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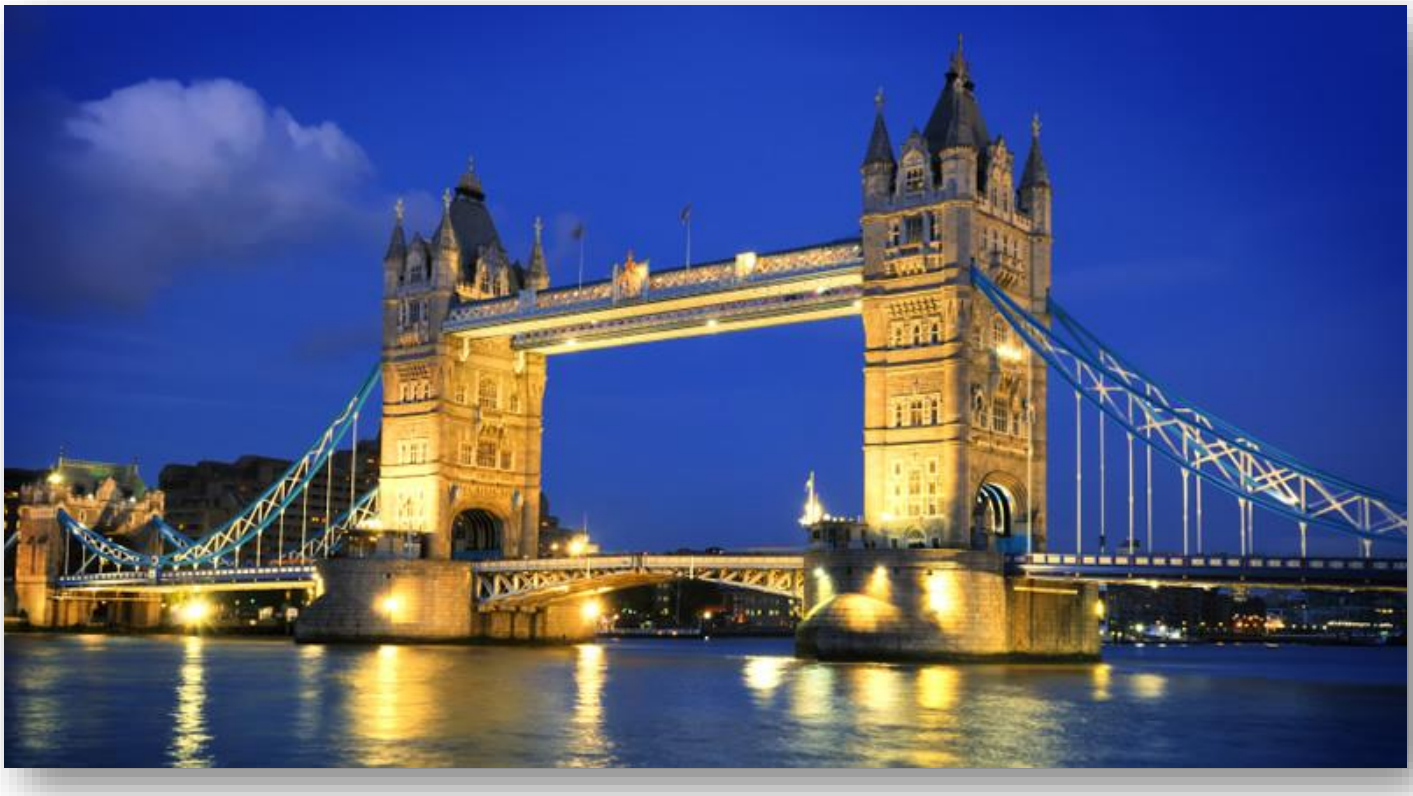

FLADGATE LLP

ESTABLISHING A BUSINESS ENTITY IN ENGLAND

[Company Address]

This guide offers an overview of legal aspects of establishing an entity and conducting business in the requisite jurisdictions. It is meant as an introduction to these marketplaces and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

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The information in this guide may be considered legal advertising.

ESTABLISHING A BUSINESS ENTITY IN ENGLAND

Foreword

The attractiveness of the United Kingdom as a business location is unabated. There are many advantages to doing business in the UK. Investors can draw on a skilled workforce and access a large market; costs of labour and production are lower compared with many other western European countries; investors benefit from a business friendly environment as well as a high degree of legal certainty and political stability; and its capital, London, is a world leading commercial and financial centre.

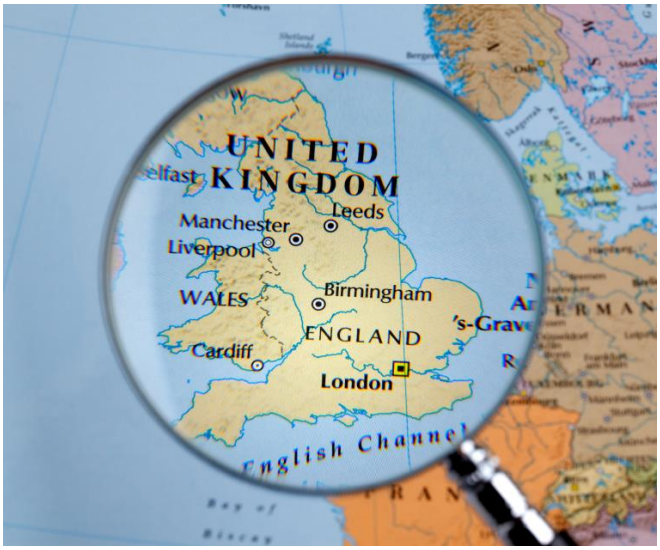
These features make the UK an attractive place to do business, not just for large corporations but also for small and medium-sized businesses. Many foreign companies use the UK as a first stepping stone for expansion into continental Europe.

Investing in a foreign country requires awareness of the pitfalls, and prospective investors will have many questions. It is important to have advisers who are familiar with both the legal and the practical issues.

This guide offers an overview of legal aspects of conducting business in the UK. It is meant as an introduction to the UK market place and does not offer specific legal advice.

Fladgate LLP accepts no liability for anything contained in this guide or for any reader who relies on its content. Before concrete actions or decisions are taken by you or your business, you should seek specific legal advice. We remain at your disposal in relation to questions regarding this guide and look forward to assisting you.

This guide describes the law in force in England and Wales as at 14 September 2023, but please bear in mind that statutes, regulations and rules are subject to change.



The UK comprises England, Wales, Scotland, and Northern Ireland. Great Britain comprises England, Wales, and Scotland.

Within the UK there are three distinct legal jurisdictions, namely England and Wales, Scotland, and Northern Ireland. Each has its own laws, courts, and lawyers. In most commercial areas, e.g., company law and tax, the law is the same or very similar but in some, such as real estate, it is very different. We are able to identify areas which need input from lawyers in Scotland or Northern Ireland and to arrange appropriate advice.

The UK left the European Union (**EU**) on 31 January 2020 and the transition period ended at 11.00pm on 31 December 2020.

From the end of the transition period the European Union (Withdrawal) Act 2018 (**EUWA**) created retained EU law, i.e. a new body of law based on EU law that applies in England and Wales (alongside the laws of England and Wales). Going forward, the UK can decide whether to introduce new UK policies or whether to mirror EU policies in UK law. UK law must be compatible with the terms of the withdrawal agreement, future agreements with the EU and other countries.

Setting up a business in the UK is quite straightforward. Essentially, the legal basis for establishing an incorporated business is the Companies Act 2006 (as amended).

1. Types of business entity

There are various ways for an overseas company, investor or entrepreneur to set up a business in the UK:

- by forming a private limited company (Limited) or a public limited company (Plc);
- by establishing a branch (a so-called "UK establishment");
- by forming a partnership (limited partnership, limited liability partnership or general partnership);
- by entering into a joint venture; or
- by buying or acquiring an interest in a company.

In addition to the above possibilities, commercial agents can be engaged, or distributors appointed.

The structure chosen for establishing a business in England and Wales is likely to be influenced by taxation considerations (which are not addressed by this guide), company law and other legal matters. Fladgate LLP has a wealth of experience in these matters and will be happy to give any legal and tax advice which may be required in connection with establishing a UK operation and in dealing with the necessary legal procedures.

1.1 Formation of a company

This section sets out the requirements for incorporating a private limited company in England and Wales (**company**) (as the wholly owned subsidiary of a foreign company). The public limited company form (mainly used for a company quoted on a stock exchange) is chosen only for a small number of companies and will not be considered further in this guide. Fladgate LLP will, however, be pleased to assist with the formation or buying of such a company, if required. Note that a foreign investor will be treated the same as a UK investor from a company law perspective.

There are two ways of incorporating a company: either by forming a new company or by buying a company that has already been formed, known as a "shelf company".

Articles of association

A company must have articles of association (**articles**), which represent its constitution. UK legislation provides model articles for use where a newly formed company has not drawn up its own articles.

Share capital

Usually a company will have a share capital. The share capital is made up of shares that have been issued and allotted to its shareholders (also called "members"). Each share will have a nominal value. As no minimum nominal value is laid down by law it can be as little as £0.01 or less. Frequently the nominal value of each share is £1. The share capital may be in any currency, for example euros (€), or it may be made up of various currencies.

A company formed under the Companies Act 2006 is not required to state its authorised share capital in its articles. All it has to do, when applying for registration with Companies House, is to notify the initial capital and to send in a notification each time new shares are issued.

Furthermore, there is no tax payable by reference to the level of capitalisation. As such, it is possible to incorporate a subsidiary with a substantial capitalisation, in order to enable it to stand alone without the support of a parent guarantee, and to avoid the need for subsequent share issues, without incurring any tax liability.

A company needs only one shareholder. The shareholder may be an individual or a company and does not need to be UK resident or incorporated in the UK.

Company name

The name of a company must end with the word "Limited" or the abbreviation "Ltd" unless a special exemption, available for non-commercial purposes only, has been granted.

The proposed company name must not be the same as any existing company name. There are also restrictions on names likely to mislead or cause offence, criminal names, names that may suggest a connection with the government or a local authority, and names containing certain specified "sensitive" words, such as Insurance or Trust.

Fladgate LLP can run a check of a chosen company name, to ensure that it is available and capable of being approved.

Directors and company secretary

A company must have at least one director who is an individual. There are a few restrictions on the choice of directors, for example, a director must be at least 16 years old, must not be disqualified from acting as a company director and must not be a bankrupt individual. Directors may be of any nationality.

There is no longer any legal obligation for a company to appoint a company secretary, although one may be appointed. The company secretary keeps the company's records and ensures that the company complies with the main provisions of company law. Where a company has foreign owners, it may be advisable to appoint a company secretary.

Registered office

A company must have a registered office in the UK for delivery of official documents and correspondence, for instance from Companies House or HM Revenue & Customs, the UK's tax authority. This address does not have to be the same as the business address.

Accounting reference period

The accounting reference period is normally a period of 12 months. It is calculated from the

date of incorporation to the last day in the calendar month, one year from the date of incorporation (the "accounting reference date"). This can be changed, subject to certain provisos. Accounting reference periods commonly selected are either the calendar year or the year from 1 April to 31 March, which is slightly in advance of the UK tax year (ending on 5 April).

Special approval requirements for a company

It should be noted that running the business of a company or branch in the UK may require certain trading licences or other approvals. For example, the formation and the operation of a financial services business will usually require authorisation from the UK Financial Conduct Authority. Fladgate LLP can advise you if authorisation requirements apply to your business.

1.2 Establishing and operating a branch (UK establishment)

A branch should be regarded as an extension of the foreign company. An authorised person appointed to run the branch can enter into transactions with third parties in the foreign company's name. The branch may be of the foreign company itself or one of its subsidiaries. In any case, under the UK system, the branch is not a legal entity in its own right and therefore the foreign company remains fully liable.

There are some registration requirements relating to both the foreign company and the branch that have to be completed within one month from opening the UK establishment.

1.3 Limited Liability Partnership

It is possible to form a limited liability partnership (**LLP**) in the UK. LLPs have the advantage of being taxed as a partnership but at the same time having limited liability. The result is something of a hybrid between a company and a partnership.

LLPs are particularly popular with professional service providers (e.g. lawyers and accountants) and in the fund and asset management sector. Whereas a company is already quite user-friendly by international standards, an LLP is even more flexible from a company law and internal structure point of view. However, it is not yet widely used as a legal form for new business start-ups outside the areas referred to above.

1.4 Partnerships and Limited Partnerships

Foreign nationals may also establish a partnership (**general partnership**) in England, although the partners will have unlimited liability. Therefore, this structure is seldom used.

Another possibility is to form a limited partnership (**LP**). In contrast to the LLP, in England and Wales, the LP has no legal personality of its own. Its partners, provided they are not involved in managing the LP, will be protected by limited liability, but it must have at least one general partner, whose liability is unlimited. The general partner may be a limited company. LPs are especially preferred by investment funds. They are neutral for tax purposes and are not taxed separately.

1.5 Using commercial agents

As an alternative to forming a company or establishing a branch, a foreign company may also decide to work in the UK market through a commercial agent.

Relations between a commercial agent and his or her principal are governed by the Commercial Agents Regulations 1993. These regulations contain a series of mandatory provisions designed to give the commercial

agent greater protection. It should be emphasised that compensation is nearly always payable if the contract is terminated. If agreed in the agency contract, an indemnity is payable: if nothing is agreed in the agency contract, compensation is payable based on the notional value of the agency at the date of the termination.

Fladgate LLP is one of the leading law firms in the area of commercial agency law and advises and represents both agents and principals.

1.6 Joint ventures

A foreign company may also form a joint venture with a UK or another foreign corporation or an individual. Most commonly, the vehicle used will be a company, but it may simply be a contractual joint venture.

1.7 Buying or acquiring an interest in a company (M&A)

As an alternative to forming a new company, the foreign business may buy an established company or purchase shares in it. This is certainly the quickest way of gaining a business foothold in the UK. M&A is an entire topic in itself, on which Fladgate LLP can advise if required (we have a top-ranked M&A practice).

2. Maintenance and reporting

2.1 Company

Public filing requirements

The company will be subject to English company law relating to the filing of information with the Registrar of Companies at Companies House. This information will be available for public inspection. Failure to comply with these requirements is a criminal and/or civil offence.

Annual accounts and reports

The company must keep proper accounting records which are sufficient to show and explain its transactions, to disclose with reasonable accuracy the company's current financial position and to enable the directors to ensure that the balance sheet and profit and loss account comply with the statutory requirements.

The accounts must be prepared in accordance with a detailed format and contents specified by the Companies Act 2006.

In general, all accounts filed with the Registrar of Companies must be audited, although there are exemptions available to small companies.

Auditors

Auditors to a company must be UK-qualified or have UK-recognised overseas qualifications.

A company is entirely exempt from the audit requirement if it qualifies as a "small company", i.e., at least two of the following conditions must be met:

- annual turnover must be £10,200,000 or less;
- the balance sheet total must be £5,100,000 or less; or
- the average numbers of employees must be 50 or fewer,

and the company must not be excluded from the "small companies' regime".

Registers

In addition to the filing of the information with the Registrar of Companies, English company law requires a company itself to maintain a number of registers, such as a register of members (or shareholders), register of directors etc.

Further both companies and limited liability partnerships are also required to keep a

register of people with significant control (**PSC Register**), recording details of anyone who has significant control over the company. For these purposes, "significant control" includes holding (directly or indirectly) more than 25% of the shares or voting rights in a company, having the right (directly or indirectly) to appoint or remove a majority of the board of directors or otherwise having the right to exercise "significant influence or control" over a company. A company's PSC register will be open to public inspection in the same way as the register of members. Any change in the person with significant control of the company must be recorded in the PSC register within 14 days of such change and confirmed with the Registrar of Companies within 14 days of the change being entered into the PSC register.

A private company has the option of keeping certain registers, including the PSC Register, at Companies House, instead of separately maintaining its own registers.

Confirmation statement

The company must deliver a confirmation statement to the Registrar of Companies each year. The confirmation statement is made by the company and confirms that the information held by Companies House (e.g. in relation to its share capital, shareholders, officers, and other corporate information) remains accurate. If the information held by the Registrar of Companies is out of date (because the appropriate filing has not been made) then the company must file the information needed to update its records before or at the same time as it delivers the confirmation statement. Failure to comply with this requirement is a criminal offence.

Registration of security

Particulars of most charges or other security created by a company must be notified to the Registrar of Companies within 21 days beginning with the day after the date of their creation.

Other matters requiring registration

The Registrar of Companies must be notified of certain other events in a company's life, including where:

- there are any changes in the details and particulars of the company's directors, secretary, and registered office and, where a new director or secretary is appointed, confirmation of his or her details and consent to act from the director;
- shares are allotted, consolidated, sub-divided, redeemed, or repurchased.

Certain resolutions passed by a company, e.g. a resolution amending its articles of association, also have to be filed with the Registrar.

Company name and stationery

The company's name, place of registration, registered number, and registered office, including the word "Limited" or "Plc", must be set out legibly on all of its business letters, notices, cheques, bills of exchange, letters of credit and other financial instruments and on all order forms, invoices, and receipts etc. The company's VAT number should be shown on all accounting forms, e.g., invoices, orders, and estimates.

The company must paint or affix its name on the outside of each place of business in easily legible characters and in a conspicuous position.

2.2 Branch (UK establishment)

Registration of security

Particulars of most charges or other security created over property or assets in the UK

owned by an overseas company with a branch in the UK must be notified to the Registrar of Companies within 21 days beginning with the day after the date of their creation. Existing charges relating to such property will have to be registered when a branch is set up or charged assets are brought into the UK.

Accounts

Once a branch has been opened in the UK, the overseas company is subject to continuing obligations to make disclosures of its accounting documents.

If the overseas company is required by its local law to prepare, have audited and disclose accounts, the overseas company must deliver to the Registrar of Companies copies of all the accounting documents prepared, audited and disclosed in accordance with its local law within three months from the date on which the accounting documents are first disclosed as required by the company's local law. English translations, where appropriate, are required.

If the overseas company is not required to prepare, have audited and publicly disclose accounts, it is still required to file accounts as if it were subject to UK law, subject to extensive modifications in that the accounts do not need to be audited, directors' reports are not required, and details of directors' remuneration and loans do not have to be disclosed (as would be the case if the overseas company were incorporated in the UK). Such accounts generally have to be filed within 13 months of the end of the relevant financial period.

These rules are slightly modified in relation to branches of credit and financial institutions and banks.

Company name and stationery

An overseas company which carries on business in the UK is required to state its name and country of incorporation and, if it has limited liability, notice of that fact, on all business letters, notices and official publications and to exhibit such information at every place where it carries on business in the UK.

Notification of changes

The Registrar of Companies must be notified of any changes to the registered particulars of the branch. This must be done within 21 days of the event, if the change relates to the person(s) authorised to accept service, or otherwise within 21 days of the date on which notice of the event could have been received in the UK, if dispatched with due diligence.

2.3 LLPs, LPs and general partnerships

An LLP is registered at Companies House and has similar reporting obligations as a company. Typically, the forms used by an LLP are variations of the forms prescribed for a company's use. The main, and probably the most important, distinction is that while articles of association of a company must be placed on the public file at Companies House, the members' agreement for an LLP is a private document.

LPs are also registered at Companies House but only have certain limited reporting obligations.

General partnerships are not registered at Companies House and have no reporting obligations.

2.3 Overseas entities owning property

Where an overseas entity owns property in the UK it will need to register with Companies House on the Register of Overseas Entities and identify its beneficial owners. Failure to do so can result in criminal sanctions, financial

penalties and also lead to restrictions on the ability of the overseas entity to make a disposition of the property or to register the interest in the property at the relevant UK land registry.

3. Competition rules and restrictions

Behavioural rules

Failure to comply with UK and, where applicable, EU competition law can have serious consequences for businesses operating in the UK. Since 1 April 2014, the Competition and Markets Authority (**CMA**) has assumed primary responsibility for the enforcement of the competition law rules in the UK (previously, it exercised these rules in conjunction with the now defunct Office of Fair Trading). The pooling of resources into a single authority has coincided with more robust and active enforcement of the competition law rules.

In the UK, two sets of competition law rules apply in parallel. Anti-competitive behaviour which may affect trade within the UK is prohibited by Chapters I and II of the Competition Act 1998 and the Enterprise Act 2002. Where the impact of the anti-competitive behaviour extends beyond the UK and affects trade between EU Member States, it is prohibited by Articles 101 and 102 of the EU Treaty (which mirror the Chapter I and Chapter II prohibitions). Following BREXIT, the CMA no longer has powers to enforce Articles 101 and 102 – these are therefore the sole preserve of the European Commission. In practice, the UK rules are interpreted consistently with their EU counterparts and so it makes little difference which of them are applicable to a particular situation.

The Chapter I and Chapter II (and Article 101 and 102) prohibitions apply to two main types of anti-competitive activity:

- restrictive agreements or arrangements between enterprises which have an appreciable impact on competition (as set out under the Chapter I/Article 101 prohibitions); and
- conduct which amounts to an abuse of a dominant market position (as set out under the Chapter II/Article 102 prohibitions).

The penalties for breaching these rules are significant. Parties can be liable for fines of up to 10% of global turnover, whilst provisions in agreements that breach Chapter I or Article 101 are void and unenforceable. Companies can also be subject to actions for damages from competitors and/or customers who are able to demonstrate that they have suffered loss(es) as a consequence of the competition law breach. The most serious infringements of Chapter I/Article 101 can result in individuals being subject to criminal sanctions and directors facing disqualification orders.

As well as the CMA, various UK "sectoral" regulators have powers to apply the competition law rules in particular industries, for example Ofcom within the communications sector and Ofgem in the gas and electricity sector. These authorities (in common with the CMA) have significant powers to investigate suspected anti-competitive activity, including entering and searching business and private premises without any prior warning. Competition law cases are also increasingly being prosecuted through the UK courts and via the specialist Competition Appeal Tribunal (**CAT**).

Merger control

Mergers in the UK are governed by the Enterprise Act 2002. A qualifying transaction for UK merger control purposes is one which involves (at least) the acquisition of material influence by one enterprise over another and where either:

- the UK turnover of the target enterprise is more than £70 million; or
- the merging parties' combined share of supply of goods/services of a particular description in the UK/a substantial part of the UK is 25% or more.

Unlike most of its equivalents in other jurisdictions, the UK has a "voluntary" system of merger control which means that parties to a qualifying merger are not under an obligation to notify and seek approval from the CMA prior to completing their transaction. However, where they fail to do so, the parties run the risk that the CMA decides to intervene and carry out an investigation into the competitive impact of the deal, which it is entitled to do at any point up to 4 months from completion or from when it first becomes aware of the transaction (whichever is later). In those circumstances, the CMA has powers to impose "hold separate" obligations on the parties forcing them to keep the merging businesses running as separate entities pending completion of any investigation. Ultimately, if the CMA decides there are competition issues, it can demand concessions from the parties or even force the buyer to sell the acquired firm/assets. It is therefore important to assess at the outset, whether the CMA might wish to review any qualifying transaction and what steps to take to mitigate any concerns it might otherwise have.

Whilst the UK government operates a largely "merger friendly" regime which encourages corporate activity, does not include any specific governmental oversight of transactions and leaves the analysis of the competitive impact to the CMA, the government does reserve the power to act where a transaction engages the "public interest". Recently, these powers have been extended to include transactions which involve national security concerns, notably those covering military/dual-use products, computing hardware and quantum technology.

In a similar vein, in 2021 the UK government enacted a new National Security and Investment Act (**NSIA**) which came into force on 4 January 2022. The NSIA makes transactions in sectors deemed to be of "national or security interest" subject to government oversight, irrespective of the size of the parties. The government has set out a list of 17 such sectors in which it will be mandatory to notify any qualifying transaction. The NSIA applies to entities and assets located in the UK, as well as those located outside the UK if they carry on activities in the UK or supply good to services to people in the UK. The government can also "call-in" transactions for investigation; much do not qualify under the NSIA thresholds, but nonetheless may give rise to national security concerns. Parties who fail to comply can be subject to large fines (and even criminal liability).

Larger transactions may fall under the jurisdiction of the EU Commission under the EU Merger Control Regulation. These require compulsory notification and therefore that completion is suspended pending competition clearance.

Given the implications, it is advisable always to obtain specialist competition law input at an early stage in relation to any proposed transaction.

4. Local shareholding/directors

There are no requirements in England for a local shareholder or director.

5. Minority shareholders' rights and protections

Members of a company or an LLP have protection against being "unfairly prejudiced" and can bring action in the courts to seek relief for this. In the case of LLPs, this can be excluded

by written agreement (typically, within the LLP members' agreement).

6. Barriers to entry

England, and indeed the UK as a whole, is relatively lightly regulated. Significant barriers to entry are only likely to apply in the case of business areas that are themselves regulated, such as banking, financial services, pharmaceuticals and gaming.

Regulation is typically intended for consumer protection.

Fladgate LLP will be happy to advise further on whether a particular sector is subject to regulation.

7. Capitalisation

Certain regulated sectors, particularly banking and financial services, have a requirement for capital linked to their business and its potential liabilities.

8. Special business or investment visa issues

EEA and Swiss nationals residing in the UK by 11.00 p.m. on 31 December 2020 were able to continue residing in the UK from 1 July 2021 onwards, if they applied for settled (having resided in the UK for 5 years) or pre-settled status (having resided in the UK for less than 5 years), by 30 June 2021 under the EU Settlement Scheme. There is the possibility to apply out of time however an EEA/Swiss national would need exceptional reasons as to why they did not apply within the deadline. Any EEA and Swiss nationals who do not have status under the EU Settlement Scheme who are arriving in the UK for the first time from 1 January 2021 onwards whether for business, work, study or to live, will be required to obtain an appropriate visa prior to travel.

There are also restrictions on citizens of other countries living and working in the UK, and specific advice should be sought prior to travel. There are visa categories available for those wishing to establish a business in the UK (and be involved in the running of that business) known as the Start-up or Innovator visa. All businesses in the UK wishing to hire foreign migrants (who do not already hold appropriate visa status), will be required to obtain a Sponsor Licence in order to sponsor migrants to work for them in the UK. From 1 January 2021, EEA migrants who were not residing in the UK on or before 31 December 2020 will need to obtain a Skilled Worker visa before being able to enter and work in the UK.

9. Restrictions on remitting funds out of the jurisdiction

9.1 Distribution of profits

Companies/Subsidiaries

There is generally no withholding tax on payments of dividends by a UK company.

Dividends received by non-residents will be taxable in accordance with the rules in their country of residence but will not be taxable in the UK. An overseas company may be entitled to a credit for UK taxation borne by an English company in which it is a shareholder on profits distributed to it.

Pursuant to some double tax treaties, a non-resident shareholder of a UK company may be exempt in its country of residence on UK dividends.

Branches

A UK branch of an overseas company will pay UK corporation tax on its profits. Since a branch is not treated, except for limited purposes, as a separate legal entity from the foreign corporation, the branch will not pay a "dividend" to the parent. The overseas company may be entitled to relief in its own jurisdiction for tax paid in the UK.

9.2 Transfer pricing

Anti-avoidance legislation exists to prevent arrangements under which the UK operation charges artificially low prices to, or is charged artificially high prices by, foreign affiliates. The transfer pricing regime is in line with OECD guidelines. It will broadly apply where the actual provisions in a transaction differ from the provisions which would have been made at arm's length between independent enterprises as a result of which a potential advantage in relation to UK taxation is conferred. Transactions for this purpose are widely defined and include interest payments. This could lead to interest payments of thinly capitalised subsidiaries being disallowed as deductions in calculating taxable profits of the subsidiary. The Government has recently laid the Transfer Pricing Records Regulations 2023, which require large companies in scope of the regulations to keep detailed records of information relating to transfer pricing.

Our firm

Fladgate LLP, located in central London, is a law firm renowned for understanding and anticipating our clients' risks and opportunities. We pride ourselves on being our clients' true partners in business, with an unrivalled understanding of the worlds in which they operate. With enterprising and commercial legal thinking at its core, the firm specialises in providing a wide variety of highly personalised legal services for a portfolio of prestigious clients in the UK and across Europe, India, Israel, the Middle East, Asia Pacific, South Africa, and North America.

With our multi-lingual and multi-qualified lawyers, Fladgate has substantial experience in facilitating cross-border activities for a diverse mix of companies, as well as entrepreneurs, ultra-high-net-worth individuals, and family offices. While the firm is organised into four core departments: Corporate, Real Estate, Dispute Resolution and Funds, Finance and Regulatory, our expertise spans a broad spectrum of areas and industries, allowing us to provide co-ordinated advice on complex issues to support our clients throughout their business cycles and personal journeys.