vidales@garrigues.com">monica.martin.de.vidales@garrigues.com</a></td>
</tr>
<tr>
<td>Renata Mendaña</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:renata.mendana@garrigues.com">renata.mendana@garrigues.com</a></td>
</tr>
<tr>
<td>Ramon Girbau (Barcelona)</td>
<td>+34 93 253 37 00</td>
<td><a href="mailto:ramon.girbau@garrigues.com">ramon.girbau@garrigues.com</a></td>
</tr>
<tr>
<td>Sergio Sánchez Solé (Barcelona)</td>
<td>+34 93 253 37 00</td>
<td><a href="mailto:sergio.sanchez.sole@garrigues.com">sergio.sanchez.sole@garrigues.com</a></td>
</tr>
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**PHARMACEUTICAL AND BIOTECHNOLOGY**

<table>
<thead>
<tr>
<th>Name</th>
<th>Phone Number</th>
<th>Email Address</th>
</tr>
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<tbody>
<tr>
<td>Jose Fernández-Rañada</td>
<td>+34 514 5200</td>
<td><a href="mailto:jose.fernandez-ranada@garrigues.com">jose.fernandez-ranada@garrigues.com</a></td>
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## Planning and Zoning

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<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Francisco Perales</td>
<td>+34 514 5200</td>
<td><a href="mailto:francisco.perales.madueno@garrigues.com">francisco.perales.madueno@garrigues.com</a></td>
</tr>
<tr>
<td>Beatriz del Peso</td>
<td>+34 514 5200</td>
<td><a href="mailto:beatriz.del.peso@garrigues.com">beatriz.del.peso@garrigues.com</a></td>
</tr>
<tr>
<td>Pablo Molina (Barcelona)</td>
<td>+34 93 253 37 00</td>
<td><a href="mailto:pablo.molina@garrigues.com">pablo.molina@garrigues.com</a></td>
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## Real Estate

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<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Felipe Yannone</td>
<td>+34 514 5200</td>
<td><a href="mailto:felipe.yannone@garrigues.com">felipe.yannone@garrigues.com</a></td>
</tr>
<tr>
<td>Lorenzo Clemente</td>
<td>+34 514 5200</td>
<td><a href="mailto:lorenzo.clemente@garrigues.com">lorenzo.clemente@garrigues.com</a></td>
</tr>
<tr>
<td>Oscar de Santiago (Barcelona)</td>
<td>+34 93 253 37 00</td>
<td><a href="mailto:oscar.de.santiago@garrigues.com">oscar.de.santiago@garrigues.com</a></td>
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## Regulatory Finance

<table>
<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Luis de la Peña</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:luis.de.la.pena@garrigues.com">luis.de.la.pena@garrigues.com</a></td>
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## Restructuring and Insolvency

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<tbody>
<tr>
<td>Antonio Fernández</td>
<td>+34 514 5200</td>
<td><a href="mailto:antonio.fernandez.rodriguez@garrigues.com">antonio.fernandez.rodriguez@garrigues.com</a></td>
</tr>
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## Securities Markets

<table>
<thead>
<tr>
<th>Name</th>
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</tr>
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<tbody>
<tr>
<td>Alvaro López-Jorrín (Equity)</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:alvaro.lopez-jorrin@garrigues.com">alvaro.lopez-jorrin@garrigues.com</a></td>
</tr>
<tr>
<td>Gonzalo Garcia-Fuertes (Debt)</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:gonzalo.garcia.fuertes@garrigues.com">gonzalo.garcia.fuertes@garrigues.com</a></td>
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## SPORTS AND ENTERTAINMENT

<table>
<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Carolina Pina</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:carolina.pina@garrigues.com">carolina.pina@garrigues.com</a></td>
</tr>
<tr>
<td>Felix Plaza</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:felix.plaza.romero@garrigues.com">felix.plaza.romero@garrigues.com</a></td>
</tr>
<tr>
<td>Diego Rodríguez (Barcelona)</td>
<td>+34 93 253 37 00</td>
<td><a href="mailto:diego.rodriguez@garrigues.com">diego.rodriguez@garrigues.com</a></td>
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## TAX GENERAL

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<thead>
<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Eduardo Abad</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:eduardo.abad@garrigues.com">eduardo.abad@garrigues.com</a></td>
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## TAX TRANSFER PRICES

<table>
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<tr>
<th>Name</th>
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<tbody>
<tr>
<td>Angel Calleja</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:angel.calleja@garrigues.com">angel.calleja@garrigues.com</a></td>
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## TELECOMMUNICATIONS

<table>
<thead>
<tr>
<th>Name</th>
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<th>Email</th>
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<tbody>
<tr>
<td>Javier Marzo</td>
<td>+34 91 514 5200</td>
<td><a href="mailto:javier.marzo@garrigues.com">javier.marzo@garrigues.com</a></td>
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### Garrigues offices

#### Spain

<table>
<thead>
<tr>
<th>A CORUÑA</th>
<th>ALICANTE</th>
<th>BARCELONA</th>
</tr>
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<tbody>
<tr>
<td>Cantón Grande, 4</td>
<td>San Fernando, 57</td>
<td>Avinguda Diagonal, 654</td>
</tr>
<tr>
<td>15003 La Coruña</td>
<td>03001 Alicante</td>
<td>08034 Barcelona</td>
</tr>
<tr>
<td>+34 981 12 46 30</td>
<td>+34 96 598 22 01</td>
<td>+34 93 253 37 00</td>
</tr>
<tr>
<td>Fax +34 981 12 46 36</td>
<td>Fax +34 96 598 24 94</td>
<td>Fax +34 93 253 37 50</td>
</tr>
<tr>
<td>BILBAO</td>
<td>PALMAS DE GRAN CANARIA</td>
<td>LOGROÑO</td>
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<tr>
<td>------------------------</td>
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</tr>
<tr>
<td>Rodríguez Arias, 15</td>
<td>Triana, 120</td>
<td>Miguel Villanueva, 7</td>
</tr>
<tr>
<td>48008 Bilbao</td>
<td>25002 Las Palmas de Gran Canaria</td>
<td>26001 Logroño</td>
</tr>
<tr>
<td>+34 94 470 06 99</td>
<td>+34 928 22 94 79</td>
<td>+ 34 941 26 25 26</td>
</tr>
<tr>
<td>Fax +34 94 44479 98</td>
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<th>MADRID</th>
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<tr>
<td>Hermosilla, 3</td>
<td>Don Cristián, 2 Ed. Málaga Plaza</td>
<td>Portillo de San Antonio, 8</td>
</tr>
<tr>
<td>28001 Madrid</td>
<td>29007 Málaga</td>
<td>30005 Murcia</td>
</tr>
<tr>
<td>+34 91 514 52 00</td>
<td>+34 95 207 55 25</td>
<td>+34 968 27 47 27</td>
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<tr>
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<th>OVIEDO</th>
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<tr>
<td>Plaza de la Escandalera, 3</td>
<td>Avenida Conde de Sallent, 23</td>
<td>Paseo Sarasate, 3</td>
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<tr>
<td>33003 Oviedo</td>
<td>07003 Palma de Mallorca</td>
<td>31002 Pamplona</td>
</tr>
<tr>
<td>+34 98 520 86 00</td>
<td>+34 971 21 34 84</td>
<td>+34 948 17 59 37</td>
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<tr>
<td>Fax +34 98 520 12 52</td>
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<tr>
<th>SAN SABASTIAN</th>
<th>SANTA CRUZ DE TENERIFE</th>
<th>SEVILLA</th>
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<tbody>
<tr>
<td>Plaza de Julio Caro Baroja, 2-2</td>
<td>Leoncio Rodriguez</td>
<td>Avenida, de La Palmera</td>
</tr>
<tr>
<td>20018 San Sebastián</td>
<td>3 Edificio El Cabo</td>
<td>19B 41013 Seville</td>
</tr>
<tr>
<td>+34 943 26 78 20</td>
<td>38003 Santa Cruz de Tenerife</td>
<td>+34 95 448 93 48</td>
</tr>
<tr>
<td>Fax +34 943 26 78 21</td>
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<tr>
<th>VALENCIA</th>
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<tr>
<td>Plaza del Ayuntamiento, 29</td>
<td>Plaza de la Rinconada, 9</td>
<td>Rua Areal, 6</td>
</tr>
<tr>
<td>46002 Valencia</td>
<td>47001 Valladolid</td>
<td>36201 Vigo</td>
</tr>
<tr>
<td>+34 96 353 66 11</td>
<td>+34 983 36 14 75</td>
<td>+34 986 81 55 25</td>
</tr>
<tr>
<td>Fax +34 96 394 47 34</td>
<td>Fax +34 983 36 14 76</td>
<td>Fax +34 986 81 55 35</td>
</tr>
</tbody>
</table>
## VITORIA
- General Álava, 20
- 01005 Vitoria
- +34 945 14 51 18
- Fax +34 945 14 51 91

## ZARAGOZ
- Plaza de Aragón, 10
- 50004 Zargazo
- +34 976 46 89 46
- Fax +34 976 46 89 50

## Worldwide
### BOGOTA
- Carrera 7 No. 75-66
- Oficina 702
- Bogotá D.C. (Colombia)
- +57 1 326 69 99
- Fax +57 1 326 69 70

### BRUSSELS
- Avenue d'Auderghem, 22-28
- B - 1040 Bruxelles (Belgique)
- +32 2 545 37 00
- Fax +32 2 545 37 99

### CASABLANCA
- 3. Boulevard Massira - Al Khadra
- 20100 Casablanca (Maroc)
- +212 (0) 522 77 72 40
- Fax +212 (0) 522 77 72 59

### LIMA
- Av. Victor Andrés
- Belaúnde, 332 (Oficina 701)
- San Isidro - Lima (Perú)
- +51 1 399 2600
- Fax +51 1 399 2699

### LISBON (PORTUGAL)
- Av. da Republica, 25
- 1070-101 Lisboa
- Portugal
- +351 21 382 12 00
- Fax +351 21 382 12 90

### LONDON
- London New York
- 20 Abchurch Lane
- London EC4N 7BB (UK)
- +44 (0) 20 7398 5820
- Fax +44 (0) 20 7398 5839

### MEXICO D.F.
- Corporativo Reforma Diana - Paseo de la Reforma, 412 - Piso 24
- Col. Juárez – 06600 México D.F. (México)
- +52 55 1102 3570
- Fax +52 55 1102 3599

### NEW YORK
- Third Avenue
- New York
- NY 10017 (EE. UU.)
- +1 212 751 92 33
- Fax + 1 212 355 35 94

### PORTO (PORTUGAL)
- Av. da Boavista, 3523 Edificio Aviz
- 4100-139 Oporto
- Portugal
- +351 22 615 88 60
- Fax +351 22 615 88 88
<table>
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<tr>
<th>SÃO PAULO</th>
<th>SHANGHAI</th>
<th>WARSAW</th>
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<tr>
<td>Rua Funchal, 418, 34 andar</td>
<td>3205 West Gate Mall</td>
<td>Warsaw Financial Center</td>
</tr>
<tr>
<td>CEP 04551-060 São Paulo (Brasil)</td>
<td>1038 Nanjing Xi Lu</td>
<td>Emilii Plater, 53</td>
</tr>
<tr>
<td>+55 11 3521 7162</td>
<td>Shanghai 200041 (China)</td>
<td>00-113 Warszawa (Polska)</td>
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<tr>
<td>Fax +55 11 3205 8110</td>
<td>+86 2 152 281 122</td>
<td>+48 22 540 6100 / +48 22 463 6100</td>
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</table>
Introduction and legal system

Population
9.7 million (August 2014)

Currency
Swedish krona (plural kronor):

SEK 7.24 = USD 1 (October 2014)

Central government
The government is, since the 2014 election, formed by two parties - the Social Democrat Party and the Green Party. The next election will be held in 2018.

Main industries
Engineering and manufacturing (vehicles, aircraft, ball bearings, electronic equipment, household appliances, packaging, drilling equipment), wood (paper, pulp, forest products), mining and steel (iron ore, steel and other metals), chemicals and pharmaceuticals, energy, IT, telecommunications and new media.

Legal system
The Swedish legal system is based on a combination of statute, supplemented by case law.

Sweden has been a full member of the European Union (EU) since 1 January 1995. Thus, European Union law is part of the Swedish legal system.

Sweden has acceded to a number of international treaties and conventions, including the UN Convention on the International Sale of Goods (CISG).

Foreign investment
Foreign investment in Sweden is widely encouraged by local and central government.

The Swedish Trade and Invest Council (http://www.tradewithsweden.com and http://www.business-sweden.se) assist foreign companies seeking to invest or do business in Sweden.

There are no exchange control and currency regulations.

Grants and incentives
There is a wide range of financial incentives available to assist both Swedish and foreign-owned companies to establish or expand their business in Sweden. These incentives include grants, loans, credit guarantees etc.

Business entities
Business activities conducted by foreign companies or individuals in Sweden are usually conducted through a Swedish subsidiary or branch. Generally, no operating licences are required to conduct business in Sweden. There are exceptions for specific areas such as insurance, banking and financial services, although investors approved by other EU countries may benefit from mutual recognition of such licences.

Limited liability companies
The most common form of business association is a limited liability company (Sw. aktiebolag or AB), where the shareholders are not personally liable for the obligations of the company. Limited liability companies are divided into public and private companies. Only public companies may issue shares or other securities to the public. A limited liability company is formed by one or more founders, who must meet certain qualification requirements. A founder must be:

- a person resident in the European Economic Area (EEA) or
a Swedish legal entity or

a legal entity established in the EEA having its seat, head office or its main activities in the EEA

A partnership, established in the EEA, may only act as founder if each partner with unlimited liability is resident within the EEA.

The Swedish Companies Registration Office (Sw. Bolagsverket) (the Registration Office) may grant exemption to persons other than those qualifying under these rules to act as founders.

The founders must prepare and sign a deed of formation. The deed must be submitted for registration at the Registration Office within the following six months, upon which the company acquires the status of a legal entity.

However, the most common method of starting a business through a Swedish limited liability company is by acquiring a so-called shelf company.

The managing director of a Swedish limited liability company must be resident in the EEA. However, the Registration Office may grant an exemption from this requirement. If none of the company’s representatives are resident in Sweden, the board of directors must appoint a duly authorised representative resident in this jurisdiction to accept service on behalf of the company.

Shareholders and capital

There are no restrictions on the number, or the nationality, of shareholders. Shareholders are entitled to regulate their relations by non-public shareholders’ agreements and/or, to a certain extent, in the company’s articles of association.

Shareholders’ rights are exercised at general meetings. Most resolutions are passed by simple majority but certain resolutions, such as a resolution to amend the articles of association, require a qualified majority.

All shares carry equal rights unless otherwise prescribed in the articles of association. The articles of association may prescribe different classes of shares, i.e. different rights to participate in the assets or profits of the company or different voting rights.

Subject to certain statutory restrictions, public companies may repurchase or sell their own shares. Private companies may only repurchase and sell their own shares in a few exceptional cases.

The board of directors, or a central securities depository (if the company’s shares are registered with such depository), is required to maintain a share register of all of the company’s shares and shareholders.

Public companies must have a share capital of at least SEK 500,000 (approximately USD 69,000) and private companies must have a share capital of at least SEK 50,000 (approximately USD 6,900).

Financial reporting and auditing requirements

An audited annual report comprising a director’s report, profit and loss account and balance sheet must be submitted to the Registration Office not later than one month after the annual accounts have been adopted by the annual general meeting. Any changes regarding the company’s directors, chairman, deputy directors, auditors, articles of association or name and any allotment or redemption of shares or reduction of the company’s share capital must be filed with the Registration Office in due course.

Smaller companies (which meet at least two of the following three criteria: no more than (i) three employees, (ii) SEK 3 million net turnover, and (iii) SEK 1.5 million balance sheet total) do not need to have an auditor.

The board of directors – meetings and authority

The board of directors of public companies and certain financial institutions such as banks and insurance companies must consist of at least three directors. In private companies the board may consist of less than three directors, provided that at least one deputy director is appointed. A majority of the directors and the managing director must be resident in the EEA unless an exemption is granted by the Registration Office.
If the board consists of more than one director, one of them must be appointed chairman. The chairman’s duties include ensuring that board meetings are held when necessary or at the request of a director or the managing director.

A managing director must be appointed in public companies and may be appointed in private companies. In public companies or companies regulated by the Swedish Financial Supervisory Authority, the managing director cannot concurrently act as the chairman of the board. The managing director is responsible for the day-to-day management of the company pursuant to the directions and instructions issued by the board and is always authorised to represent and sign on behalf of the company in relation to the day-to-day management of the company’s affairs.

In the private sector there are statutory requirements on board representation for employees, which entitle the employees, through their trade unions, to appoint two directors and two deputy directors in companies consisting of more than 25 employees, and three directors and three deputy directors in certain companies with more than 1,000 employees.

**Directors’ duties and liabilities**

The board is responsible for the organisation of the company and the management of the company’s affairs. In particular, it must ensure that the company’s accounting records, management of fund and financial matters are properly organised.

Directors have a fiduciary duty to act in good faith and in the best interests of the company. Any member of the board, or the managing director, may be liable in damages vis à vis the company where, in the performance of his duties, he wilfully or negligently causes the company to suffer damage.

In order for such liability to arise towards a third party, such as a shareholder, employee or creditor, the act or omission of the person concerned must constitute a breach of the Swedish Companies Act, the Swedish Annual Reports Act, or the articles of association.

The board or any duly authorised representative thereof acts on behalf of the company and signs on behalf of the company in relation to external matters.

**Voting**

In order to constitute a quorum a majority of the directors - or a higher number if stipulated in the articles of association - must be present. Unless the articles of association require a qualified majority, the board may adopt resolutions by simple majority. If not all board members are able to attend a board meeting then in order for a resolution to be adopted, the directors present and voting in favour of such resolution must represent more than a one-third majority of all the directors unless otherwise prescribed by the articles of association.

**Parent company liability**

A parent company is generally not liable for the debts and liabilities of its subsidiary. However, in a few cases the Swedish Supreme Court has held the parent company liable. In these cases the subsidiaries were undercapitalised and dominated by the parent company to such an extent that they had substantially abrogated their independence from the parent company.

**Letterhead requirements**

Company letterheads, invoices and order forms must state the name of the company, the place in Sweden where the registered office is located and the company’s registration number. A public company’s name must be accompanied by the addition “(publ)” unless the company name contains the word “publikt” (public).

**Registered offices**

The articles of association must specify the place in Sweden where the registered office is situated. Any change of address must be notified to the Registration Office.

In legal proceedings the company will be subject to the jurisdiction of the district court in which the registered office is located, unless otherwise prescribed by legislation or by agreement between the parties to the litigation.
Branches

A foreign company or private individual may conduct business activities in Sweden through a Swedish branch (Sw. filial). Branches must operate under a separate trading name which must include the word “filial” and the trading name must be registered with the Registration Office.

The branch must be placed under the direction of a managing director. The managing director must be resident in the EEA. However, the Registration Office may grant an exemption from this requirement. If the managing director is not resident in Sweden, the foreign company must appoint a person resident in Sweden authorised to accept service on behalf of the foreign company.

New Swedish rules in respect of branches have entered into force in late 2011, which facilitates matters for foreign entities conducting businesses in Sweden.

Partnerships

Two or more parties may jointly conduct business through a partnership (Sw. handelsbolag or HB) whereupon all partners are jointly and severally liable for the partnership's obligations.

A limited partnership (Sw. kommanditbolag or KB) is a partnership where one or more of the partners are not personally liable for the debts and liabilities of the partnership. At least one partner must assume unlimited liability. The remaining partners’ liability is limited to the amount of their unpaid registered contributions. Partnerships and limited partnerships become legal entities upon registration.

Accounting

Companies may elect any twelve month calendar period as their financial year. The accounts must be kept in Sweden and be retained for at least seven years.

Employment

General

The Swedish labour market is regulated by both legislation and through collective bargaining agreements. Trade unions traditionally enjoy a powerful position in Sweden. Although mandatory law and/or collective bargaining agreements provide the basic terms of employment, the employer must provide the employee with the key terms of employment in writing. Employees in managerial positions are not covered by the mandatory rules in the Swedish Employment Protection Act and are excluded from the terms of collective bargaining agreements. For these employees, the employment is governed by the terms of the individually negotiated employment agreement.

Working hours

The statutory maximum ordinary working hours are 40 hours per week, excluding lunch. Under special circumstances, ordinary working hours may exceed 40 hours per week as long as the average working hours do not exceed 40 hours per week during a four week period. However, the total working hours (including, inter alia, overtime hours) during each period of seven days may not average more than 48 hours for a period of four months. The Swedish Work Environment Authority (Sw. Arbetsmiljöverket) may grant an exemption from the rules mentioned above.

Holiday entitlement

Employees are entitled to paid annual vacation of a minimum of 25 days in addition to bank holidays (roughly ten working days per year). Employees who occupy a managerial or comparable position or who are entrusted to organise their own working hours and are therefore not entitled to overtime pay, are normally compensated with five additional vacation days per year.

Sick pay

Employers must pay sick pay during the first two weeks of each period of sick leave, except for the first day, which is not remunerable. The sick pay during the subsequent days of the two week period shall amount to at least 80% of the employment benefits.
The Swedish National Social Insurance Office (Sw. Försäkringskassan) is responsible for payment of sickness benefit after the first two weeks of sick leave.

The state funded sickness benefit is capped. For 2014 the maximum annual amount whereupon sickness benefit is based is approximately 80% of SEK 323,000 (approximately USD 44,640). For salaried employees, the cap is often lower than 80% of the actual salary, and thus it is not uncommon that the employer provides certain additional compensation, normally up to the 90th day of sick leave. It is also common for collective bargaining agreements within this sector to provide for such additional compensation.

Parental leave

Parents are entitled to a total of 480 days paid leave, which can be shared between them and used at any time before the child reaches the age of four. No more than 96 out of the 480 days can be used when the child is between four and twelve years old. However, 60 days of the leave are earmarked for each parent. If a parent does not use his/her 60 days, they will be forfeited.

Payment during any period of parental leave is funded by the state and generally amounts to approximately 80% of the salary for the parent on leave. However, for 2014 it is capped at a maximum of approximately 80% of an annual salary of SEK 440,000, i.e. SEK 37,000 (approximately USD 5,067) per month. It is not uncommon that the employer pays certain additional compensation to cover the gap between the actual salary and the compensation from the National Social Insurance Office.

On returning to work, parents are generally entitled to resume their employment on the same conditions. Parents are also entitled to reduce their working time down to 25% (without pay) until the child reaches the age of eight or, if older, until the completion of the child’s first year of school.

Dismissal

According to mandatory law, a dismissal by the employer must be based on objective grounds. These grounds must be based on either economic, technical or organisational reasons, i.e. redundancy, or personal reasons, for instance serious misconduct or disloyalty. Summarily dismissal is only possible when the employee has grossly neglected his or her duties towards the employer. In a redundancy situation, the principle of "last in-first out" generally applies, although the principle is subject to certain exceptions.

If the employer is bound by a collective bargaining agreement (or if the employee is a member of a trade union) the employer must initiate and complete consultations with the relevant trade union(s) before any action is taken in a redundancy situation. An employer who wishes to summarily dismiss an employee or terminate an employment due to personal reasons shall, within certain time-limits, inform the employee and notify the relevant trade union. Upon request from the employee or the relevant trade union the employer is also obliged to enter into consultations.

A notice of dismissal must include certain prescribed information. The period of notice normally varies between one and six months, depending on the duration of the employment. Under certain collective bargaining agreements, this period is prolonged when the employee has reached a certain age and has been employed for a certain number of years.

In case of wrongful dismissal, the employer might be liable to pay significant damages. Normally such damages range from 16 to 32 monthly salaries. The employee can also, depending on the circumstances, sue for reinstatement with a retained entitlement to remain employed with salary and benefits throughout the legal proceedings regardless of the outcome of the dispute.

Loyalty and restrictive covenants

The collective bargaining agreements generally include obligations for the employee to observe confidentiality and to refrain from competition during employment. These principles are also well established practice. In addition, employment contracts for employees in key positions may include an undertaking by the employee restricting him/her from entering into any business competing with the business of the employer for a certain period after the termination of employment. There is no specific legislation in Sweden to prohibit such clauses, however, there is a provision in the Swedish Contracts Act to the effect that a covenant prohibiting competition can be modified or set aside to the extent a court of law finds it unreasonable. For a restrictive covenant to be legally enforceable, Swedish case law indicates, inter alia, that the covenant must be limited to a maximum of two years after the termination of the employment and that certain compensation must be paid for the inconvenience caused to the employee during the restricted period. Employers bound by collective bargaining agreements are subject to further restrictions on applying restrictive covenants.
Cost of employment

The employer must pay a national social security contribution, which for 2014 amounts to slightly more than 31%, with certain exceptions, of the employee’s gross salary. It is also common for employers to pay contributions to employee pension schemes.

The social security contribution on such payments is approximately 24% of the amount contributed.

Overseas employees

Foreigners other than citizens of EEA countries must have a work permit in order to work in Sweden. Work permits must normally be obtained before travelling to Sweden. There are tax incentives for overseas key position managerial employees and experts exempting one quarter of the overseas employee’s wages and the full amount of certain employment benefits from taxation. Provided that the remuneration for the employee exceeds two basic amounts per month (i.e., SEK 88,800 in 2014), the requirements for exemption are considered fulfilled. The exemption is available upon application from the employer and for a maximum period of three years.

Income tax

Swedish income tax is payable by all Swedish residents on their worldwide income. This may be subject to modification as a result of existing tax treaties for the avoidance of double taxation.

In addition to the national income tax of 20% there is an income tax payable at the municipal level. The municipal tax rate varies between 29% and 35%.

Assuming an average municipal tax rate of 32%, the effective rate of income tax in 2014 is 32% on the first SEK 420 800 of the annual income. Additional income up to SEK 602,600 is taxed at 52% (municipal tax 32% plus national tax 20%) and income above SEK 602,600 is taxed at 57% (municipal tax 32% plus national tax 25%). The income brackets are adjusted annually. Investment income (dividend income and net interest income) and capital gains are taxed as income from capital at a flat rate of 30%. Special rules apply to capital gains resulting from the disposal of shares in closely held companies and on dividend income from such companies.

Taxation of Swedish limited liability companies

General structure

Companies in Sweden are subject to corporate tax on their worldwide income at a general rate of 22%. However, allocations to a “tax allocation reserve” will normally result in a lower effective tax rate. The tax computation is based on the audited annual accounts adjusted pursuant to provisions in tax legislation.

The tax is calculated on a preliminary basis and is charged regularly throughout the year. If the preliminary payments have resulted in an overpayment, a refund will be made.

For financial years starting after 1 January 2012, new rules apply and four different assessment periods are introduced. Under the new rules, each financial year has a given assessment period:

- A tax return for a financial year ending 30 April 2014 must be filed by 2 November of the calendar year following the financial year
- A tax return for a financial year ending 30 June 2014 must be filed by 15 December of the calendar year following the financial year
- A tax return for a financial year ending 31 August 2014 must be filed by 2 March of the calendar year following the financial year
- A tax return for a financial year ending 31 December 2014 must be filed by 1 July of the calendar year following the financial year
Interest

Interest on external loans is generally deductible. Interest on loans between affiliated parties is, however, subject to certain restrictions, and is non-deductible under the main rule. Interest may however be deducted if either of the following conditions is met:

► The interest income is taxed at a rate of at least 10% in the hands of the beneficial owner, if the interest had been the only income of the recipient. Even though the 10% threshold is met, the deduction may still be denied if the debt relationship has been put in place primarily to provide a substantial tax benefit for the group.

► The debt relationship is primarily motivated by business reasons, and the beneficial owner is resident within the EEA or in a state with which Sweden has a tax treaty. Interest payments to affiliated parties resident in tax havens will hence be non-deductible.

Sweden does not have any debt to equity ratio requirements nor will withholding tax be charged on interest paid to overseas lenders.

Capital gains and inter-company dividends

Capital gains and dividends on qualifying participations are exempt from corporate tax. The exemption applies to shares held by a Swedish limited liability company provided that the shares are not quoted. In addition, it applies to quoted shares, where the shareholding represents at least 10% of the distributing company’s voting rights or the shareholding is connected with the business conducted by the shareholding company or by another company which, taking into account ownership or organisational circumstances, may be deemed to be closely associated with the former company. However, in order for a capital gain on quoted shares to be exempt from tax, the shares must have been held for at least one year at the time of disposal. Dividends on quoted shares are tax exempt even if the shares have not been held for at least one year at the time of the dividend distribution. Such dividends will, however, be taxed later if the shares are not held for at least one year or if the holding falls below 10% within that year. Shares held as inventory assets do not qualify for the exemption. Special requirements apply to foreign source dividends.

Withholding tax

Dividends distributed to non-resident shareholders are subject to withholding tax at a rate of 30%. However, due to the EU Parent Subsidiary Directive, and existing tax treaties, the tax liability is often relieved or eliminated, either by way of a direct reduction of the tax deducted on remittance or by way of a refund following application. Dividends from qualifying participations, i.e. dividends on non-quoted shares distributed to foreign companies will normally be exempt from withholding tax.

Tax losses

Operating losses may be set off against business income (including capital gains). Losses may be carried forward indefinitely.

Capital losses on qualifying participations are not deductible. Capital losses on other shares and securities can only be set off against capital gains on such investments.

Capital losses on the disposal of Real estate can normally only be set off against capital gains on Real estate.

Restrictions are imposed on the use of losses carried forward in case of a change of ownership or control of a company.

Tax allocation reserve

Allocations to “tax allocation reserves” are deductible from business income for most companies. Each annual allocation will create a separate reserve. The maximum annual allocation is 25% of the company’s taxable income each year.

Allocations must be reversed as taxable income within six years of the year of allocation.

Transfer pricing

Swedish law on transfer pricing is based on the so called arm’s length principle. Under this principle, the tax authority may adjust the income of a Swedish company if its taxable income in Sweden is reduced as a result of contractual provisions that differ from those that would be agreed by unrelated parties.
Other forms of taxation

**Value Added Tax (VAT)**

Value Added Tax (VAT) is charged on the supply of goods and services effectuated in Sweden in the course of a business. Goods imported to Sweden are also subject to VAT. The rate of VAT is normally 25%. Some goods and services are exempted from VAT or are taxed at a lower rate. The sale of Real estate, insurance and financial services, health services, and some educational services are tax exempt.

**Stamp taxes and capital taxes**

A stamp tax is payable on a deed of transfer of Real estates. The stamp tax is 1.5% for individuals and 4.25% for legal entities. No capital tax is payable on the issue of shares, on an increase of share capital or on the transfer of shares.

**Real estate tax**

The former national Real estate tax has been replaced with a municipal Real estate fee (Sw. kommunal fastighetsavgift) as of 2009. As regards apartment houses, the fee 2014 amounts to SEK 1,217 for each apartment, however not more than 0.3% of the "taxed value" of the apartment house, which is 75% of the market value. Newly built apartment houses are subject to a reduced fee or are exempted from the fee.

Real estate tax shall however still be paid for undeveloped land and for apartment houses buildings under construction.

**Taxation of branches**

In principle, branches are taxed the same way as a Swedish limited liability companies. Branch profits remitted to the head office are not subject to withholding tax.

The accounts of a branch must be kept separate from the accounts of the foreign company.

**Dispute resolution**

**Court system**

The Swedish courts are divided into:

- General courts (the district courts, the Courts of Appeal and the Supreme Court) having jurisdiction in respect of civil and criminal cases
- Administrative Courts (county administrative courts, Administrative Courts of Appeal and the Supreme Administrative Court) with jurisdiction in respect of issues of public law, including taxation
- Special Courts for disputes within certain legal areas such as labour law, environmental law and market regulation

In civil litigation the losing party is generally ordered to reimburse the successful party’s costs incidental to the proceedings.

Sweden is a party to the Lugano and the Brussels Conventions. By virtue of its membership of the EU, Sweden is also bound by the Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters.

Furthermore, Sweden is a party to the Rome Convention on the Law Applicable to Contractual Obligations. By virtue of its membership of the EU, Sweden is also bound by the Rome I Regulation on the Law Applicable to Contractual Obligations and the Rome II Regulation on the Law Applicable to Non-Contractual Obligations.

**Arbitration**

The institution of arbitration has an exceptionally long standing in Sweden and Stockholm is often chosen as a venue for international arbitration. The state courts have conscientiously upheld a pro-arbitration stance in their supervisory functions. The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has for decades distinguished itself in the service it provides to the arbitration community.
The main source of arbitration law in Sweden is the Swedish Arbitration Act. An arbitral award is final and is not subject to substantive review. However, arbitral awards may be challenged on the basis of serious procedural defects or on public policy grounds.

In addition to the Swedish Arbitration Act, the SCC Arbitration Rules applies to SCC arbitrations, if agreed upon between the parties.

Sweden has entered into a number of conventions regarding arbitration. One of those is the 1958 New York Convention, according to which an arbitral award is recognized and enforced in basically all countries worldwide.

**Settlement of Investment Disputes**

Sweden is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and to a large number of Bilateral Investment Treaties (BITs), most of which include a mechanism for Investor State Dispute Settlement (ISDS).

**Acquisitions**

Acquisitions of unlisted companies are not governed by any specific rules save for the general rules in the Swedish Companies Act. Such acquisitions may however be subject to specific provisions in the articles of association or in shareholders’ agreements.

Acquisitions of listed companies are primarily regulated by the so-called Takeover Rules issued by the Swedish Corporate Governance Board.

**Sources of information**

There are several open sources of information on companies, including the public Trade and Industry Register, court records, shareholders’ registers etc. Information from these sources may often be obtained free of charge or for a minor administrative fee.

In addition, listed companies have far-reaching obligations to disclose key information and to make public announcements regarding important decisions and events.

**Pre-contractual negotiations**

The parties may prepare a Memorandum of Agreement, or a Letter of Intent, before an acquisition. These documents commonly contain provisions related to the negotiation of the transaction such as "lock-up" and confidentiality clauses.

**Formalities (private company acquisitions)**

There are no requirements as to form for an agreement to acquire shares or a company’s assets. However, it is customary to set out the conditions and terms of the transaction in a written agreement. A share transfer must be registered in the share register of the target company.

In order for the purchaser to gain protection from the seller’s creditors it is necessary to transfer the share certificates, duly endorsed, to the purchaser. An acquisition of a “qualified holding” (normally exceeding 10% of the shares or the votes) of a regulated company (banks, insurance companies, fund companies etc.) requires prior consent from the Swedish Financial Supervisory Authority.

**Formalities (public company acquisitions)**

If a person or legal entity, irrespective of nationality, acquires or sells shares in a company listed on NASDAQ OMX Stockholm, another stock exchange or on a regulated market, the listed company and the Swedish Financial Supervisory Authority must be notified when the aggregate holdings exceed or fall below certain limits. Notice is required by statute if the shareholding (including holdings of certain financial instruments) in a listed company reaches, exceeds or falls below 5%, 10%, 15%, 20%, 25%, 30%, 50%, 66 2/3% and 90% of the total number of shares or votes in the company. Notice must be given no later than the trading day after the relevant transaction has been completed.
The Swedish Act on Stock Market (Takeover Bids) imposes on a purchaser of shares in a listed company an obligation to make a public offer to purchase all remaining outstanding shares if the purchaser’s shareholding reaches or exceeds 30% of the total number of votes in a listed company.

**Tax implications**

A capital gain arising from a sale or exchange of shares and assets is generally subject to tax.

Capital gains on shares held by companies are in many cases exempt from tax.

**Major pitfalls**

Employees and their rights are automatically transferred to the purchasing company on the acquisition of a whole or part of a business.

**Merger control**

Acquisitions may under certain circumstances be subject to merger control, please see further under Competition.

**Competition**

The Swedish Competition Act (Competition Act) governs in principle all substantive aspects of Swedish competition law.

The Competition Act includes two primary prohibitions, which are practically identical to Articles 101 and 102 of the Treaty on the Functioning of the European Union (the TFEU):

- Agreements and concerted practices which have as their object or effect the prevention, restriction or distortion of competition (Chapter 2, Section 1). Horizontal as well as vertical agreements are covered (whether oral or written). There is a legal exemption from the prohibition mirroring that of Article 101.3 TFEU (Chapter 2, Section 2). Block exemptions (based on existing EU block exemption regulations) have been implemented through specific Swedish statutory provisions (Chapter 2, Section 3)

- Abuse of a dominant position mirroring that of Article 102 TFEU (Chapter 2, Section 7). An abuse may, for example, consist in imposing unfair prices or other unfair trading conditions, exclusionary practices or so-called tying and bundling practices

**Merger control**

The Competition Act also regulates the control of concentrations. The Swedish merger control rules are to a large extent modelled on the EU rules. The Swedish Competition Authority’s (the Competition Authority) regulations and guidance for the notification and examination of concentrations are available on its website (also in English).

Notification of mergers and acquisitions to the Competition Authority is mandatory if:

- the transaction brings about a lasting change in control over one or several undertakings or businesses (including mergers, acquisitions of a controlling interest, full-function joint ventures and operations that bring about a change in the quality of control over an undertaking or business)

- the aggregate turnover in Sweden of all undertakings concerned during the preceding financial year exceeds SEK 1 billion and

- at least two of the undertakings concerned each had a turnover in Sweden during the preceding financial year exceeding SEK 200 million

If these thresholds are not exceeded, the parties are not obliged to notify the concentration. However, the Competition Authority may, under certain circumstances, order a party to notify a concentration that meets the SEK 1 billion threshold but not the SEK 200 million threshold. The parties may also voluntarily notify such a transaction.

The Swedish merger control rules are, however, not applicable if the concentration has an EU dimension, i.e. if it meets the thresholds set out in the EU Merger Regulation.
There is no time limit within which a notification must be submitted to the Competition Authority. However, a notification must be made prior to the implementation of the concentration. There is a standstill obligation during the Competition Authority's review. There are no direct sanctions for a failure to notify, but the Competition Authority may order the parties to submit a notification subject to a fine if they fail to comply.

The Competition Authority must within 25 working days from the receipt of a complete notification either adopt a clearance decision or initiate an in-depth investigation. This initial period (Phase I) is automatically extended to 35 working days if a party to the concentration offers commitments with a view to securing a clearance decision.

In order to block a notified concentration, the Competition Authority must commence civil proceedings before the Stockholm City Court within three months after the initiation of an in-depth investigation (Phase II). The Court may extend this time limit in exceptional circumstances.

Marketing agreements

**Agency**

Agents are protected in Sweden by the Swedish Commercial Agency Act, which came into force in 1992, implementing the EC Commercial Agency Directive. Unless an agency agreement is entered into for a fixed period of time, the notice period is one month during the first contract year and thereafter an additional month is added for each contract year up to a maximum of a six-month notice period.

When an agency agreement either has expired or has been terminated, the agent may under certain circumstances be entitled to commission in respect of contracts concluded after the termination of the agreement. In addition, the agent may be entitled to a one year indemnification of an amount up to the equivalent of the average of the agents' remuneration during the preceding five years.

**Distribution**

There is no specific legislation governing distributorships in Sweden. Case law suggests that a distributor is entitled to a reasonable period of notice of termination of the distribution agreement.

The provisions of the Swedish Commercial Agency Act may be applied by way of analogy in cases where the distributor forms part of the supplier's sales organisation and the distributor has extensive obligations towards the supplier. However, there is no clear authority on this. The parties' freedom to negotiate terms is to some extent restricted by competition law rules. There is a block exemption for vertical agreements broadly corresponding to that which exists in EU law.

**Franchising**

According to the Swedish Franchisor (Information Requirements) Act, a franchisor must give certain minimum information to an intended franchisee within reasonable time before entering into a franchise agreement. Failure to furnish such information may result in an order to fulfil such information requirements to a conditional fine. The Swedish Franchise Association (www.svenskfranchise.se) plays an active part in a self-regulating process by requiring its members to comply with stipulated ethical rules. In terms of competition law, there is a block exemption for vertical agreements broadly corresponding to that which exists in EU law, which is also applicable to franchising arrangements.

**Intellectual property**

Intellectual property rights are protected by a set of specific statues. Both criminal and civil liability may apply in respect of infringements of such rights.

**Patents**

Patent issues are governed by the Swedish Patents Act. Patent applications are submitted to the Patent and Registration Office (Sw. Patent- och registreringsverket (PRV)). The registration process generally takes around three years. The maximum duration of a patent is 20 years from the date of application although certain products in the pharmaceutical and plant industry may be granted an additional maximum five years of protection based on the Council Regulations (EC) Nos 1768/92 and 1610/96. Applications and patent portfolio management are generally handled by patent agencies and only rarely by law firms.

Sweden is a party to the Paris Convention, the Patent Cooperation Treaty and the European Patent Convention.
Trademarks

Trademarks are governed by the Swedish Trade Marks Act. Exclusive protection may be obtained either by registration with PRV or by consistent usage by the proprietor or its licensee. It takes approximately six months to register a trademark. The term of registration is indefinite, subject to renewal every ten years.

Sweden is a party to the Madrid Agreement and has implemented the Trade Mark Directive. Furthermore, the EC Community Trade Mark Regulation applies in Sweden. As a member of the European Union, Sweden also applies Council Regulation (EC) 40/94 on the Community Trade Mark.

Copyright

Copyright is governed by the Swedish Copyright Act. No registration or other formalities are required to obtain protection under the Act. Works are protected by copyright upon creation. The author, or creator, may assign economic rights to a work, but certain moral rights remain vested with the author or creator.

Copyright protection lasts for the lifetime of the author or creator and for a period of 70 years thereafter.

Sweden is a party to the Berne Convention and the Universal Copyright Convention, and has implemented European Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

Designs

Designs are governed by the Swedish Design Protection Act as well as the Council Regulation on Registered and Unregistered Designs. A design may be registered with PRV if it qualifies as a novelty and differs substantially from other previously known designs. Protection under the Act generally lasts for renewable terms of one or several five year periods with a total, maximum, protection period of 25 years.

Sweden is a party to the Paris Convention and the Locarno Agreement.

Confidential information and trade secrets

Protection for trade secrets is governed by the Swedish Trade Secrets Act. The Act prescribes both criminal and civil liability for unauthorised use or disclosure of trade secrets.

Infringement investigation

Upon petition of a proprietor or a licensee showing reasonable cause for suspicion of an Intellectual property infringement, a court may for the purpose of securing evidence, grant leave for a so-called infringement investigation. An infringement investigation is executed through the local Enforcement Authority, which is empowered to record and document objects, and make copies of documentation, relevant to the investigation.

Unfair marketing

Advertising and other marketing measures are governed by the Swedish Marketing Act, as well as certain other specific regulations regarding products such as tobacco, pharmaceutical products and alcohol.

The Swedish Marketing Act contains prohibitions against unfair marketing in general and against certain specific marketing practices such as e.g. aggressive and misleading marketing. Use of the unfair marketing practices may result in court orders to cease such use subject to a conditional fine. In certain cases, liability in damages towards third parties may also arise.

Product liability

The Swedish Product Liability Act is based on the European Community Directive on Liability for Defective Products. The Act imposes strict liability on sellers, importers or manufacturers for personal injury and for damage to property suffered by individuals and caused by an unsafe product.

In certain circumstances, manufacturers may also be liable for damages under general tort or contract law. Sweden has also adopted a new Product Safety Act, based on the European Community Directive on Product Safety, under which marketing and sales of products or services may be restricted or prohibited by a public authority for safety reasons.
The information herein is of general, informational nature. The content does not purport to be exhaustive and should not be relied upon as a substitute or replacement for individual legal advice on any specific matter. If you have a specific legal question you are welcome to address it to one of our lawyers.

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Existing law is stated as it applied in October 2014.

Further information
Contact details of the firm/employees

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<tr>
<th>MANAGING PARTNER</th>
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<tbody>
<tr>
<td>Maria-Pia Hope</td>
</tr>
<tr>
<td>Member of the Swedish Bar Association</td>
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<table>
<thead>
<tr>
<th>ADVOKATFIRMAN VINGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Smålandsgatan 20</td>
</tr>
<tr>
<td>Box 1703</td>
</tr>
<tr>
<td>111 87 Stockholm, Sweden</td>
</tr>
</tbody>
</table>

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