DOING BUSINESS IN United Kingdom

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Introduction

The United Kingdom ("UK") is an excellent jurisdiction in which to do business. It is one of the most competitive economies in the world, is serviced by a strong labor market, has excellent communications and distribution networks and offers favorable tax regimes and incentives to facilitate new business growth. Furthermore, there are very few restrictions on foreign ownership of businesses in the UK which, together with the familiarity of the English language, all make the UK an attractive choice for carrying on business for foreign entrepreneurs and organizations looking to establish a business presence outside their country of origin.

This guide summarizes some of the principal considerations when establishing a business presence in the UK. Whilst most of the relevant legislation applies throughout the UK, this guide is directed principally towards establishing a business in England & Wales (and use of the term "UK" in this guide should be construed in that context). There are some local variations in the law as it relates to Scotland and Northern Ireland.

The guide is intended to be no more than a general introduction to the relevant considerations when establishing a business presence in the UK and, as such, is not exhaustive. Further professional advice should always be taken in relation to specific circumstances.

The UK is currently a member of the European Union (EU) and hence EU law forms an integral part of UK law. As a Member state the UK is obliged to implement EU directives at the national law level, whereas EU regulations are directly applicable. However, in a referendum on Thursday 23 June 2016 the UK voted to leave the EU. On Wednesday 29 March 2017 the UK triggered Article 50 of the Treaty of the European Union and so began the two year process of leaving the EU. The UK is scheduled to leave the EU at 11am on Friday 29 March 2019. Negotiations have been slow and complex and any final decisions may impact on some of the issues set out in this guide. The law is stated as at February 2018. We are happy to provide further information or assistance about any matters listed in this guide.

Business Structures: What types of business structures are permitted?

There are a number of different business structures that are permitted in the UK. A summary of the key options are explained below.

Incorporating a UK Subsidiary

Generally an overseas entity wishing to establish a subsidiary in the UK will incorporate one of the following:
- Private company limited by shares ("private company") – where the shareholders’ liability is limited to the amount, if any, unpaid on the shares allotted to them; or
- A public company limited by shares ("public company") – as with a private limited company, the shareholders’ liability is limited to the amount, if any, unpaid on the shares held by them. However, a public company is subject to more stringent requirements and regulations predominantly because, unlike a private company, its shares can be offered for sale to the general public.

When first venturing into the UK market, most overseas entities will elect to start with a private company and later convert to a public company if and when it is felt that the additional status is desirable or required, and the company is able to comply with the additional regulations and statutory requirements of a public company.

It is very straightforward to incorporate a company and the whole process can usually be completed in 24 hours.
Acquisition of an existing UK company
This is generally done by entering into a share purchase agreement, pursuant to which the purchaser buys all, or the majority of, the shares of the target company. If the shares in a target company are purchased, the buyer acquires the target company with all of the assets and liabilities of the target in it, even if the buyer does not know about them. An existing company may have the benefit of real profit, infrastructure and a customer base already in place, which means the business is up and running and may be able to expand more quickly. It may have a favorable tax position (for example it may have losses to set off against taxable profits). However, the fact that the purchaser will have to rely on warranty and indemnity protection in respect of existing liabilities may make it less appealing.

Branch
Instead of incorporating a subsidiary, an overseas entity may decide to conduct its business through a branch office in the UK. Whether or not the overseas entity has established a fixed or permanent base from which to conduct its business in the UK (a “UK establishment”) will generally determine whether the overseas business is required to comply with the registration requirements under UK company law and become subject to UK tax. The principal point to note about a branch or UK establishment is that it is not a separate legal entity; the branch is simply that part of the overseas entity trading in the UK. The overseas entity is directly responsible for the liabilities of the UK operation.

Partnership Arrangements
There are a number of different types of partnership under UK law including:
- General partnerships: a general partnership is established where two or more persons carry on business with a view to making a profit. A partnership is not a separate legal entity and the partners each have unlimited liability. Thus a partnership structure does not tend to be used for businesses establishing in the UK; or
- Limited liability partnerships ("LLPs"): these are an alternative type of corporate body. An LLP is a separate legal entity and is therefore more akin to a company and has similar formal registration and regulatory requirements. Professional organizations, such as law firms and accountants, tend to use the LLP structure and they are also popular as fund/venture capital investment vehicles.

There are no formal requirements for establishing a general partnership; it is a matter of fact. Therefore care should be taken that one does not unwittingly enter into such an arrangement.

Agency, distributorship and franchising arrangements
An overseas supplier wishing to sell goods or services in the UK may be wary of committing the relatively substantial resources required to establish a presence in the UK or simply lack the necessary knowledge of the UK market. In these cases an alternative would be to appoint an agent or distributor instead of establishing a presence or doing business directly itself in the UK. Another option would be to franchise its business. Broadly speaking:
- An agency may be the most suitable vehicle for selling goods where the goods are heavily customized or where the relationship with the end customer is important;
- A distributorship will usually be chosen where commodity goods are being sold. For specialist and luxury goods, a “selective” distributorship may be the most appropriate model; and
- A franchise structure may well be appropriate where the supplier’s business lends itself to this model, especially where this is already the business structure of the supplier.
The decision as to which structure to use will depend on a number of key commercial factors such as the size of operations, resources available, level of permanency required in the UK and the degree of risk prepared to be incurred, as well as legal, tax and regulatory considerations.

**Taxation:** Briefly explain the country’s tax regime including rates and how rates differ based on business structures.

There are various taxes applicable to an entity establishing and/or conducting business in the UK and the business structure will impact how much tax is due. In broad terms tax can be levied on the following in the UK:
- Profits made by businesses;
- Income of individuals including from their employment (such as income tax and National Insurance contributions) and dividend payments;
- UK source income;
- Disposal of capital assets;
- VAT on sales; and
- Transfers of real property and shares.

**Corporation tax**
The profits of a company are subject to corporation tax if that company is a ‘resident’ in the UK or is a ‘non-resident’ but carries on a trade in the UK through a permanent establishment, such as a branch. Corporate residents in the UK are subject to corporation tax on the whole of their worldwide profits. A non-resident company that does not carry on a trade in the UK through a permanent establishment is not chargeable to UK corporation tax or capital gains tax. However, subject to any relevant double tax treaties, such types of companies are generally liable for income tax on income with a UK source. The company’s taxable profit is the sum of its income profits and chargeable gains less certain deductible payments if applicable. As part of the Government’s plan to make the UK corporate tax system more competitive, 2015 saw a cut in the main rate of corporation tax to 20%. It was reduced further to 19% from 1 April 2017 and to 17% from 1 April 2020. This makes it one of the most competitive corporation tax regimes in Europe.

Corporation tax is generally payable either within nine months of the end of the accounting period or, for large companies, by quarterly installments, the first of which is payable in the seventh month of the accounting period in question. In addition, the UK does not charge withholding tax on the return of post-tax profits out of the UK. This means once a UK company has paid corporation tax on its profits, the UK does not levy any further charge on dividends paid out to a non-UK parent company/shareholder.

**Payroll and VAT**
If you employ staff in the UK it is highly likely that you will have to operate the “pay as you earn” system (“PAYE”), such that you deduct income tax at source from salary and account for the same to the UK tax authority, HMRC. In addition employer’s national insurance contributions apply to UK employers at a rate of 13.8% and this is effectively an additional cost of employing staff in the UK. If you conduct a material level of business in the UK it is likely that you will need to register for VAT, charge VAT on fees charged to clients/customers and account for the same to HMRC. The standard rate of VAT currently applies at a fixed rate of 20%.

**Tax Incentives**
The UK has certain tax incentives available, but their applicability will be dependent on the nature of the activities in the UK. For example, the UK has a comprehensive R&D tax credit regime, which enables enhancements to the amount of deductions available for expenditure on innovative research and development activities and, in some cases, a payment of a credit from HMRC. Likewise, the UK has a “patent box” regime, which permits reduced tax on profit attributable to patents falling within the regime.
Much of the focus on UK tax incentives is around investment into UK companies and encouraging entrepreneurial activity. For example, there are certain tax reliefs available for investing into UK resident companies, whereby UK resident investors receive a tax credit against their income tax liabilities. Similarly generous tax reliefs may be available for share incentives provided to UK resident employees of qualifying UK companies.

For non-UK investors, there are no such incentives available. However, non-UK shareholders are not subject to UK tax on the receipt of dividends from UK shares or on the sale of UK shares.

**Double tax agreements**

The UK has a wide network of double tax agreements with many countries around the world. Double taxation agreements (also known as double taxation treaties or conventions) (DTAs) are primarily aimed at preventing tax from arising on the same profits in multiple jurisdictions. For example if the UK was set up as a branch of an existing foreign company, both the UK and country the foreign company is registered in may seek to tax the profits. It is likely that the DTA would provide that the profits should be taxed primarily from where they derive – i.e. the UK if you have a fixed presence in the UK.

DTAs typically become important where there are movements of cash and/or people across borders. For example, the taxation of cross-border royalty payments is likely to require consideration of DTAs. Similarly if staff move between offices and provide services in more than one jurisdiction, DTAs may become relevant.

Of itself, a DTA is not a reason to set up in the UK, however the UK’s network of DTAs may prove helpful, particularly if you were looking to use the UK as a hub through which to expand your business into other jurisdictions, such as in Europe, though this may change. Given the complexity of this area and its business-critical nature, individual tailored advice should be sought at an early stage, which we can provide.

The first key issue from the immigration perspective is to ensure that all workers have the right to work in the UK. There are both criminal and civil sanctions that can be imposed if illegal workers are hired. The main immigration routes for principals and senior employees coming to the UK are set out below.

**Sponsor license under Tier 2**

UK employers can obtain a special license from the Home Office which enables them to sponsor overseas nationals for work. There are two main categories of sponsorship: Tier 2 Intra-company transfer and Tier 2 General (used for new hires and transfers who want to obtain settlement in the UK). The UK company would need to show that it has policies and procedures in place to manage the sponsor license to ensure compliance.

Once the license has been granted it can then be used to sponsor employees in the UK, including the principal or senior employee tasked with running the UK office. The main requirements are:

- The role must be skilled to a specified level (e.g., graduate, specialist and professional roles);
- There are minimum salaries in place which vary depending on the type of sponsorship and the role; and
- Tier 2 General requires a search of the resident labor market to ensure there are no suitable UK settled workers unless an exemption from the test applies.

**Sole representative**

This category is for an overseas business outside the European Economic Area (EEA) setting up in the UK. The visa enables a senior employee of the overseas entity to relocate to the UK to set up a branch or subsidiary. The main requirements are as follows:

Immigration: Summarize immigration laws, including visas available for foreign employees.
- A senior employee who speaks English and who has responsibility to set up UK office and who is not a majority shareholder; and
- There must be no active established branch or subsidiary.

The overseas entity must set out in a business plan details of the establishment of the UK branch or subsidiary. The sole representative can only work in relation to their role establishing and running the UK office.

**Employing staff from outside the EEA in the UK**

Staff who are not nationals of an EEA country will usually require sponsorship in order to work in the UK. If an employee has a UK visa already in place, the business will need to check it to ensure there is no restriction on employment. Employees sponsored under certain “Tiers” can only work in the role for which they have been sponsored so changes to their role and salary may be restricted. It is advisable to carefully check any work restrictions and seek advice if in doubt before making an offer of employment or making changes to the migrant’s employment.

Immigration and visa requirements play an increasing part in the establishment of a UK business and in the recruitment process as an employer’s ability to recruit key personnel is crucial to the business’ success.

**Foreign Investment Review and Issues:** Does the government review and approve foreign investments? What factors are considered?

Traditionally the UK has had very few restrictions on foreign ownership and investment. Currently, there are a number of industry sectors that require companies, both UK and foreign owned, to be authorized or licensed to operate. Particular industry sectors that are subject to additional regulations include: banking and financial services; professional advisory services; energy and utilities; media, broadcasting and telecommunications; life sciences and pharmaceuticals; gambling; defense; waste disposal; and, food and drink production.

However in October 2017 the UK government released a Green Paper entitled ‘National Security and Infrastructure Investment Review’ for comments on their proposals for increased review of business combinations in the dual-use and military use sector and in parts of the advanced technology sector. Foreign ownership is limited in only a few strategically privatized companies, such as Rolls Royce and BAE Systems, due to their importance to UK defense policy.

While the UK does not have a formalized investment review body to assess the suitability of foreign investments in national security sensitive areas, an ad hoc investment review process does exist and is led by the relevant government ministry with regulatory responsibility for the sector in question.

**Dealing with the Government:** Identify major issues when dealing with local and federal governments.

As a Member State of the EU the UK has adopted EU legislation to ensure that the EU public procurement market is open and competitive and that suppliers are treated equally and fairly. The rules cover aspects such as advertising contracts, procedures for assessing company credentials, awarding the contracts and remedies (penalties) when these rules are breached. These rules are contained in the following directives:

- Utilities: Directive 2014/15/EU – in relation to water, energy, transport and postal services sectors;
- Public Sector: Directive 2014/24/EU – in relation to public procurement; and

The UK Government prioritized the implementation of the Public Contracts Directive via Public Contracts Regulations 2015, which deregulated the area where the most procurement activity occurred. The rules require public bodies to hold a competitive tender process for contracts above set financial thresholds.
A contracting authority is obliged to publish a contract notice if it is pursuing offers in respect of public contracts for works, goods or services, and the estimated value of the contract equals or exceeds the relevant financial threshold. Where the financial thresholds are not met, the contracting authority must still continue to apply the principles of non-discrimination, transparency, equal treatment, mutual recognition and proportionality.

Additionally, to achieve the UK’s objective of achieving value for money in all public procurements, if it is thought that the contract will attract cross-border interest there is a responsibility to publish an advertisement to ensure that potential suppliers in other Member States have access to the correct information before granting the contract.

EU State Aid rules are engaged when state resources are used to provide assistance to organisations giving them an advantage over others. State Aid may be necessary where there is a genuine market failure. State Aid rules apply where the following four elements are present:
- Assistance is granted by the State or uses State resources;
- The assistance gives an advantage to the organisation engaged in economic activity over other organisations;
- The assistance distorts or has the power to distort competition; and
- The assistance affects trade between Member States.

Once it is established that the rules apply, there may be a need to notify the State Aid if the de minimis threshold (€200,000 in any rolling three year period) is exceeded. If there is a need for notification, aid cannot be administered until approval has been received.

Dispute Resolution and Court Systems: Summarize the court system, including the use of juries and arbitration.

The United Kingdom does not have a single unified legal system - England and Wales has one system, Scotland another and Northern Ireland a third. In England and Wales, civil cases begin in the High Court (smaller cases can begin in the County Court) and may, if given permission, be appealed to the High Court, then to the Court of Appeal and finally to the Supreme Court of the United Kingdom (which serves as the highest court for the entire UK).

Juries are used in more serious criminal cases tried in the Crown Court, which are unsuitable to be determined by a judge alone. Juries are used in only a limited number of civil cases, such as where the case involves libel or slander, malicious prosecution or fraud.

Commercial arbitration has become more popular in the UK, the framework for which is provided by the Arbitration Act 1996.

Foreign Corrupt Practices: What are the anti-corruption, anti-bribery and economic sanction laws which impact doing business in the country?

Bribery sanctions in the UK are set out in the Bribery Act 2010. The penalties for committing a crime under the Act are a maximum of 10 years’ imprisonment, along with an unlimited fine, and the potential for the confiscation of property under the Proceeds of Crime Act 2002, as well as the disqualification of directors under the Company Directors Disqualification Act 1986. Jurisdiction to prosecute under the Bribery Act is extremely broad, allowing for the prosecution of an individual or company with links to the United Kingdom, regardless of where the crime occurred. Whilst the UK’s anti-corruption regime is regulated by the Bribery Act 2010, it is a common law offence conspiracy to defraud as well as a criminal offence for certain cartel behaviors under s188 of the Enterprise Act 2002.

The UK imposes economic sanctions against various countries and individuals, these sanctions are negotiated by the Foreign and Commonwealth Office and implemented by the Treasury. All individuals and legal entities who are within or
undertake activities within the UK’s territory must comply with these sanctions and must also comply with any EU financial sanctions, while the UK remains a member of the EU. Countries against whom sanctions are currently employed include Afghanistan, Ukraine, Syria and Sudan. A full list can be found on the website of HM Treasury. The UK implements UN sanctions as a Member State of the EU, directly applicable by EC regulation, and this is likely to continue on a voluntary basis after Brexit.

**Types of transaction: How may businesses combine?**

The most common business combinations in the UK are detailed below. All of the methods allow an acquirer to pay in cash, securities or a combination of both.

**Contractual offer**

This is where the potential buyer makes a contractual offer to all of a target company’s shareholders to acquire their shares. The takeover offer will include a condition relating to the minimum number of acceptances by target shareholders which the buyer is seeking to obtain (the acceptance condition). Although the minimum acceptance condition of a takeover offer must be over 50%, in practice the condition is often set at 90% which is the percentage that a buyer must hold in order to invoke the statutory squeeze-out procedures to acquire shares from any minority shareholders who do not accept the offer. The principal advantages of a contractual offer are that an acquirer can achieve effective control of the target company (with more than 50% acceptances) more quickly than in a scheme of arrangement and there is greater flexibility to vary the terms of the offer in a competitive situation. This method is typically used for public company business combinations but the 90% squeeze-out procedure is no less applicable to private companies.

**Scheme of arrangement**

A scheme of arrangement (the term “scheme” here is similar to the US term “plan” and is entirely non-pejorative), is a statutory arrangement between a company and its members under Part 26 and 27 of the Companies Act 2006 (Companies Act). Schemes of arrangement have in recent years become a common deal structure for larger value takeovers and mergers, particularly in the case of all-share transactions. A scheme of arrangement requires the approval of a majority in number, representing 75% in value of each share class, of shareholders attending and voting at the relevant shareholder meeting, together with court approval. The degree of co-operation required between an acquirer and target company means that a scheme is very unlikely to be used for a hostile (or unilateral) takeover. Again, this is typically used for public companies business combinations.

**Private share acquisition**

In a private share acquisition the buyer and seller work together to negotiate a share purchase agreement (SPA) to effect the transaction on terms agreed between themselves. The SPA can be an extensive document and the complexity of it depends on the nature and circumstances of the transaction. There is additional risk for the buyer (as compared with an asset purchase) by virtue of it acquiring the target company’s tax history and its past and future liabilities. Hence there may be a long negotiation process and a detailed schedule of warranties (the UK term for what in the US are referred to as representations) will form an integral part of the SPA. Warranty and indemnity insurance has been commonly used in the UK for much longer than in the US and it is a regular feature of many transactions.

**Private Asset Acquisition**

An alternative method to private share acquisition is a private purchase of the target’s underlying business. Here, the buyer is able to specify exactly what it wishes to purchase and hence select the liabilities it wants to assume. Through purchasing specific assets instead of the entire issued share capital of the target company, the buyer does not having to deal with minority shareholders who
refuse to sell. UK companies may also combine with other EEA businesses using the European merger procedures provided by the Companies (Cross-Border Mergers) Regulations 2007.

**Competition Law: How do laws impact competition?**

A takeover may be completed while it is being considered by the UK’s Competition and Markets Authority (CMA). However, the bid must lapse if the proposed transaction is the subject of a “hold separate” order of the CMA, if there is a referral to the UK’s Competition Commission or if the European Commission of the EU launches a Phase II investigation before the later of the:
- First closing date; or
- Date when the offer becomes unconditional as to acceptances; or
- If any Phase I investigation is still underway.

Where the Takeover Panel jurisdiction it has discretion to suspend the bid timetable (usually at day 39) if there is significant regulatory delay in a decision.

Where as a result of meeting certain size and other tests the transaction is regarded as having an “EU dimension” for the purposes of the EU Merger Regulation (EUMR), the EU merger control regime will apply to the exclusion of the individual merger regimes of the UK and any other relevant EU member states. Notification under the EUMR is a mandatory obligation.

For mergers with a purely domestic impact, the primary legislation is the Enterprise Act 2002 (EA02). This lays down the UK merger control regime which captures “relevant merger situations”, in which two “enterprises cease to be distinct.”

Enterprises cease to be distinct where they are brought under common ownership or control, regardless of whether the selling business ultimately ends up under such ownership or control. The concept of control for these purposes also includes the ability to have a “material” influence over the policy of the enterprise in question or the companies or individuals that run it.

The UK authorities have jurisdiction to examine an anticipated or completed merger where either one of the following tests is satisfied:
- The UK revenues of the target exceeds £70 million; or
- The merger creates or adds to a 25% share of supply (or purchase) of goods or services of a particular description in the UK (or a substantial part of it).

Where either test is satisfied, there is deemed to be a “relevant merger situation.” Notification under the domestic UK regime is voluntary; a merger can be completed without making any notification to, or obtaining clearance from, the CMA. The CMA has the power to refer a transaction to a Phase II in-depth investigation up to four months after the transaction becomes unconditional or is made public. It actively monitors mergers and acquisitions in the jurisdiction with a view to finding and investigating un-notified relevant merger situations which could significantly lessen competition.

The CMA has a duty to refer mergers (anticipated or completed) to Phase II where it believes that there is, or may be, a relevant merger situation that has resulted or has a reasonable prospect of resulting in a substantial lessening of competition in the UK. On such a reference, the CMA's Phase II investigation team will carry out an in-depth review of the proposed transaction.

**Employment Relations: Briefly summarize major laws impacting employment and employee relations.**

Employment in the UK is highly regulated with a wide range of statutory protection for employees, much of which is derived from the European Union. Not all people in work are classed as employees and their rights are also sometimes limited by how long they have been employed at a company.
Broadly speaking, people in work can be an employee, a worker or a self-employed independent contractor. This guide focuses on rights afforded to employees as these are most likely to be relevant, but if you require further detailed advice on how to deal with issues relating to self-employed contractors or agency workers please let us know.

An employee is entitled to the following main rights:
- An implied term of mutual trust and confidence in their employment contract: this can give the employee a wide range of possible causes of action against their employer if the relationship breaks down.
- The right not to be unfairly dismissed and the right to receive a statutory redundancy payment, under the Employment Rights Act 1996 (this will only apply if the employee has two years’ service).
- The right to be automatically transferred to another company if their employer’s business is taken over, under the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- The right to be protected against certain health and safety risks by the employer.

An employer can also be ‘vicariously liable’ for acts committed by its employees in the course of their employment (e.g. an employee injured by another employee at work could sue the employer as well).

All employees, workers and self-employed independent contractors are entitled to protection from discrimination and harassment at work under the Equality Act 2010.

Other issues to consider
The UK does not have US-style employment at will and legislation sets out certain statutory minimum notice periods for all employees with more than one months’ service, namely one week’s notice up to two years’ service with an additional week for each complete year of service after that, up to a maximum of twelve weeks. Contracts can specify more than this, but not less.

All workers in the UK are entitled to certain rest breaks, a limit on night working and a limit on their working week to 48 hours (unless they have agreed to forego this entitlement, known as “opting out”).

Workers are entitled to national minimum hourly rates.

Subject to certain qualifications, employees are entitled to statutory sick pay after three days absence due to sickness. Some employers offer more generous sick pay provisions for limited periods.

Workers have a generous holiday entitlement as compared with their US counterparts – they are entitled to a minimum of 28 days (pro rated for part time workers) paid holiday a year. This allocation includes certain public holidays spread throughout the year.

Post-employment termination restrictions will not be implied into the employment contract, so if they are not included, the business will have little protection against a departing employee. This will only really need to be a consideration for key employees.

Common types of restriction include non-solicitation (seeking to prevent an ex-employee from soliciting his or her former employer’s customers); non-dealing (seeking to prevent an ex-employee from dealing with his or her former employer’s customers irrespective of who makes the approach); and non-competition.
The Courts are naturally unwilling to prevent an individual from earning a living, so these clauses must be carefully drafted to ensure they are no wider than necessary to protect the business. If too widely drafted, such clauses are likely to be unenforceable.

Directors are subject to fiduciary duties of good faith and loyalty and common law duties of skill and care, both of which are codified in legislation (although this codification is not exhaustive) and include a duty to act within powers, a duty to promote the success of the company, a duty to exercise independent judgement, a duty to exercise reasonable care, skill and diligence and a duty to avoid conflicts of interest.

Employees must be automatically enrolled in a company’s pension plan (auto-enrolment). This regime is being phased in over a number of years, with employers having staggered start dates depending on the number of employees they have. A key point is that the auto enrolment obligation applies to all employers (whether UK based or not) that engage workers in the UK. The regime will be fully implemented by early 2018.

The two key elements of auto-enrolment are the requirement for employers to automatically enroll “jobholders” in a workplace plan that meets qualifying criteria and a mandatory minimum employer pension contribution to be made by the employer on behalf of the employees who join. Many employers offer more than the minimum contribution.

(2) Termination of employment

Contractual rights
If an employer terminates in breach of the terms of the employment contract, an employee can bring a claim for breach of contract, known as “wrongful dismissal”.

Unfair dismissal - fair reason and process
All employees with at least two years’ service are entitled not to be unfairly dismissed. However, there are categories of dismissal for which no specific length of service is required such as dismissals in connection with whistleblowing, trade union activities or maternity.

In order to dismiss fairly, employers must ensure that not only the reason for the dismissal is fair, but also the process adopted in conducting the dismissal was fair and that it was fair and reasonable in all the circumstances to dismiss the employee for the reasons given. There are five potentially fair reasons for dismissal set out in legislation. These are: conduct, capability, redundancy, that an employee could not continue to work without contravening a statutory duty or “some other substantial reason”. The first three reasons are by far the most common.

Procedural fairness is governed by the ACAS Code of Practice which provides employers with basic practical guidance on conducting a disciplinary process.

Redundancy
In order to dismiss fairly by reason of redundancy the employer must go through certain processes which include: warning, consulting, selecting fairly and considering alternative employment. If 20 or more employees are being made redundant in a 90 day period, there are additional collective consultation obligations. Employees with two years’ service who are made redundant are entitled to a statutory redundancy payment which is calculated by reference to age, length of service and weekly pay.
### Retirement
There is currently no default retirement age in the UK at which it is “fair” to dismiss an employee. Employers who wish to select an age for retirement must ensure that this age can be objectively justified.

### Compensation
If an employee is found by an employment tribunal to have been unfairly dismissed, they will be entitled to both a basic and compensatory award. The basic award is designed to compensate an employee for loss of job security and is calculated on a formula based on the employee’s age, length of service and weekly pay (subject to a statutory limit). The compensatory award is subject to an upper limit unless there is a finding of discrimination, in which case there is no upper limit on the award, which will be based on financial losses and is not punitive.

### Some other employment issues to consider

#### Tax
Employers must deduct applicable tax (such as income tax) and national insurance contributions from salary payments.

#### Trade unions
If a trade union is not already recognized, there is a statutory process that enables a trade union that is supported by a majority of the relevant workforce to force recognition. In reality such applications are relatively rare.

### Statutes and regulations:
**What are the main laws and regulations governing business combinations?**

The fundamental statutory framework for the sale and purchase of companies is provided for in the Companies Act in: Part 26 (Arrangements and Reconstructions), Part 27 (Mergers and Divisions of Public Companies) and Part 28 (Takeovers) of the Companies Act.

The City Code on Takeovers and Mergers (City Code) provides additional regulation for takeovers. The Panel on Takeovers and Mergers (Takeover Panel) is the designated supervisory authority for the purposes of the European Directive on Takeover Bids (2004/25/EC) (Takeover Directive). The City Code can apply to offers for an unlisted public company or a private company. It also applies to, and contains provisions for dealing with, schemes of arrangement.

The Financial Services and Markets Act 2000 (FSMA) forms the statutory framework to regulate the financial services industry including for the official listing of securities, public offers of securities and the announcement of invitations to participate in securities transactions. The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA), together with the Bank of England are the official regulators of financial services firms.

The Market Abuse Regulation (MAR) came into effect on 3 July 2016. MAR contains prohibitions of insider dealing, unlawful disclosure of inside information and market manipulation. Its provisions aim to prevent and detect market abuse to increase market integrity and investor protection.

The FCA, as the UK’s securities regulator, produced the UKLA Sourcebook of Rules and Guidance which includes the Listing Rules, the Prospectus Rules and the Disclosure and Transparency Rules (DTRs). These rules are applicable to business combinations involving listed companies and contain prospectus rules for public offers by both listed and unlisted issuers. The Criminal Justice Act 1993 and DTRs state that companies must maintain ‘insider lists’ (lists of those people party to inside information). Companies must also consider recommendations by the European Securities and Markets Authority with regards to the European Commission’s Regulation on Prospectuses (No. 809/2004).
### Governing Law: What law typically governs the transaction agreements?

Share purchase agreements can be governed by the law of choice of the parties. Typically this would be the law applicable to the target company, but it can also be the law of the jurisdiction of the purchaser or seller.

### Filings & Fees:

#### Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees payable in connection with a business combination?

The CMA can charge fees in certain circumstances where there is a relevant merger situation under the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003. These fees range from £40,000 to £160,000, depending on the value of the UK revenues (a commonly-used UK term is “turnover”) of the businesses acquired. No fees are payable in respect of notifications to the European Commission under the EUMR. No other filings are required in the sale of private companies with the exception of conveyancing if there is a need to transfer real estate.

For public offers governed by the Takeover Code, documents must be sent to the Takeover Panel. If listed shares form part of the consideration, typically a prospectus must be produced for UKLA approval and then filed with the FCA. If shares are purchased using stock transfer forms, stamp duty is payable at 0.5 per cent if the consideration is more than £1,000. If shares are purchased electronically, stamp duty is charged under Stamp Duty Reserve Tax (SDRT). Stamp duty is calculated based on the price paid for the shares, not the actual market value.

Stamp duty land tax (SDLT) is imposed on purchases of non-residential property over £150,000. The tax is paid at a staggered rates, so that the portion of consideration within a certain band is charged at the rate for that band. Currently the SDLT bands are 2 per cent for consideration from £150,001 to £250,000 and 5 per cent on the portion of consideration above £250,000.

### Information to be Disclosed:

#### What information must be made public in a business combination? Does this depend on the structure used?

DTRs need listed companies to disclose ‘inside information’ concerning it directly through notification to a regulatory information service (RIS). Exceptions to the immediate disclosure requirement arise whereby disclosures may risk the issuer’s legitimate interests, risking potential developments by premature disclosure.

If required, a prospectus may contain necessary information allowing investors the ability to make an informed assessment. Additionally, there exists a requirement of detailed rules to the content of the prospectus, consisting of a thorough description of the business. Exemptions to producing a prospectus exist in relation to securities offered with regards to a merger or take-over, although it is common for a prospectus to be produced.

There are significant disclosure requirements in the case of a takeover governed by the City Code and these are referred to below.
Disclosure of substantial shareholdings: What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

Under the DTRs, when a listed company's shares are admitted to trading on a regulated market, a person who directly or indirectly holds shares or other financial instruments with aggregate voting rights in excess of 3% and where a subsequent acquisition or disposal causes that person's shareholding to increase or decrease through a whole percentage, must notify the company. The notification must be made within two trading days for a UK issuer and four trading days for a non-issuer. The thresholds for non-UK issuers that have shares admitted to trading on a UK regulated market and whose home state is the UK are 5, 10, 15, 20, 25, 30, 50 and 75%. The notification must be disclosed to a Regulatory Information Service within one trading day in the case of an issuer with shares admitted to trading on a regulated market or three trading days in the case of a non-UK issuer or an issuer with shares admitted to trading on a prescribed market.

The disclosure regime under the City Code applies once an offer period begins, that is, once the possibility of a bid is publicly disclosed. By noon on the tenth business day after an offer period begins, or after the announcement that first identifies a competing paper acquirer, an acquirer must make an opening position disclosure in respect of its interests, and those of its concert parties, in relevant securities of the target and also of the acquirer in respect of an exchange offer. If an announcement of a firm intention to make a bid is made before the deadline, then an opening position disclosure must be made with the announcement.

Since April 2016, UK companies and small business have obligations to keep a register of persons with significant control (PSC). This includes those who hold more than 25 per cent of the company’s shares, who have a right to appoint or remove a majority of the board of directors, or who otherwise have the power to exercise significant influence over the company. Each time the PSC register changes the relevant notification should be made to Companies House. The aim of the PSC register is to increase transparency over who owns and controls UK companies which will help inform investors when they are considering investing in a company. It also assists law enforcement agencies with investigating money laundering.

Under s.793 of the Companies Act, a public company may request a person who knows or reasonably believes is interested in the shares of the company to provide details of the nature of that interest. Failure to comply with a notice under s.793 is an indictable offence with a maximum sentence of two years’ imprisonment or a fine, or both, unless the person can demonstrate that the request was frivolous or vexatious.

If the company is involved in a business combination, during the offer period, the City Code requires any dealings by certain persons in any relevant securities of any party to the offer (except a cash offeror) to be notified to a RIS within a prescribed time period following the date of the transaction.

There are additional notification requirements for UK financial sector companies. The FCA’s Financial Stability and Market Conduct Sourcebook contains a notification obligation for net short positions representing an economic interest of 0.25 per cent or more of the issued capital of a UK financial sector company (a ‘disclosable short position’). Failure to adequately disclose their interest on an ongoing basis can be seen as market abuse. The disclosure requirements apply when the person's position reaches, surpasses or falls below a disclosable short position of 0.25, 0.35, 0.45 or 0.55% of the issued share capital of the company and through each 0.1% thereafter.
Duties of directors and controlling shareholders:
What duties do the directors or managers of a company owe to the company’s shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The general statutory duties directors owe to the company are set out in ss171-177 of the Companies Act. Directors have a duty to:
- Act in accordance with the company’s constitution and exercise powers for the purposes for which they were conferred;
- Promote the success of the company;
- Exercise independent judgement;
- Use reasonable care, skill and diligence;
- Avoid conflicts of interest;
- Not to accept benefits from third parties; and
- Declare interests in proposed transactions and arrangements.

The responsibility to ensure compliance with the provisions of the City Code falls on all directors of the acquirer and the target and not merely executive directors. Individual directors are therefore unable to rely on their lack of knowledge of the conduct of the takeover in order to absolve themselves from responsibility.

A target board in receipt of a proposal from a potential acquirer, or once an offer has been announced, will need to consider its attitude to the offer. Directors must consider a number of factors including: the long-term consequences of a decision, the impact of a decision on a company’s business relationships, the company’s reputation, the need to act fairly between shareholders and the wider society and environment.

The City Code requires the target board to send a circular to all target shareholders and persons with information rights which sets out the target board’s opinion on the offer and the reasons for forming its opinion including independent advice in respect of the offer (usually from its financial advisor).

The target board’s circular must include the views of the target board on the effects of the offer on all the target’s interests, including, specifically, employment and the target board’s views on the acquirer’s strategic plans for the target and their likely repercussions on employment and the locations of the target’s places of business.

The target board’s opinion normally also consists of simple advice to accept or reject the offer. When giving its opinion, the target board is not required by the City Code to consider the offer price as the determining factor and is not restricted from considering other factors which it considers relevant. The duties of the target directors in giving their views on an offer are not always perfectly aligned with their statutory general duty to promote the success of the company for the benefit of its members as a whole.

Traditionally the interests of the company have been identified with those of its shareholders, both present and future, therefore requiring the directors to balance short and long term interests. What is beneficial to the current shareholders who are sellers of the shares may not necessarily coincide with what would promote the success of the company. In giving their views on the offer, directors are addressing current shareholders and in practice the best price often prevails.

The managers of a company have a duty to act in accordance with the directions of the board of directors. Controlling shareholders do not have similar duties. However, they should not use their position to discriminate against minority shareholders.
### Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

Depending on the structure of the business combination, the Companies Act may give shareholders indirect approval rights. For example, if the takeover requires an equity fundraise by allotting more shares that would take the issued share capital above the authorized amount, or the company's constitutional documents require amendment, shareholder approval would be required. Alternatively, if the takeover involves a director or significant shareholder (or a person connected to either of them), shareholder approval is required for the transaction.

A scheme of arrangement under part 26 and part 27 of the Companies Act requires approval by a majority who represent 75% in value of shareholders present and voting at the meeting. Shareholders who cannot attend the meeting can cast their votes via a proxy. The scheme is then subject to final approval by the court, which in effect gives a fairness ruling on the transaction.

The Listing Rules apply for listed companies. They provide that for acquisitions of a certain size (typically over 25% of the size of the offeror) or where there are connected persons involved, the acquisition must be approved at a general meeting of the shareholders.

A members' voluntary liquidation under section 110 of the Insolvency Act 1986 and the following sale of all or part of a business in exchange for securities needs shareholder approval of 75% majority in value of those shareholders present and voting.

### Hostile transactions

What are the special considerations for unsolicited transactions?

The following provisions of the City Code apply to all offers but are particularly relevant in hostile transactions:

- The offer must first be put to the board of the offeree company or its advisers;
- All offeree company shareholders of the same class should be treated equally;
- Information given to an offeror or potential offeror must also be given on the same basis to any other offeror who requests it;
- There are limitations on share purchases before or during an offer period, the offer price and the type of consideration that can be offered;
- There are constraints on the board of the offeree company taking actions that might frustrate the inclination of an offeror to make an offer or complete an existing offer and these are referred to in more detail below; and
- Advisers cannot be incentivized by the payment of a fee conditional upon the failure of a bid.

In hostile bids, both the offeree and the offeror issue their own circulars. The board of directors of the offeree sends a defense document to its shareholders explaining its reasons for why it wants the offer to be rejected. This is unlike a recommended bid scenario where the offeree and offeror would produce a joint circular.

The target board are constrained by the City Code on what defensive actions they can take in relation to a hostile bid due to the general principle that the target board must not deny shareholders the opportunity to decide on the merits of the bid. Rule 21.1 of the City Code expands on the principle by prohibiting the target’s board from taking the following actions during an offer period (or earlier if the board believes an offer might be imminent) without the approval of shareholders:

- Taking any action which may result in any offer or possible offer being frustrated;
- Issuing any authorized but unissued shares or transferring or selling any shares out of treasury or granting options in respect of unissued shares;
- Creating or issuing, or permitting the creation or issue of, any securities carrying rights of conversion into or subscription for shares;
**Break-up fees – frustration of additional bidders:** Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company’s ability to protect deals from third-party bidders?

| Traditionally, break fees payable by an offeree were a common feature of UK takeover bids as a protection mechanism for the potential offeror. However in September 2011, the Takeover Panel introduced a general prohibition on certain deal protection measures including break fees. Break fees, matching arrangements, exclusivity and non-solicitation agreements, implementation agreements and other offeror protections are generally no longer permissible for public acquisitions. However, in hostile bid situations the Takeover Panel will allow an offeree to enter into a break fee arrangement with an offeror if the offeree board seeks a ‘white knight’. Other exceptions include if the offeree has gone through a formal process to put itself for sale or is in severe financial distress. Exceptional break fee arrangements are usually limited to 1% of the value of the offer price. Break fee arrangements are still available in private acquisitions. There are a number of legal issues involved when entering into such arrangements. The directors are bound by their statutory duties to the company. Break fee arrangements are acceptable only where the board can take view, in good faith, that without this arrangement the shareholders would be deprived of an offer the board would otherwise recommend. The Listing Rules provide that if the break fee is greater than 1% of the offer price, then it will be categorized as a ‘class 1 transaction’ and shareholder approval will be required. The Takeover Code does not prohibit the payment of a reverse break fee by an offeror to an offeree. However these arrangements are not common. A scenario where it may be used is where an offeror requires shareholder approval. |
| -Selling, disposing of or acquiring, assets of a material amount (10% of assets is the limit suggested by the Takeover Panel); or -Entering into contracts other than in the ordinary course of business. The practical implications of Rule 21.1 are that a number of defensive tactics which are acceptable in some other jurisdictions (in particular poison pills) are not permitted in the UK. The target board can, however, take certain defensive actions depending on the view the board has taken of the offer including: -Returning value to shareholders by declaring special dividends or initiating a share buyback; -Referring the offer to relevant regulatory bodies and seeking to persuade them not to approve it; and -Seeking a third party rival “white knight” acquirer. Any defensive tactics adopted by the target board would need to satisfy the general directors’ general duties under the Companies Act to act in a way they consider, in good faith, would be most likely to promote the success of the target for the benefit of its members as a whole. Where competing possible offers are announced they will each have “put up or shut up” deadlines to satisfy and the target company may seek deadline extensions for different potential acquirers or may request an extension in relation to one potential acquirer but not others. A potential competing acquirer’s “put up or shut up” deadline will no longer apply if another acquirer announces a firm intention to make an offer, in which the potential competing acquirer will become subject to a new deadline. Where a competing acquirer emerges after a firm intention to make an offer has been announced, the timetable is normally altered so that both acquirers are bound by the timetable established by the publication of the new acquirer’s offer document. |
### Government influence

In general, the government would not intervene or seek to influence business combinations. However, there are some exceptions. Notable exceptions include combinations by companies in the defense and armaments industries due to the potential risks to national security. Government agencies may have some de facto influence in certain regulated sectors such as utilities (water etc.) In addition, the secretary of state for culture, media and sport may wish to influence mergers in the media sector on the grounds of ‘public interest’.

Since the financial crisis in 2008, the UK government has sought to strengthen the public perception of the UK banking. For example, HM Treasury’s purchase of stakes in Royal Bank of Scotland and Lloyds Banking Group was to increase confidence in UK banks. Legislation was amended to enable the government to intervene in a wider range of merger control decisions by including the wording ‘maintaining the stability of the UK financial system’.

In addition, the Banking Act 2009 also affords HM Treasury, the Bank of England and the PRA with a range of powers for dealing with failing banks and other financial institutions.

### Conditional offers

The acceptance condition to a takeover offer will usually be set starting at 90%, being the percentage required for the offeror to be able to begin squeeze-out measures for buying out the remaining minority shareholders. However, under the City Code this can be set as low as 50%.

The City Code aims to ensure that offers are not subject to conditions that depend solely on subjective judgments by the directors of the offeror. An offeror should not normally invoke any condition that cause an offer to lapse unless it is of material significance to the offeror and has been prior approved by the Takeover Panel. The readiness of finance cannot be a condition to an offer and neither can completion of due diligence.

Preconditions allow a longer timetable since the offer does not have to be made until after the preconditions are satisfied. They can only be used if prior consent was obtained from the Takeover Panel. They are needed when business combinations require regulatory clearances and it is unlikely the parties would be able to obtain the relevant authorizations within the offer timetable. In a scheme of arrangement, a majority vote of 75% is required for acceptance which then needs to be sanctioned by the court.

### Financing

The offer document must contain a detailed description of how the offeror intends to finance the transaction. This includes information about the source, the names of lenders and the terms of repayment. It is rare for there to be a single bank guarantee for the full amount of the cash consideration, but, an offer announcement of a cash offer must include confirmation from an independent party that there is sufficient funding in place. If the independent party cannot later demonstrate that all reasonable steps have been taken to assure itself that the cash will be available when needed it can be required to produce that cash itself.

A public company generally cannot provide financial assistance for the purchase of its own shares or for shares in its holding company. Financial assistance can include any of the following: guarantees, security, indemnities, loans and any other financial assistance given by a company that has no net assets or the net assets of which are thereby reduced to a material extent. A notable exception is dividends declared out of distributable profits.
### Minority squeeze-out: May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

A successful offeror can ‘squeeze out’ minority shareholders. Under the Companies Act, an offeror that acquires not less than 90% of the shares to which the offer relates and 90 per cent of the voting rights carried by those shares may purchase the remaining shares by giving notice to the holders before the expiry of a three-month period, starting from the day after the last day of the offer acceptance period. Similarly, once the 90% threshold is achieved, minority shareholders have the equivalent right to require the bidder to also acquire their shares on the same terms, or on different terms as may be agreed, at any time before the end of the offer acceptance period.

The Takeover Directive does not apply to companies whose securities are not admitted to trading on a regulated market. In these situations, notice can be given before the expiry of a six-month period beginning with the date of the offer, if that period ends before than the general three-month period.

The compulsory acquisition regime applies to takeover offers of all UK companies, including private companies, whether or not they are subject to the City Code.

A scheme of arrangement, if successful, ensures that the bidder acquires 100% of the shares so there will not be any minority shareholder.

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### Cross-border transactions: How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

The EUMR provides a mechanism for the control of mergers and acquisitions at the EU level. It applies to any ‘concentration’ that has an ‘EU dimension’ as defined in the EUMR. EEA member states may not apply their own national competition laws to these transactions. However, they may still be subject to the competition laws of non-EEA member states. Cross-border transactions that are not caught by the EUMR are often covered by competition laws of the EEA and non-EEA jurisdictions.

The term ‘concentration’ under the EUMR covers mergers, acquisitions of control and joint ventures. The concept covers situations where ‘control’ is acquired. Whether a concentration has an ‘EU dimension’ depends on whether certain thresholds for worldwide and EU-wide revenues are met. Only large-scale concentrations that will have a significant effect on trading within the EU will satisfy the thresholds. However, if it is more appropriate for a transaction to be dealt with a member states national laws, there are procedures the parties can follow to enable the jurisdiction to be transferred.

It is mandatory to notify the European Commission of transactions that fall under EUMR using Form CO or Short Form CO. A transaction cannot be effected unless and until they have received European Commission clearance. The regime is enforced by the Directorate General for Competition of the European Commission in Brussels. No fees are charged by the European Commission for filing a notification.

The effectiveness of purely revenue-based thresholds has been criticised as high value transactions in sectors with lower revenues are not caught. For example, digital services and pharmaceutical companies do not generally generate significant revenue to reach the thresholds. The European Commission conducted a public consultation to determine whether to add additional thresholds which...
may lead to amendments to the current regime.

The Cross-Border Mergers Regulations prescribe the way in which cross-border mergers between UK companies and other EEA companies may be carried out. The Cross-Border Mergers Regulations recognise mergers by absorption and formation, which is otherwise not generally a concept known to UK law. These types of mergers involve the transferor company’s assets and liabilities being moved to a different entity. At least one of the merging companies must be UK-incorporated and at least one other must have been incorporated in another EEA state.

The Cross-Border Mergers Regulations set out key provisions relating to employee participation. The transferee must abide by the applicable employee participation rules of the EEA state in which that company will be registered. The UK does not have any specific employee participation rules but the Cross-Border Mergers Regulations lay out situations where a UK transferee company will have to put employee participation agreements in place.

These provisions are used much less commonly than the other methods of implementing business combinations referred to above.

### Waiting or notification periods:

**Waiting or notification periods**: Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

There are generally no waiting or notification periods applicable to business combinations except minority shareholders squeeze out provisions described in section 25 above.

However, mergers and acquisitions in the financial services sectors are subject to change of control provisions in accordance with European Directive 2007/44/EC (the Acquisitions Directive). Acquisitions or purchases leading to a significant increase in shareholdings in UK banks, investment firms, insurance companies, asset managers and certain brokers and other persons authorized under FSMA require the prior approval of the FCA or PRA (as appropriate).

The FCA must be notified when a person decides to take a significant shareholding or gains control indirectly. The assessment period is 60 working days, which may be interrupted no more than once. For banks, investment firms, asset management companies and insurance companies, the threshold is 10%, 20%, 30% or 50%. Failure to notify a change of control to the FCA is a criminal offence and the FCA may require the shares to be sold or otherwise restrict the rights attaching to the shares.

Transfers of banking and insurance businesses normally require a court approved scheme to be effected.

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<th>Sector-specific rules: Are companies in specific industries subject to additional regulations and statutes?</th>
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<td><strong>Water</strong>: Under the Water Industry Act 1991, the CMA has a duty to refer to Phase II mergers or proposed mergers involving two or more “water enterprises” unless either the value of the revenues of the target or the revenues of all water enterprises owned by the acquirer is below GBP10 million. The Competition Commission is required to consider the potential impact of a merger and has the power to impose remedies.</td>
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Tax issues: What basic tax issues are involved in business combinations?

As explained in section 15, on the sale of shares in a UK incorporated company, stamp duty or SDRT will generally arise at the rate of 0.5% of the consideration for the transfer. With effect from March 2015, it is no longer possible to mitigate these transfer taxes on a public takeover carried out through a scheme of arrangement, where target shares are cancelled under the scheme and new shares are issued to the acquirer.

Stamp duty and SDRT has been abolished for shares quoted on the following recognized UK growth markets:
- AIM.
- The High Growth Segment of the Main Market.
- ICAP Securities & Derivatives Exchange (ISDX).

Apart from these recognized growth markets, the stamp duty / SDRT position does not depend on whether the shares are listed.

The 0.5% SDRT charge has not generally applied when interests in shares are transferred in the form of depositary receipts (such as Global Depositary Receipts (GDRs) or American Depositary Receipts (ADRs)) or in a clearance service. The 1.5% "season ticket" charge, imposed on the introduction of shares into a depositary receipt system or clearance service, has recently been held to be incompatible with EU law in many circumstances. Unless further changes are made in this area, this development may potentially offer further mitigation opportunities.

Corporate sellers may be able to benefit from a capital gains tax exemption in transactions where they dispose of not less than 10% shareholding and the shares disposed were held for a continuous period of six years prior to the disposal. This is known as the substantial shareholding exemption (SSE).

The SSE provides many UK corporate sellers with the equivalent of the common European 'participation exemption' and leaves the UK holding company in a competitive situation when compared to its European counterparts, because no withholding tax is imposed on dividends paid by UK companies and dividends from UK and non-UK companies paid to UK companies are (subject to some exceptions) exempt from tax.

The sale of business assets of a company is treated very differently. In the sale of business assets of a company the consideration is allocated among the various assets disposed of:

Newspapers and media: Newspaper and media mergers are subject to special provisions contained in the Communication Act 2003. Newspaper and media mergers which raise public interest considerations (such as plurality of media ownership, quality broadcasting and freedom of expression) may be reviewed by the Secretary of State for Culture, Media and Sport with assistance from Ofcom and the CMA. A reference to Phase II follows if the CMA or Ofcom decide that competition concerns arise and/or if the Secretary of State for Culture, Media and Sport decides there are public interest grounds for doing so. Following Phase II’s investigation, the Secretary of State will decide whether there is an adverse public interest finding and if any remedies are appropriate.

Financial system: In 2008, the Enterprise Act 2002 was amended to introduce "the interest of maintaining the stability of the UK financial system" as a new public interest consideration. This means that the Secretary of State for Business, Innovation and Skills may intervene in relation to any UK merger which they considers raises this public interest consideration and refer the matter to Competition Commission following advice from the CMA. This power was used in relation to the Lloyds TSB bid for HBOS.
- The element attributable to inventory will be brought into account as with any other receipts on trading account;
- The element attributable to assets that have qualified for capital allowances may give rise to recapture of earlier tax depreciation or an allowance of further relief; and
- The element attributable to capital assets will generally give rise to a capital gain or loss.

Profits arising on the disposal of goodwill and other intangible assets can be taxed as either income or capital under the rules on the taxation of intangible property.

**Restructuring, bankruptcy or receivership:** What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The most common types of corporate bankruptcy are administration, receivership and liquidation. Due to the nature of these companies, only limited warranties will be available to the purchaser. Risk can be mitigated in several ways including:
- Increased level of due diligence to check for hidden liabilities;
- Retaining part of the purchase price in the event of unexpected liabilities so this can be set off against the purchase price; and
- Negotiating a lower price.

**Administration**

This is where the company is placed under the control of an administrator. The administrator will be a licensed Insolvency Practitioner ("IP"). The administrator’s duty is to attempt the following: (i) to rescue the company, if this is not possible; (ii) to achieve a better result for the company’s creditors than would be likely if the company was put into liquidation, if this is not possible; (iii) realize the company’s property and make a distribution to the company’s secured or preferential creditors.

Administration grants a moratorium – this means that creditors and others are prohibited from taking or pursuing a claim against a company while it is in administration.

In an administration, the administrator will sometimes continue to run the business of the company in order to try to get the company to ‘trade its way out’ of its debts. Alternatively, the administrator may conduct a ‘pre-pack sale’.

**Pre-pack sale**

In a pre-pack, the administrator will negotiate the sale of the business and assets of the company to a third party buyer. The buyer will purchase the business and assets of the company, but unlike a share sale will not purchase the company’s liabilities.

The negotiations will take place, and all of the relevant sale documentation will be prepared and signed (but not dated), before the administrator is appointed. This is so that once the administrator is appointed, the documents are not re-negotiated by the buyer. The administrator is also subject to various statutory duties once they are appointed, so by waiting until all of the documentation is ready the administrator ensures that they are subject to the statutory duties for as short a time as possible. The completion of a pre-pack therefore takes place immediately following the appointment of the IP as administrator.

In a pre-pack sale, the administrator will have very little information about the company and its business. Therefore, the administrator will never provide any warranties or indemnities about the company or the business and assets that it is selling and will usually only agree to sell such rights, titles and interests as it acquires by virtue of its appointment as the company’s administrator. For this reason, businesses are generally sold relatively cheaply by administrators in a...
pre-pack situation, to account for this lack of warranty and indemnity protection.

**Liquidation**

Liquidation is an umbrella term for three different types of insolvency process that a company may undergo. All three processes involve an IP being appointed as the liquidator of the company. The liquidator’s job is to realize the assets of the company and distribute them to the company’s creditors. Following the end of the liquidation, the company will be dissolved. Liquidation is also referred to as winding-up. A company can be wound up if various statutory grounds are satisfied, the most common one being that the company is unable to pay its debts.

**Compulsory liquidation**

This is a court procedure which takes place by presentation of a petition at court. The petition is usually presented by one of the company’s creditors. The court will arrange a hearing of the petition and, if it is satisfied that the company should be wound up, it will make a winding-up order and a liquidator will be appointed. Additionally, a compulsory liquidation may immediately follow an administration where the administrator was not able to rescue the company. In a compulsory liquidation, as in an administration, there is a moratorium which prohibits claims being pursued against the company.

The liquidator will fulfill its duties as above and, once the liquidation is complete, will file a final return with Companies House. Three months later, the company will be automatically dissolved.

**Creditor’s voluntary liquidation (“CVL”)**

A CVL usually takes place when the directors of a company realize that the company has become insolvent. The members of the company must pass a special resolution to nominate an IP to act as liquidator. The company is deemed to be in liquidation from the passing of the resolution.

Unlike a compulsory liquidation, a CVL does not grant a moratorium.

The liquidator will then fulfill its duties as above. In a voluntary liquidation, the liquidator also has the power to continue the company’s business so far as it is necessary for the beneficial winding up of the company. Once the liquidation is complete then final return is filed and the company is dissolved as above.

**Members’ voluntary liquidation (“MVL”)**

An MVL is similar to a CVL. The key distinction is that in an MVL all of the creditors are paid in full and an MVL may only take place if the directors swear a statutory declaration of solvency. This declaration states that the directors, following a full inquiry into the company’s affairs, are satisfied that the company will be able to pay its debts in full for the next 12 months.

An MVL happens by the members passing a special resolution as in the case of a CVL, but this resolution must take place within five weeks of the declaration of solvency. The company is deemed to be in liquidation from the passing of the resolution.

Unlike a compulsory liquidation, an MVL does not grant a moratorium. The liquidator will fulfill its duties as above and distribute the assets of the company to the company’s creditors and, if there is any surplus, to the company’s members. Once the liquidation is complete then final return is filed and the company is dissolved as above.
**Receivership**
A receiver can be appointed when a company has granted security over an asset. If the company has defaulted on its obligations (or another event of default has occurred pursuant to the documents that grant the security) then the secured creditor can appoint a receiver over the charged assets.

The receiver will usually have a power to take possession of the assets and to sell or otherwise dispose of the assets. The receiver will also have the power to protect the assets (e.g. insuring them).

Once the receiver has sold the secured asset, he must distribute the funds received in accordance with a prescribed order. Broadly, the balance (after the payment of liabilities of the secured assets, interest and fees) will be paid to the secured creditor.

Once the receiver has realized the assets and distributed the funds he will typically be removed from office by the appointed secured creditor.

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**Labor and employee benefits:** What is the basic regulatory framework governing labour and employee benefits in a business combination?

Private acquisitions of, or public offers for, shares in a target company will not generally affect the terms of the individual’s contract of employment with that target company. The employee remains employed by the target company on his or her existing terms. Senior executives may have a contractual right, for example, to resign or be paid an agreed sum on a change of control, although such payments are rare and contrary to institutional investor guidance.

**City Code**
Subject to the obligation to maintain secrecy, the City Code permits consultation before and during a bid. An acquirer or target company may pass information on a confidential basis to employee representatives or employees in their capacity as such. The Takeover Panel has indicated that it will not normally count employee representatives of the target company toward the six parties that may be approached regarding an offer, or possible offer, before an acquirer has been publicly identified.

Copies of the announcement commencing an offer period and the firm intention to make an offer announcement, or a circular summarizing the terms and conditions of the offer, must be sent to a target company’s employee representatives, or where there are none, to the employees themselves, and they must be told that an opinion on the effects of the bid on employment can be appended to the target company board’s circular, provided that such opinion is obtained in sufficient time. If such an opinion is not received in sufficient time before publication of a target company circular, the target company must promptly publish the employee representatives’ opinion on a website and announce the publication through a RIS.

The offer document and any defense document must also be made readily available to the target company’s employee representatives, or employees as the case may be, at the same time as it is sent to target company shareholders.

**TUPE**
On the sale of a business (or part) all employees working wholly or mainly for the business (or part) will automatically transfer with the business to the purchaser, on their existing terms and conditions, under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). TUPE restricts the transferee from changing the terms of employment of transferring employees unless the sole or principal reason is an economic, technical or organizational reason entailing changes in the workforce. There is a minimum element of protection of rights under occupational pension plans for relevant employees who are subject to a TUPE transfer.
TUPE places an obligation on the transferor to provide employee representatives with prescribed information about the transfer such as its timing and the reasons for it, its legal, economic and social implications, any proposed measures (redundancies) and information about the use of agency workers. The transferor and transferee are jointly and severally liable for any such failure. A consequence of failing to inform and consult is awarding up to 13 weeks' pay per employee.

There are further obligations to consult employees and provide them with information pursuant to the EC Directive on Informing and Consulting Employees (2002/14/EC), which was implemented in the UK by the Information and Consultation of Employees Regulations 2004. However, it is worth noting that the onus is on employees to ask for information. Employers are only obliged to set up arrangements where 10% of the workforce request information. There is also a risk that consultation obligations may be prompted under the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006.

In the case of a scheme of arrangement, TUPE will apply to a transfer or change if it involves the transfer of a business or a change in service provider (even if it is intra-group).

The Pensions Act 2004 and related secondary legislation provide for a Pensions Regulator. The parties to the transaction may opt to seek clearance in advance from the Pensions Regulator if appropriate.

In business combinations, a key element of the due diligence process is to ensure the target company has an anti-bribery trading policy. The Bribery Act 2010 makes it an offence to give or receive bribes including bribing a foreign public official and an offence of failing to prevent bribery. This means a company itself has potential liability. The Bribery Act is stricter than the FCPA rules of the USA. Buyers must be conscious of ensuring compliance with UK sanctions, anti-corruption and money-laundering regimes. The UK sanctions are established through EU regulations and it is expected that the UK will voluntarily continue to follow the EU regulations post Brexit. However, the UK is also able to impose its own sanctions under Schedule 7 of the Counter Terrorism Act 2008 against countries that pose a significant risk to national interests. The UK used these powers for the first time in November 2011 against Iran.

The offences under the UK sanctions regime may be committed by any person in, or carrying on business in, the UK (including companies) or by any person elsewhere who is a UK citizen or an entity incorporated under the laws of the UK. Therefore, the overseas branch of a UK company will also be subject to the UK sanctions regime in addition to any local law requirements but an overseas subsidiary will not (in principle). Breaching the UK sanctions regime is punishable by imprisonment or a fine. Where a corporation commits an offence, it is possible for the officers of that entity to be guilty of an offence. In certain circumstances it may be possible to obtain a license from HM Treasury permitting specific transactions or payments that would otherwise be subject to a sanctions regime but otherwise there are very few statutory exclusions and exemptions from the regime.