
# COMPENDIUM OF PRINCIPLES OF LAW

## Chapter 1: The Establishment and Operation of a Business in Various Countries

- Australia
- Cyprus
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- Germany
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- Switzerland
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Compiled by the International Transactional Services Practice Group

International Society of Primerus Law Firms

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This compendium was prepared by various members of the Primerus International Transactional Services Practice Group, and was compiled and edited by Linda L. McCarty, Esq. of Wall Esleeck Babcock, LLP. It is not the work of any one person or firm and does not represent the views of any one person or firm. It is intended as a general overview of the principles of law regarding the establishment and operation of a business in various jurisdictions around the world. It should be used as a starting point for understanding the law in any particular jurisdiction.

** The summaries within this Compendium chapter are considered works in progress. The chapter will continue to evolve as more country/ jurisdictional summaries are added to the chapter, and as updates are made to the summaries which reflect new laws or changes to the laws since the summaries were originally published or last updated. Please note that each summary is dated to reflect the law of the corresponding country on that date. Any updates or revisions made to a country's summary will be dated to reflect when the summary was last updated or revised.

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COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN AUSTRALIA

## 1. A Brief Overview of the Legal Framework of Australia

The Commonwealth of Australia is comprised of a federation of six states and two mainland territories. Whilst being a former British colony has had a heavy influence on the Australian governmental and legislative processes, American federalism has also been incorporated resulting in dual layers of government and legislation affecting the administration of businesses.

Australian law is subject to an implied separation of powers between the Executive, the Legislature and the Judiciary. These distinctions are less defined in practice, however the distinction between the formation of law by the Government and decisions by the judiciary means that law can be formed both by the Government and the courts – making Australia a common law system.

Corporations need to comply with both federal laws and relevant state laws. The main law governing corporations is the federal *Corporations Act 2001 (Cth)* which sets out the creation and administration of companies in Australia. A multitude of other laws at both state and federal levels may also be applicable dependent on the type of business, the employment of workforce, and the sourcing of materials. Where a company trades in more than one state, different laws may also apply for the same issue depending on location.

Corporate law in Australia is regulated by the Australian Securities and Investments Commission (ASIC), a body overseeing the financial systems and corporate entities in Australia. Other bodies including the Australian Competition and Consumer Commission (ACCC), Takeovers Panel, Australian Securities Exchange (ASX), Foreign Investment Review Board (FIRB) as well as government departments, play a part in regulating corporations in Australia.

## 2. A Discussion of Ways in Which a Foreign Company May Operate in Australia

### 2.1 Establishing a Separate Legal Entity

Requirements for establishing a separate legal entity in Australia vary based on the size and type of company being established. Corporate entities in Australia take three main forms: small proprietary company, large proprietary company or public company.

A proprietary company differs from a public company in that it has a limited number of shareholders and does not take part in public capital raising or investment measures. Proprietary companies operate under reduced regulation compared to public companies.

The distinction between a small and large proprietary company is based on whether the company and the entities it controls have: consolidated revenue of A$25 million or more in one financial year; gross assets of A$12.5 million or more at the end of the financial year; or 50 employees or more. If any one of these criteria is met, then the proprietary company is defined as large, otherwise it is a small proprietary company. Lesser financial reporting requirements exist for a small proprietary company than a large proprietary company.

The specific obligations for the operation of a company within Australia include:

- for a small proprietary company: at least one director and one shareholder, with at least one director

living in Australia;

- for a large proprietary company: at least one director and one shareholder, with at least one director living in Australia; audited financial reports to be lodged with ASIC; and
- for a public company: at least three directors and one shareholder, with at least two directors living in Australia; at least one company secretary who lives in Australia (one person may act as both a director and company secretary) and audited financial reports to be lodged with ASIC.

In addition, companies registered in Australia, must also meet the following requirements:

- registration of the company with ASIC;
- acquiring an Australian Business Number (ABN) and fulfilling use and display requirements;
- registration of the company's trading name with the appropriate State authority;
- setting up a registered office for the company with required display of company details;
- having a principal place of business in Australia;
- appoint company officers meeting the specific requirements of the company type;
- ASIC notification for the change of company details within the relevant time limits;
- submit annual returns and fees;
- maintenance of company records and registers including minutes of general meetings, any charges over company property and financial records for at least seven years; and
- holding registers at the company's registered office.

### 2.2 Establishing a Branch Office

Any foreign company wishing to do business in Australia must be registered with ASIC as a foreign company and obtain an Australian Registered Business Number (ARBN). An agent for the company must also be established to act as representative in Australia from a registered office.

Compliance with reporting requirements for foreign companies include the provision of financial statements to ASIC; notification of changes to company details and supplying any information required by the law applicable in the company's country of origin. Establishment of a branch office is a less common method of operating a foreign company in Australia due to the limitation of liability benefits associated with establishing a separate legal entity.

### 2.3 Use of Distributors and Sales Representatives

Distribution arrangements using an unconnected entity differ from utilising a subsidiary model in a number of key areas. A distributor is a third party to the foreign company who sells their goods in the targeted market – in this way the foreign company may introduce their products to the Australian market without the need to establish an entity here.

The advantages of distributors can include local knowledge; a personal interest for the distributor in selling the product due to profits being derived from sales; decreased liability arising from market entry as a subsidiary or having an agent; as well as avoiding the registration requirement associated with establishing a new company office or entity in Australia.

Distribution does have limitations however, including the increase in costs associated with having a separate entity with its own expenses responsible for distribution; markups in pricing by distributors to sustain profit margins; and reduction in direct input in control of distribution methods. Additional considerations may also arise depending on the type of business, including obligations under the *Competition and Consumer Act 2010 (Cth)*.

### 2.4 Other

Another option for entry into the Australian market is the takeover of an Australian company already trading in the relevant industry. Such an acquisition would allow for entry via an already established business with resources and trading systems already in place.

Takeovers are subject to the law governing foreign investment (outlined below) as well as review by a Takeovers Panel and potentially approval of the ACCC regarding the effect on competition within the relevant industry. As always, foreign investment may also be subject to review by the Australian Government on the basis of national interest.

## 3. Regulation of Foreign Investments

### 3.1 A Discussion of Regulations Restricting Foreign Investment in Australia

Foreign investment in Australia is subject to a number of restrictions under the *Foreign Acquisitions and Takeovers Act 1975 (Cth).* Foreign investments are to be declared to the Australian Federal Government when the investment type or value meets certain criteria. Once declared, the investment is subject to review on a case-by-case basis to gauge whether the investment would be contrary to the national interest. This review is undertaken by the Foreign Investment Review Board with decisions made by the Australian Treasurer or the Treasurer's delegate.

Investments by foreign governments or related entities should all be notified to the Government no matter the value or the nature of that investment. Privately owned foreign investors are required to notify the Government at differing levels of value depending on the type of investment. The value of investment in an Australian business triggering notification requirements is a 15% interest or value over $231 million (2011 value - threshold indexed annually). Real estate investments require notification for residential real estate of any value; commercial real estate valued at $50 million or more; and heritage listed real estate valued at $5 million or more.

Higher thresholds exist for investment by United States investors as a result of trade agreements between Australia and the United States of America. Similar agreements with New Zealand will soon come into effect resulting in the same increased thresholds applying.

Additional obligations and restrictions for foreign investment exist where the investment is in media, banking, Australian international airlines, airports, ships registered in Australia and in Telstra (a national telecommunications company).

Applications and notification are required to be lodged in advance of the relevant transaction – with the transaction not to proceed until notification of approval. For this reason it is suggested that the contracts for any transaction are made contingent on approval of the investment.

Where doubt exists as to whether an investment is notifiable, the policy requires that notification should occur.

- ***Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)**

The Government introduced anti-money laundering and counter-terrorism financing laws in order to help businesses avoid being misused for money laundering and terrorism financing.

The laws impose a number of obligations on reporting entities that are providing designated services including:

- customer identification and verification;
- record-keeping;
- establishing and maintaining an AML/CTF program; and
- ongoing customer due diligence and reporting requirements.

The laws have been introduced in tranches. The laws have been introduced with an aim to maintain international business relationships; prevent and detect money laundering and terrorism; and bring Australia in line with international standards.

### 3.2 A Discussion of Financial Incentives Available from the Government to Encourage the Establishment of Industries in Australia

There are a number of financial incentives available from the Government of Australia with the aim of encouraging the establishment of industries.

- ***R&D Tax Credit***

Commencing on 1 July 2011, the Government of Australia introduced new tax legislation which provides incentives for companies investing in Australian research and development (R&D). The $1.8 billion R&D Tax Credit provides a tax offset for expenditure on eligible R&D activities.

The offsets are applied directly to the company's income tax liability in order to reduce the amount of tax payable.

The program includes:

- a 45 per cent refundable tax offset (equivalent to a 150 per cent deduction) for eligible R&D entities with a turnover of less than $20 million per annum; and
- a non-refundable 40 per cent tax offset (equivalent to 133 per cent deduction) for all other eligible R&D entities. Unused offset amounts can be carried forward for use in future income years.

Eligible entities include Australian companies; corporations that are Australian residents for tax purposes; foreign companies resident in a country with which Australia has a double tax agreement and that carry on

R&D activities through a permanent establishment in Australia; and public trading trusts with a corporation acting as a trustee.

- ***Austrade***

The Australian Trade Commission (Austrade) is responsible for the facilitation of foreign direct investment into Australia and for the promotion of Australia as an internationally competitive place to do business.

Austrade provides international companies with free and comprehensive assistance to establish and build their business in Australia.

Austrade can provide assistance with information on the business environment; market intelligence reports; site visits; Government programs and approval processes.

- ***Major Project Facilitation (MPF)***

The Department of Infrastructure and Transport administers the Major Project Facilitation program (MPF). The program enables the relevant government Minister to grant MPF status demonstrating the Australian Government's support for major and/or strategic new investment.

The Australian Government aims to encourage private investment in productive and sustainable enterprise and an open, transparent and internationally competitive environment. The MPF program is open to all industry sectors.

- ***Privately-owned foreign investors***

The Government has a number of grants that eligible companies can apply for.

- ***Other incentives***

There are a number of taxation benefits for conducting business in Australia, including a tax system which aims to avoid double taxation. Australia has also entered into a number of bilateral tax treaties with a number of countries in order to prevent double taxation.

Furthermore, Australia attracts a high level of foreign direct investment compared to other developed countries. Australia is considered a highly competitive economy and in 2009 was ranked in the top three countries in the Asia-Pacific region for its overall competitiveness. Australia has a strong and independent financial sector and regulatory financial system along with a stable political and regulatory environment making it a safe and ideal destination for investment.

## 4. Forms of Doing Business in Australia

The following section will consider available business forms in Australia focusing on:

- the legal process involved in establishing a business form in Australia: approximate time and costs involved, and ancillary legal documents needed to formally recognise the business form;
- whether the business form provides for limited liability for its owners;

- a description of the management of the business form: whether the business form must have citizens as members of its governing board or whether foreign nationals may hold such offices;
- whether a minimum share capital needed to establish a business form; and
- a discussion of how each business form is treated from a tax standpoint.

Key business structures available in Australia are:

- sole proprietorship;
- partnership;
- proprietary company;
- public company; and
- trust (a hybrid structure requiring a legal entity – individual or company as trustee controller).

  A trust exists mostly in common law countries and reference to Hague Convention 30 (which Australia has ratified) will provide helpful background to those not familiar with trusts.

This section will provide an overview of the key structures available looking at the process of establishment; management; liability of owners; share capital and tax requirements.

- **Sole Proprietorship**

A sole proprietor or sole trader is a business form which enables an individual to carry on a business in his or her own name. There is no separation between the business and the individual's personal assets and obligations. The individual is personally liable for all of the debts of the business.

***Establishing a sole proprietorship***

Establishing a sole proprietorship is the simplest and most inexpensive business form in Australia. An individual can trade under his or her own name or register a separate business name.

***Liability***

A sole proprietor has unlimited liability and is personally liable for the debts and obligations of the business.

***Management of a sole proprietorship***

A sole proprietor has complete control of the management of all aspects of the business.

***Share capital requirements***

There are no share capital requirements and the finance of the business is usually limited to the resources of the individual.

***Tax***

The sole proprietor's income is combined with the losses and profits of the business for tax purposes and the

individual is the taxpayer.

The business income earned (after expenses) must be recorded on the sole proprietor's personal tax return along with any other income earned. The tax paid is the same as any other individual.

Individuals are entitled to a tax-free threshold for the first $6,000.00 (as at 2011) on income earned.

- **Partnership**

Partnerships are made up of two or more individuals carrying on a business with a common view to make a profit.

***Establishing a partnership***

A partnership arises as a matter of law; however, it is common practice to record the terms of the agreement of a partnership in a formal legal document known as a partnership agreement. The costs involved will include the legal costs of preparing such an agreement and will depend on the complexity of the arrangements.

Under section 115 of the *Corporations Act 2001 (Cth)* partnerships with more then 20 partners are not accepted. The legislation does provide a few exceptions.

Partnerships are governed by the respective state or territory laws in which the partnership is established.

***Liability***

A partnership is not a separate legal entity and accordingly, each partner is jointly and severably personally liable for the debts of the partnership.

Additionally, partners are agents for each other in regards to the conduct of the business. As a result, any partner can incur an obligation for which all of the other partners are liable.

A special form of limited partnership may also be permitted. This allows an individual to contribute capital to a partnership and have limited liability. However, the individual will have no say in the day-to-day management of the partnership. Limited partnerships must have at least one limited partner and one general partner with unlimited liability.

***Management of a partnership***

Each partner has a right to participate in the management of the partnership and share in profit equally unless the partnership agreement states otherwise.

One of the difficulties associated with partnerships is that each time a partner changes, (i.e. resignation or new partner joining), the original partnership must be dissolved and new partnership formed. In the case of a retiring partner, the assets and obligations must be transferred.

***Share capital requirements***

There are no share capital requirements and the finance of the business is usually limited to the resources of the individual partners.

***Tax***

Partnerships must lodge an annual partnership income tax return on behalf of the business to show the total income earned and deductions claimed by the business. This return will also show each partner's share of net partnership income. Each partner declares their respective share of income of the partnership in their personal tax return and tax is paid at personal tax rates.

Limited partnerships as discussed above, are however treated as a company and therefore taxed at the company rate.

- **Companies**

The most common business structure in Australia is a company. There are two broad categories; proprietary and public companies. The following section will outline the key features of these two broad categories.

Public companies can be limited by shares; limited by guarantee; unlimited with share capital or no liability. Proprietary companies include companies limited by shares and unlimited companies with share capital.

The company is the most complex business form in Australia. Accordingly, the set-up and administrative costs associated are much higher than other business forms. However, as will be discussed most company structures offer members the benefit of limited liability.

- **Proprietary Company**

A proprietary company is a company registered under the *Corporations Act 2001 (Cth)*. It is distinguished by having the words 'proprietary limited' or 'Pty Ltd' after its name.

***Establishing a proprietary company***

In order to register a company, an application must be lodged with ASIC. Upon registration, companies can conduct business in any state or territory in Australia. The application requires numerous details including:

- proposed company name;
- class and type of company;
- registered office/principal business office details;
- director and secretary details;
- share structure details; and
- members share details.

The company name must indicate the type of company and the liability of members.

ASIC upon review of the application will issue the company with an Australian Company Number (ACN) along with a certificate of registration.

Businesses other than companies must register their business name with the relevant state or territory authority. However, a business name does not constitute a legal entity. The company name must indicate the type of company and the liability of members.

***Liability***

Proprietary companies include companies limited by shares and unlimited companies with share capital. The most common form of company in Australia is a company limited by shares. A company limited by shares limits the liability of its members to the amount (if any) unpaid on shares held by them.

Unlimited companies are companies in which there is no limit on the liability of each shareholder.

***Management of a proprietary company***

A company must have at least one member who is a natural person. This individual can also be the director of the company. Proprietary companies are governed by the *Corporations Act 2001 (Cth)* and *Corporations Regulations 2001 (Cth)*. The larger the company, the more extensive the reporting and disclosure requirements. The legislation sets out tests for small and large proprietary companies. Some of the additional obligations of a large company include preparing audited financial statements and lodging them with AISC.

Unlike sole proprietors and partnerships, the shareholders of a company have little say in the management or the operation of the business. The overall responsibility for directing the company is the responsibility of the board of directors.

The day-to-day management of a company is usually in the hands of an appointed general manager, managing director or chief executive officer who reports to the board of directors.

- **Constitution or Replaceable Rules?**

On registration a company is governed by the replaceable rules under the *Corporations Act 2001 (Cth)* or its own written constitution or a combination of both.

A written constitution comes with the additional expenses associated with keeping the document up to date with changes in legislation; however, it affords the company greater flexibility and the ability to adapt the governing rules to suit the needs of the company.

Proprietary companies are only required to hold a copy of the constitution which may be called upon at a later date.

Sole director/shareholder companies are not required to be bound by any internal governance rules, be they the replaceable rules or a written constitution. The *Corporations Act 2001 (Cth)* does however set out provisions

for specific powers of such companies.

All companies in Australia must also have a registered office that is located in Australia.

- **Directors' Duties**

There are a number of duties and obligations of directors which apply to both proprietary and public companies in Australia.

Directors must provide their consent in writing to holding the position of director. Directors' duties include duties to:

- act in good faith;
- exercise care and diligence;
- act in the best interests of the company;
- act honestly; and
- avoid conflicts of interest.

Breach of such duties can lead to a number of civil and criminal penalties including paying pecuniary penalties up to $200,000; being disqualified from managing companies and paying compensation for loss or damage.

***Share capital requirements***

A proprietary company must comply with the *Corporations Act 2001 (Cth)* which states that a proprietary company must:

- be limited by shares; or an unlimited company that has a share capital; and
- have no more than 50 non-employee shareholders.

The only minimum requirement is that there is one shareholder. There is no prescribed minimum share capital for companies in Australia.

A proprietary company is restricted in raising capital from the general public.

***Tax***

Proprietary companies are distinct legal entities that are regulated by ASIC. Companies are required to lodge an annual company tax return and are liable to pay their own income tax. Proprietary companies are taxed at a rate of 30% on net taxable profit.

A proprietary company must also have its own bank account. Unlike sole proprietors and partnerships, there are no tax-free thresholds for companies.

Australia has a company tax imputation system which ensures that company profits are no longer subject to double taxation. Shareholders declaring dividend receipts for tax purposes are able to obtain credits for tax

already paid by the company on the profit behind those dividends.

- **Public Company**

The *Corporations Act 2001 (Cth)* sets out requirements of public companies.

***Establishing a public company***

The requirements for establishing a public company in Australia are the same as the requirement for establishing a proprietary company as discussed above.

Public companies however, have a number of additional obligations imposed on them and their participants. Some of these additional obligations include:

- requirement to hold an annual general meeting;
- requirement to lodge audited financial reports with ASIC;
- special restrictions on transactions with related parties;
- consent of ASIC required for resignation of auditor; and
- additional requirements on matters to constitute directors' reports.

Public companies may be listed or unlisted but all companies listed on the ASX are public companies.

***Liability***

A company limited by shares limits the liability of its members to the amount (if any) unpaid on shares held by them.

A company limited by guarantee limits the liability of members to the amount they have guaranteed to contribute to the property of the company if it is wound up.

Companies with no liability are a special form of company which must be limited to mining. This form of company has no right to recover unpaid calls.

***Management of a public company***

Public companies in Australia must have at least three directors, two of whom must be ordinarily resident in Australia. There must also be at least one company secretary ordinarily resident in Australia.

The day-to-day management of the company will usually be the role of a Managing Director or Chief Executive Officer. In addition, the company must have a registered office in Australia.

Public companies have an obligation to lodge a copy of their constitution when applying for registration with ASIC. A public company must provide ASIC with a copy of its audited financial report and directors report within four months of the end of the financial year. Unlike proprietary companies, public companies are required to hold an Annual General Meeting at least once each calendar year.

Public companies must also decide whether they will adopt a constitution or follow the replaceable rules

under the *Corporations Act 2001 (Cth)*. If a constitution or a combination of replaceable rules and constitution is adopted, a copy must be lodged with ASIC when applying to register the company.

***Share capital requirements***

A public company unlike a proprietary company can raise funds from the general public. There are strict rules around fundraising that must be complied with.

The only minimum requirement is that there is one shareholder. There is however, no prescribed minimum share capital for companies in Australia.

***Tax***

The tax requirements for public companies in Australia are similar to the requirements for proprietary companies. Public companies are distinct legal entities that are regulated by ASIC. Public companies are taxed at a rate of 30% on net taxable profit.

- **Trust**

A trust arises where an individual or company (known as trustees) is required to hold or invest property for the benefit of another individual or company (known as beneficiaries).

A trust exists mostly in common law countries and reference to Hague Convention 30 (which Australia ratified) could provide helpful background to those not familiar with trusts.

***Establishing a trust***

Establishing a trust requires a written trust deed. This process can be quite costly and complicated to establish. There are also expenses in completing the tax returns each year.

***Liability***

Trusts are not separate legal entities and it is the trustee who is liable for the debts incurred on behalf of the trust. However, the trustee will generally have a right to be indemnified out of the trust assets.

By appointing a company as a trustee the liability of the trust will be limited to a certain degree.

***Management of a trust***

The trustee appointed under a trust has a number of obligations and duties to the beneficiaries of the trust. A high degree of care must be exercised and there must be full disclosure to beneficiaries.

***Share capital requirements***

There are two main forms of trust, namely a unit trust and a discretionary trust. A unit trust is similar to a company in that the beneficial interests are divided into units. These units entitle the holder to share of the profits and may also be transferred.

A discretionary trust does not ascertain the identity or interest of the beneficiary at the time of formation as entitlements to income of capital are at the discretion of the trustee.

***Tax***

The liability to pay tax will depend on the type of trust that exists and whether income has been distributed to beneficiaries. If the entire trust income has been distributed then the trust is not liable to pay tax and each beneficiary declares their distribution at a personal tax level.

Where income has been distributed to foreign residents or minors, the trust must pay tax. The individuals are also required to declare their income in their tax return and claim credit for the tax already paid by the trust.

Income that has been accumulated by the trust is assessed at the highest individual marginal rate. If a trust is operating a business, then a trust tax return must also be lodged.

- **Available Business Forms in Australia – Non-profit organisations**

***Unincorporated Associations***

Unincorporated associations are clubs and societies which are formed to carry on various activities but where members do not aim to make a profit. Any profit made must be used for the purpose of the association and cannot be distributed to individual members.

Unlike a company, unincorporated associations are not separate legal entities. Therefore, the association is unable to hold property in the association's name and cannot enter into contracts itself. Additionally, the members of the association do not have the benefit of limited liability. As a result, unless a committee has been appointed, the members of the association are required to defend any legal proceedings brought against the association.

***Incorporated Association***

An association may become incorporated under the Associations Incorporation Act of the state or territory in which it operates. Incorporated associations have the benefit of limited liability for their members.

Additionally, public companies limited by guarantee are a common entity type used for non-profit operations.

***Tax***

Certain non-profit entities are entitled to taxation exemptions and some are designated as Deductible Gift Recipients, entitling donors to the company or association to claim a tax deduction for donations.

## 5. A List of Tax Treaties Currently in Effect in Australia

There are currently seventy nine treaties in force in respect of taxation, including:

- Convention between the Government of the Commonwealth of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes and Estates of Deceased Persons
  **[1953] ATS 4**

- Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1969] ATS 14**

- Exchange of Notes constituting an Agreement with the Government of the Republic of Singapore Extending the Operation of Article 18 (3) of the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 11 February 1969
  **[1975] ATS 18**

- Agreement and Protocol between the Commonwealth of Australia and the Federal Republic of Germany for the Avoidance of Double Taxation of Income and the Prevention of Fiscal Evasion with respect to Taxes on Income and Certain Other Taxes
  **[1975] ATS 8**

- Agreement between Australia and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and Protocol
  **[1976] ATS 24**

- Agreement between the Government of the Commonwealth of Australia and the Government of Italy for the Avoidance of Double Taxation of Income Derived from International air transport
  **[1976] ATS 7**

- Agreement with the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, with Respect to Taxes on Income.
  **[1979] ATS 21**

- Agreement with the Government of the Republic of the Philippines for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1980] ATS 16**

- Agreement between the Government of Australia and the Government of the Hellenic Republic for the Avoidance of Double Taxation of Income Derived from Air Transport
  **[1981] ATS 10**

- Convention between Australia and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
  **[1981] ATS 14**

- Agreement between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1981] ATS 15**

- Agreement between the Government of Australia and the Government of Sweden for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1981] ATS 18**

- Agreement between the Government of Australia and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, with Respect to Taxes on Income.
  **[1981] ATS 26**

- Exchange of Notes constituting an Agreement to further extend the operation of Article 18(3) of the Agreement for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income of 11 February 1969
  **[1981] ATS 31**

- Agreement and Protocol between Australia and Switzerland for the Avoidance of Double Taxation with Respect to Taxes on Income.
  **[1981] ATS 5**

- Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1983] ATS 16**

- Agreement between the Government of Australia and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains
  **[1983] ATS 25**

- Convention and Protocol between the Government of Australia and the Government of the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1984] ATS 2**

- Agreement between Australia and Malta for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.
  **[1985] ATS 15**

- Convention and Protocol between Australia and the Republic of Italy for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, with Respect to Taxes on Income.

**[1985] ATS 27**

- Protocol amending the Agreement with the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 13 October 1977
  **[1986] ATS 25**

- Agreement between the Government of Australia and the Government of the Republic of the People's Republic of China for the Avoidance of Double Taxation of Income and Revenues Derived by Air Transport Enterprises and International Air Transport
  **[1986] ATS 31**

- Second Protocol Amending the Agreement between Australia and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and Protocol, of 17 March 1976
  **[1987] ATS 22**

- Agreement between Australia and the Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
  **[1988] ATS 21**

- Exchange of Notes constituting an Agreement to Further Extend the Operation of Article 18(3) of the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 11 February 1969
  **[1989] ATS 26**

- Agreement between Australia and the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1989] ATS 36**

- Protocol amending the Agreement with the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income.
  **[1990] ATS 3**

- Agreement between Australia and Fiji for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1990] ATS 44**

- Agreement between the Government of Australia and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of fiscal Evasion with respect to Taxes on Income
  **[1990] ATS 45**

- Agreement between Australia and the Republic of Kiribati for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1991] ATS 34**

- Agreement with the Democratic Socialist Republic of Sri Lanka for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1991] ATS 42**

- Agreement between the Government of Australia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1991] ATS 49**

- Agreement between Australia and the Republic of Poland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1992] ATS 14**

- Agreement between Australia and the Republic of Hungary for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1992] ATS 18**

- Agreement between the Government of Australia and the Government of the Republic of Indonesia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1992] ATS 40**

- Agreement and Protocol between Australia and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1992] ATS 41**

- Agreement between the Government Australia and the Government of the Socialist Republic of Vietnam for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[1992] ATS 44**

- Agreement between Australia and the Czech Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
  **[1995] ATS 30**

- Exchange of Notes constituting an Agreement to Amend [Article 23] of the Agreement with the Socialist Republic of Vietnam for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 13 April 1992
  **[1997] ATS 20**

- Agreement with the Government of New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
  **[1997] ATS 23**

- Exchange of Letters constituting an Agreement Prolonging the Effect of Certain Provisions of the Agreement between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income of 20 August 1980

**[1999] ATS 24**

- Agreement between the Government of Australia and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income.
  **[1999] ATS 34**

- Agreement between Australia and the Slovak Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
  **[1999] ATS 35**

- Agreement between Australia and the Argentine Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
  **[1999] ATS 36**

- Protocol amending the Agreement between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[2000] ATS 25**

- Agreement between the Government of Australia and the Government of Romania for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, and Protocol
  **[2001] ATS 4**

- Protocol amending the Convention between Australia and Canada for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
  **[2002] ATS 26**

- Protocol Amending the Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income of 6 August 1982
  **[2003] ATS 14**

- Convention between the Government of Australia and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the prevention of Fiscal Evasion with respect to Taxes on Income and on Capital Gains
  **[2003] ATS 22**

- Agreement with the Government of the Russian Federation for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income
  **[2003] ATS 23**

- Exchange of Letters constituting an Agreement to Amend the Agreement with the Socialist Republic of Vietnam for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income of 13 April 1992, as amended by an Exchange of Notes of 22 November 1996

**[2003] ATS 9**

- Second Protocol amending the Agreement between the Government of Australia and the Government of Malaysia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income as amended by the First Protocol of 2 August 1999
  **[2004] ATS 1**

- Agreement between the Government of Australia and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income
  **[2004] ATS 4**

- Agreement with the Government of Bermuda on the Exchange of Information with respect to Taxes.
  **[2007] ATS 31**

- Convention with the Kingdom of Norway for the avoidance of double taxation with respect to taxes on income and the prevention of fiscal evasion.
  **[2007] ATS 32**

- Agreement with the Government of Finland for the Avoidance of Double Taxation with Respect to Taxes on Income and the Prevention of Fiscal Evasion.
  **[2007] ATS 36**

- Protocol amending the Agreement with the Government of New Zealand for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income of 27 January 1995
  **[2007] ATS 5**

- Agreement with the Government of the Kingdom of Netherlands in respect of the Netherlands Antilles for the Exchange of Information with Respect to Taxes.
  **[2008] ATS 8**

- Convention with the Government of the French Republic for the avoidance of double taxation with respect to taxes on income and the prevention of fiscal evasion, and Protocol
  **[2009] ATS 13**

- Convention between Australia and New Zealand for the Avoidance of Double Taxation with respect to Taxes on Income and Fringe Benefits and the Prevention of Fiscal Evasion
  **[2010] ATS 10**

- Agreement between the Government of Australia and the Government of Gibraltar on the Exchange of Information with respect to Taxes
  **[2010] ATS 16**

- Agreement between the Government of Australia and the States of Guernsey for the Exchange of Information relating to Tax Matters
  **[2010] ATS 17**

- Agreement between the Government of Australia and the Government of the Isle of Man for the Allocation of Taxing Rights with respect to Certain Income of Individuals and to establish a Mutual Agreement Procedure in respect of Transfer Pricing Adjustments
  **[2010] ATS 2**

- Second Protocol Amending the Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income as amended by the Protocol of 16 October 1989
  **[2010] ATS 26**

- Agreement between the Government of Australia and the Government of the Isle of Man on the Exchange of Information with respect to Taxes
  **[2010] ATS 3**

- Agreement between the Government of Australia and the Government of Jersey for the Exchange of Information with respect to Taxes
  **[2010] ATS 4**

- Agreement with the Government of Antigua and Barbuda on the Exchange of Information with respect to Taxes.
  **[2010] ATS 7**

- Agreement between the Government of Australia and the Government of the Turks and Caicos Islands on the Exchange of Information with respect to Taxes
  **[2011] ATS 11**

- Agreement between the Government of Australia and the Government of Saint Lucia on the Exchange of Information with respect to Taxes
  **[2011] ATS 13**

- Agreement between the Government of Australia and the Government of the Cayman Islands on the Exchange of Information with respect to Taxes
  **[2011] ATS 14**

- Agreement between the Government of Australia and the Government of Anguilla on the Exchange of Information with respect to Taxes
  **[2011] ATS 15**

- Agreement between the Government of Australia and the Government of the Bahamas on the Exchange of Information with respect to Taxes
  **[2011] ATS 3**

- Agreement between the Government of Australia and the Government of Belize for the Exchange of Information with respect toTaxes
  **[2011] ATS 4**

- Agreement between the Government of Australia and the Government of Saint Vincent and the Grenadines on the Exchange of Information with respect to Taxes
  **[2011] ATS 5**

- Agreement between the Government of Australia and the Government of San Marino on the Exchange of Information relating to Taxes
  **[2011] ATS 6**

- Agreement between the Government of Australia and the Government of St Kitts and Nevis for the Exchange of Information relating to Tax Matters
  **[2011] ATS 7**

- Agreement between the Government of Australia and the Government of the Principality of Monaco for the Exchange of Information relating to Tax Matters
  **[2011] ATS 8**

- Agreement between the Government of Australia and the Government of the British Virgin Islands for the Allocation of Taxing Rights with respect to Certain Income of Individuals

- Agreement between the Government of Australia and the Government of the British Virgin Islands for the Exchange of Information Relating to Taxes.

## 6. A List of Hague Conventions Ratified

Australia is a signatory to or has ratified the following Hague Conventions that are currently in force in Australia:

- Statute of the Hague Conference on Private International Law
- Convention of 1 March 1954 on civil procedure
- Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions
- Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents
- Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters
- Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations
- Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

- Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations
- Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages
- Convention of 25 October 1980 on the Civil Aspects of International Child Abduction
- Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition
- Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption
- Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN CYPRUS

## 1. Overview of the legal framework of Cyprus

The Cyprus legal system is largely based on the English model. Cyprus was a colony of England until 1960 when it gained its independence. Under this colonial rule, the English legal system, a system based on common law and equity, was introduced to the country.
Upon its independence, the Cypriot legal system continued to be based on the same structure, i.e. common law.

According to section 29 of The Courts' Law (Law No. 14/1960 as amended from time to time) the courts of the country apply to:

- The Constitution of the Republic of Cyprus which established the Republic of Cyprus;
- The Statutes then in force and enacted thereafter by the Parliament;
- Common Law– case precedents;
- The principles of equity; and
- As of January 5, 2004, European Community Law after Cyprus' accession into the European Union (EU).

Cypriot companies are governed by the Companies Law Chapter 113, as amended from time to time. This law was enacted on February 16, 1951 and is based on the English Companies Act of 1948. Since then, various amendments have taken place, especially after Cyprus' EU accession, but in substance the law is very similar to the English Companies Act of 1948. It goes without saying that Cyprus, as an EU member state, follows and applies all EU legislation.

## 2. Ways in which a foreign company can enter Cyprus

### a. Establishing a separate legal entity as a subsidiary.

Under the Cyprus Companies Law, Chapter 113, the following legal entities can be registered:

- Limited liability companies by shares;
- Limited liability companies by guarantee with share capital, or without share capital.

Limited liability companies by shares can be either public or private. A foreign company may also enter the country by re-domiciliation of the foreign company in Cyprus, provided that the foreign jurisdiction allows this to take place.

i. Procedure and documents:

(1) Application for Re-domiciliation in Cyprus

A foreign company that is registered in a country which allows re-domiciliation and whose Memorandum and Articles of Association provide for the possibility of re-domiciliation, may apply to the Registrar of Companies in Cyprus to be registered in Cyprus as a continuing company pursuant to the provisions of the Companies Law, Chapter 113.

(2) Licensed activities

Companies, which offer licensed activities under certain provisions of the law in their jurisdiction of origin and for which similar licenses are required in Cyprus, must produce relevant consent for their re-domiciliation by the proper authorities of their country. Any foreign company that undertakes any activity for which a license is required in Cyprus must obtain such a license according to the requirements of Cypriot Law (such companies are, among others, financial services companies, insurance companies, and banking institutions).

(3) Public Companies

If the foreign company is a public company, the following must be produced in addition to the above:

- The prospectus of the foreign company, once the shares have been offered to the public;
- If it is listed in any stock exchange, evidence of consent of the foreign stock exchange allowing re-domiciliation in Cyprus;

(4) A list of present shareholders that has been duly certified

(5) Registration in the Republic

Once the Registrar is satisfied that the documents submitted, as those specified above, are in accordance with the law, the Registrar temporarily deposits the relevant documents and certifies that the foreign company is *temporarily* registered as a continued entity in the Republic from the date of such registration. The Registrar will issue the Temporary Certificate of Continuation of the company in Cyprus.

(6) Time Limit

Within a six-month period from the issuing of the Temporary Registration Certificate, the foreign company must present to the Cypriot Registrar evidence that it has stopped being a company registered in the country

of initial incorporation and/or that its registration in the foreign country has been cancelled. Usually this document is called the Certificate of Discontinuance, which must be duly notarized.

(7) Final Certificate of Continuation

Once the Certificate of Discontinuance is presented, the Cypriot Registrar issues the final Certificate of Continuation, which certifies that the foreign company has been registered in the Republic.

**c. Establishing a Branch Office**

The Cyprus Companies Law, Chapter 113 as amended from time to time, provides for a foreign company to set up a branch in Cyprus. In essence, the registration procedure is the same as for companies. Any foreign company may function in Cyprus as a branch.

i. Procedure And Documents:

The following documents must be submitted to the Registrar of Companies within one (1) month of establishment of a branch:

- a certified, true copy of the Memorandum and Articles of Association of the foreign company;
- a list of the directors and secretary; and
- the names and addresses of persons residing in Cyprus who are authorized to accept service of all notices and legal documents on behalf of the company.

Regarding certification of the documents, these must be legalized and apostilled in the country of origin, as applicable.

Foreign companies with branches in Cyprus are required to file accounts annually along with certified Greek translations. As part of Cyprus' EU accession process, company law changes were implemented in 2003 including some rules covering branches. In particular, each foreign company which has a registered branch in Cyprus must submit copies of its financial statements for every financial year as portrayed by the company's last AGM. EU companies that published audited financial statements in their respective countries of registration and submitted these to the Registrar of Companies in Cyprus are exempt from having to prepare and submit separate financial statements of the branch. Moreover, a branch registered in Cyprus is required to file accounts annually with the Inland Revenue Department.

It is important to note that the registration of a branch does not create a new legal entity in Cyprus; it merely means that the legal entity that is registered in another jurisdiction has a branch in Cyprus and may operate through this branch for its activities.

The following documents must be translated into the Greek language and must be submitted to the Registrar of Companies: (i) evidence of the existence of the company purporting to establish a branch; (ii) certified copies of the Articles of Association; (iii) the names of the directors; (iv) the share capital; (v) the registered office; and (iv) names of the representatives acting on behalf of the interested entity.

In addition, a written report showing the following must be submitted to the Registrar of Companies:

- the name and legal nature of the foreign company, as well as the place of business if different from the name of the foreign company;
- the seat and the address (postal address or other) of the foreign company, as well the address (postal address or other) of the place of business;
- the objects and the scope of business of the foreign company and the place of business;
- the register of the foreign company (with a relevant filing number) where the relevant details of the foreign company have been filed;
- the issued share capital where available;
- details with regards to the dissolution of the foreign company and the appointment, personal details and the powers of the liquidators where applicable;
- in case of a foreign company which is not an EU member state, the jurisdiction governing the foreign company;
- a certified, true copy of the Articles of Association and Memorandum of the company as well as any amendments to these and, if these are not in the English language, a certified, true copy of their translation;
- a list of the directors and secretary of the company, as well as all of the persons who are authorized to represent the company and the place of business in transactions with third parties and before the courts and authorities; and
- the names and addresses of one or more persons who reside within the Republic of Cyprus and who are authorized to accept service of legal documents and any other notifications required to be served on behalf of the company.

**d. Use of Distributors and Sales Representatives**

It is possible to use distributors and sales representatives in Cyprus.

## 3. Regulation of foreign investments

### a. Controlled foreign company (CFC) legislation

Cyprus does not have Controlled Foreign Company (CFC) legislation. In effect, no income is imputed to a Cypriot parent even if the income arises in a tax haven country or in respect of the activities of the subsidiary. A recent decision of the European Court of Justice (ECJ) (between Cadbury Schweppes and the U.K. Commissioners of Income Tax) reconfirmed the tax competition within member states and in effect established that CFC rules cannot be enforced once the subsidiary registered in a Member State is engaged in genuine economic activities.

This decision of the ECJ provides tremendous opportunities to investors and businesses to commence careful tax planning and use, for their business activities, subsidiaries situated in low tax rate countries such as Cyprus, whose tax system, even if it provides for low tax rates, has been strengthen by this decision.

### b. Thin capitalization rules

Cyprus' tax legislation does not contain any thin capitalization provisions; namely, there are no provisions in the law requiring companies to maintain a particular debt to equity ratio. In this respect, a Cypriot holding company may be financed by loans without any restriction.

### c. Regulations restricting foreign investment in Cyprus

There are no regulations restricting foreign investment in Cyprus.

### d. Financial incentives available from the Government to encourage the establishment of industries in Cyprus

[*Note: the below information was received from the Cyprus Investment Promotion Agency (CIPA)*]

i. Foreign direct investments:

In order to further encourage foreign investment, the government has liberalized the Foreign Direct Investment (FDI) policy, not only for EU citizens, but also for investors from other countries in most sectors of the economy, effective October 1, 2004. In particular:

- Limitations related to the minimum level of investment and foreigners' participation percentage have been abolished in most sectors of the economy allowing for up to 100% equity participation in registering companies and existing companies.

- Administrative procedures have been simplified and measures have been taken to streamline the infrastructure regarding foreign investment, thus reducing the level of bureaucratic intervention and fostering improved economic activity.

- Consequently, foreign companies now have the opportunity to invest and establish business in Cyprus on equal terms with local investors.

ii. Research and development (R&D)

The government of Cyprus, acknowledging the importance of research, development, and innovation, is strongly committed to enhancing the scientific base in Cyprus. The Research Promotion Foundation of Cyprus (www.research.org.cy) has funded over €25 million worth of research projects and supporting activities and the budget is expected to grow in the coming years according to the following five strategic categories:

- Strategic & Multi-thematic Research and Development

- Growth of National Scientific & Research Human Capital

- Applied Research Development and Enterprise Innovation

- Research Infrastructure Development and Large Scale Investments

- International Networking and Collaboration in the field of R&D and Innovation

**4. Forms of doing business in Cyprus**

The most popular vehicle for carrying out business in Cyprus is the private limited liability company by shares. This is the type of company used by the majority of foreign investors for their international tax planning. Until Cyprus' accession into the European Union, this type of company was distinguished in two main categories from the tax point of view:

- Local companies – doing business in Cyprus

- Offshore companies – doing business exclusively outside Cyprus.

The new tax legislation, which was enacted in 2002 in view of Cyprus' accession into the European Union and has been effective since 01/01/2003, eliminated the distinction between local and offshore companies; however, with this new legislation, companies are now distinguished as Resident companies and Non-resident companies with regards to taxation matters. The legal consequence of this distinction is that profits of tax resident companies are taxable at the rate of 10% Corporate Tax while non-tax resident companies, unless they have activities/income in Cyprus, are not taxable in Cyprus.

**a. Main characteristics of the Cyprus Private Limited Liability Company**

- The liability of its members is limited to their share participation. The company has its own legal personality and this personality is distinct from its shareholders.

- The minimum number of shareholders is one and the maximum number is fifty.

- Shares cannot be issued to the bearer.

- Special classes of shares with preferential rights may be issued.
- There is no minimum share capital. The share capital may be expressed in any currency.

- Nominee shareholders can be used where anonymity and confidentiality is desirable.

- The Company must have a registered office in Cyprus.

- Each company's file at the Registrar of Companies is available for, and open to public inspection.

- The minimum number of directors is one and there is no maximum number. Directors may be local or foreign, physical or legal persons. Alternate directors may be appointed.

- Meetings of the Board of Directors can be held either in Cyprus or abroad.

- General meetings of the shareholders of the company may be held either in Cyprus or abroad.

- Accounts must be kept and financial statements must be duly certified by certified or chartered accountants practising in Cyprus and prepared according to International Financial Reporting Standards. Financial statements must be filed with the Registrar of Companies and tax returns must be filed with the Income Tax Authority.

- Bank accounts of any kind may be opened in any currency, either in Cyprus or abroad. Bank accounts opened in Cyprus are operated without any exchange control restrictions.

- Annual returns containing information as to any changes to Directors, Secretary, shareholders, authorised, issued or paid up capital, registered office, mortgages/charges and other related matters must be filed with the Registrar of Companies once a year.

- The Company must appoint one Secretary, who may be local or foreign, or a physical or legal person.
- The company must have a Memorandum and Articles of Association prepared by a licensed advocate in Cyprus, signed by the subscribers, and deposited with the Registrar of Companies.

- Cypriots, European Union nationals and foreigners (other than Cypriots or European Union nationals) may establish such a company without obtaining any licence. As of January 10, 2004, there was a complete liberalisation of direct investments in Cyprus by foreigners.

- Re-domiciliation is possible.

**b. Advantages of the Cypriot company**

The Cypriot company is a European jurisdiction company where advantageous tax planning structures can be achieved in view of the modern and attractive tax regime and company legislation. Further, the stability and respectability gained through its European Status make the Cypriot company the most advantageous vehicle for International Tax Planning and use. Compared to other offshore jurisdictions facing an unstable future, unless they effect structural changes in their systems, Cyprus has made the move with the final result known and now in practice. The Cypriot company, with its European diversion and acceptability, opens the gates to Europe. It offers a lawful way to enter Europe and also a lawful way to go out of Europe without adverse tax consequences. Effectively, the company is taxed as follows:

- **0% tax on dividends received** -- Dividends received by a Cypriot company, on certain conditions, are free of tax, which makes Cyprus the most competitive jurisdiction for holding companies.

- **0% withholding tax on dividend payments** -- Dividends payable by a Cyprus resident company to its foreign shareholders (whether a company or individual) are not subject to any withholding tax in Cyprus. Cyprus provides full tax exception on the payment of dividends to its non-resident shareholders and has a real advantage over the other traditional holding jurisdictions.

- **Companies engaged in the trading of titles --** Trading companies in shares and other securities, as identified in the law, may be formed with 0% taxation on profits from this trading. No capital gains tax is payable on the sale or transfer of shares. No capital gains tax is paid on the transfer of immovable property owned by a Cypriot company abroad (outside Cyprus).

- **No estate tax is payable on the inheritance of shares -**- In case of the death of a shareholder there is no estate tax payable in Cyprus.

- **10% Taxation for tax resident companies --** Resident trading companies, subject to certain exceptions for holding companies, and companies trading in shares or securities are subject to the lowest tax rates in Europe (10%) on their net profits.

- **0% Taxation for non-tax resident companies –** Non-tax resident trading companies engaged in global international trading may be established with 0% taxation in all respects, provided their management and control is outside Cyprus. Trading companies which are now looking for

respectable jurisdictions with the EU "stamp'' have the possibility to use such a structure on their trading tax planning.

- **0% taxation on profits from foreign establishment --** A resident company is not taxed on profits received from its overseas establishment, subject to certain conditions.

- **Unilateral Tax Credit Relief --** Unilateral tax credits are granted on any tax paid abroad to any foreign country, regardless of whether Cyprus has a double taxation treaty or not. In such a case the income is not taxed twice but only once.

**c. Other advantages of the Cypriot Company**

i. Reorganizations of companies

The new tax legislation has provided extensive and flexible reorganisation rules by implementing the European Commission Merger Directive. The Cyprus legislature implemented the Directive in a very liberal approach, and the Cyprus reorganisation rules are far more flexible than the EC Directive. The reorganisations, according to Cyprus Law:

- apply not only to companies but also to any body of persons;

- any profits or gains made by reason of reorganisations, the transfer of property, and the transfer of shares in exchange for shares in another company are exempt from income tax; and

- Reorganisations include merger, de-merger, and transfer of assets and exchange of shares between Cyprus resident companies and /or non-resident Cyprus companies.

ii. Losses

Losses can be carried forward and set off against future profits indefinitely. There is no time limit.

iii. Group relief

Group relief (set off of the loss of one company with the profit of another) is allowed, provided that the companies seeking group relief are tax residents in Cyprus. Group relief is available only when both companies belong to the same group for the whole financial year. Losses incurred in one year can be set off only against profits of the same year.

## 4. Forms of doing business in Cyprus

**a. Private Limited Liability Company:**

There are shelf companies and approved names available for immediate use. When the company name is available and acceleration fees are paid, registration may be concluded in a relatively short time, but this depends on the overload of the Registrar. It might take 7 to 15 working days. If a shelf company is purchased, the procedure for dispatching the company documentation may be concluded in 2 to 3 days.

i. Procedure of Registration

The same procedure applies to Cypriots, European Union nationals or foreigners, namely:

- Approval of the intended company name by the Registrar of Companies, in cases where a shelf company or an already approved name will not be used.

- Preparation of the Memorandum and Articles of Association.

- Submission of the company documents to the Registrar of Companies and receipt of certified Memorandum and Articles, Certificate of Incorporation, list of directors and secretary, registered office and shareholders.

It is important to note that only a licensed advocate practicing law in Cyprus is permitted to register a company.

ii. Ancillary legal documents needed to formally organize the business form.

The below information and documentation is required to register a company:

- The name of the company, which must be approved by the Registrar of Companies in advance.

- The amount of the authorized, issued, capital of the company.

- The main objects and line of business of the company.

- Shareholders—The full name, profession, address, nationality, and respective shareholding of each shareholder must be provided. A copy of each shareholder's passport and other identification documents must also be provided.

- Directors—Secretary—Full name, profession, nationality and address of the directors and the secretary of the company along with a copy of their passport must be provided.

- Registered Office address

iii. Memorandum

This is the document which sets out the capital structure and the objects of the registered company. The Memorandum can be amended by a court order only. It is submitted for filing with the Registrar of Companies and must contain the following information:

- The name of the company, which must end with the word Limited or Ltd;
- The registered office of the company;
- The objects of the company;
- Whether the liability of the members is limited by shares or by guarantee;
- The share capital of the company and how it is divided; and
- The subscribers to the Memorandum and the number of shares they are subscribing for.

iv. Articles of Association

This is the document that sets out the internal procedures of a registered company, which contains matters such as shareholders' voting rights, directors' appointment removal and duties and general working or management practices. It can be amended by the decision of the shareholders.

v. Shareholders

A Cypriot company must have a minimum of one shareholder. A shareholder may be a legal or a physical entity. The names of the shareholders along with their details are recorded in the company's file and kept with the Registrar of Companies where the file is open for public inspection. If clients need anonymity as to their investment in the company, they have the option to use nominee shareholders who will hold the shares in trust for the owners.

vi. Directors – Secretary

There must be at least one director and one secretary. All or any of the directors may be non-Cypriots (corporations or individuals). The same person can be director and secretary provided that the company has only one shareholder.

vii. Limited Liability for Owners

Liability is limited to the share participation of each member both in private, as well as public, limited liability companies.

viii. Management of the Business

The management and control of a company is exercised by the board of directors in accordance with the law and the Articles of Association of the company. In relation to the law there are specific processes that are the prerogative of the shareholders such as matters relating to the share capital of the company, the change of Articles and Memorandum, and the decision to liquidate the company. In effect, the day to day business of the company is carried out by the directors without the sanction of the shareholders. There is no limitation on the nationality or the residence of the director. Effectively, any foreign person may become a director in a Cypriot company. Whereas there is no limitation by law as to the nationality of the director, from a tax perspective, the appointment of a director is a very crucial issue as it may affect the tax residency of the company. Companies are considered tax residents in Cyprus *only* if their management and control is exercised in Cyprus. There is no definition in the law of the meaning of "*management and control.*" It is expected that the Commissioner of Income Tax will adopt the meaning that the court decisions of Commonwealth countries follow on this matter.

As the residence issue is a factual matter, this is expected to be determined by considering a number of factors which will point to the central management and control of the company, such as:

- The place of directors' meetings, where Board decisions are taken. This factor is treated as being the most crucial;

- The residence of the directors or at least the majority of them;

- The degree of control exercised by the directors on company decisions;

- The place at which the general policy of the company is formulated. It is important to point out that the issuing of a general power of attorney to a non-director might be considered an abdication of control, and before issuing such a power of attorney, careful consideration must be given;

- Whether the directors think and decide the policy issues of the company and take their own decisions or blindly follow the instructions of a non-director, the shareholders, or the beneficiaries;

- In which country the bank accounts are situated and who manages them (who the signatories of the accounts are);

- Whether or not the directors consider and sign contracts and/or invoices for the company and the place where this occurs;

- Whether or not the directors are a signing agency acting on instructions or whether or not they consider and decide if the signing of a particular contract or particular action is to the benefit of the company or not;

- While it is possible for foreign natural and/or legal persons to hold the post of director(s) in a Cypriot company, it may be prudent that the director of a Cypriot tax resident company is a Cypriot tax resident in order to avoid any attack or dispute as to the tax residency of the company being put forward by foreign tax authorities.

ix. Minimum capital requirements

No minimum share capital is needed for the establishment of a *private* limited liability company. However, the minimum share capital for a *public* company is € 25.630,00. There must be evidence of payment of such capital for the public company to being able to commence its activities.

x. Tax Treatment

(1) Application of Cyprus tax law

The new taxation system applies to the worldwide income of tax residents of Cyprus and to the income that non-tax residents of Cyprus derive in Cyprus , i.e. Cyprus source income. In effect a company or an individual is taxed in Cyprus only if they are a tax resident of Cyprus. Tax residents are taxed on their worldwide income.

- Non-tax residents of Cyprus are not subject to any kind of Cyprus taxation, except for income that the non-tax residents (company or the individual) derive from operations or a permanent establishment in Cyprus

- Companies and individuals will be distinguished as tax residents and non-tax residents with regard to taxation matters.

(2) Summary of the provisions of the new tax legislation on companies:

The Law is in force as of January 1, 2003. A Company, irrespective of where it is registered, is taxed <u>only</u> if it is a tax resident of Cyprus. A Company is considered a tax resident of Cyprus if its management and control is in Cyprus.

- A non tax resident company is not subject to any tax in Cyprus on any income derived from sources outside Cyprus (0%), but is taxed on profits arising from within Cyprus.

- The taxable net profits of all tax resident companies (i.e. having their management and control in Cyprus) whether incorporated in Cyprus or not, will be subject to corporation tax at the rate of 0% - 10%, subject to their activities and irrespective of whether or not the shareholders are tax residents of Cyprus.

- There is no tax (0%) on profits from the sale of titles, i.e., shares, bonds, debentures, founders' shares and other titles of companies or other legal persons, incorporated in Cyprus or abroad and options thereon.

- There is no corporation tax (0%) on dividends received from tax resident or non-tax resident companies.

- There is no special defense contribution tax on dividends received from another resident Cyprus company. There is no special defense contribution tax on dividends received from a non-tax resident company (under certain conditions).

- There is no tax (0%) on profits from a permanent establishment abroad (under certain conditions).

- Passive Interest Income as of January 1, 2009 is taxed only with Special Defense Contribution Tax – 10%.

- Trading Interest Income is only subject to corporate tax – 10%.

- There is no withholding tax (0%) on payments to non-tax resident shareholders in respect of dividends, or interest or royalties arising from sources outside Cyprus. Royalties from the use of an asset in Cyprus are subject to 10% withholding tax.

- Tax losses can be carried forward and set-off against future profits, indefinitely.

- Group relief is allowed. Tax losses of one company in the same group are set-off against the profits of another company of the group.

- Reorganizations (mergers, de-mergers, transfer of assets and exchange of shares) are exempt from income tax (0%).

- Eligible Cypriot ship owning companies, charterers and ship management companies, once they meet the requirements of the Merchant Shipping (Fees and Taxing Provisions) Law 44(I) of 2010, may pay only Tonnage Tax according to the provisions of the relevant Law.

- Double tax treaties apply to tax resident companies, which may invoke their provisions and be benefited accordingly.

- Unilateral tax credit relief is granted. Any amount of tax paid for any income taxable in Cyprus, in any foreign country, irrespective of whether a double taxation treaty has been signed or not, is given as a tax credit in Cyprus and the tax due in Cyprus is reduced accordingly.

## 5. Tax treaties currently in effect

A list of the tax treaties currently in effect as regards Cyprus with the relevant effective date is detailed below:

| Country: | Effective Date: |
|---|---|
| Austria | 10/11/1999 |
| Bulgaria | 03/01/2001 |
| Belarus | 12/02/1999 |
| Belgium | 08/12/1999 |
| Canada | 03/09/1985 |
| China | 05/10/1991 |
| Denmark | 10/08/1981 (new agreement 11/10/2010) |
| Egypt | 14/03/1995 |
| France | 01/04/1983 |
| Germany | 11/10/1977 |
| Greece | 16/01/1969 |
| Hungary | 24/11/1982 |
| India | 21/12/1994 |
| Ireland | 12/07/1970 |
| Italy | 09/06/1983 (additional protocol 04/06/2009) |
| Kuwait | 25/09/1986 (new agreement 05/10/2010) |
| Malta | 11/08/1994 |
| Mauritius | 12/06/2000 |
| Norway | 01/01/1955 |
| Poland | 09/06/1993 |
| Romania | 08/11/1982 |
| Russian Federation | 17/08/1999 (amending protocol 07/11/2010) |
| South Africa | 08/12/1998 |
| Sweden | 14/11/1989 |
| Syria | 22/02/1995 |
| Singapore | 08/02/2001 |
| Thailand | 04/04/2000 |
| United Kingdom | 01/11/1974 |
| United States of America | 31/12/1985 |
| Serbia* | 08/09/1986 |
| Montenegro* | 05/11/2008 |
| Slovenia* | 08/09/1986 (new agreement 12/10/2010) |
| Slovakia** | 30/12/1980 |
| Czech Republic** | 26/11/2009 (new agreement 20/04/2009) |
| Azerbaijan*** | 26/08/1983 |

| | |
|---|---|
| Armenia*** | 26/08/1983 |
| Kirgizstan*** | 26/08/1983 |
| Moldova | 03/09/2008 |
| Tadzhikistan*** | 26/08/1983 |
| Uzbekistan*** | 26/08/1983 |
| Ukraine*** | 26/08/1983 |
| Lebanon | 14/04/2005 |
| Seychelles | 27/10/2006 |
| San Marino | 17/07/2007 |
| Qatar | 20/03/2009 |

***Notes:***

******the agreement between the Republic of Cyprus and the Socialist Federal Republic of Yugoslavia continues to exist.*

***the agreement between the Republic of Cyprus and the Socialist Republic of Czechoslovakia continues to exist. The said agreement will cease to exist between Cyprus-Czech Republic as of 01/01/2010, which is the date of application of the new double tax treaty between Cyprus and the Czech Republic.*

****the agreement between the Republic of Cyprus and the USSR continues to exist.*

## 1. A brief overview of the legal framework of Germany

### a. Constitution

The Federal Republic of Germany, founded after the end of the Second World War on May 23, 1949, is a democratic and social federal state as evidenced by its Constitution. It is currently composed of sixteen states ("Länder"), including the city-states of Berlin, Hamburg and Bremen. The federal capital is Berlin.

The legal and political order of the Federal Republic of Germany is set forth in the Constitution. In addition to human and civil rights that are guaranteed, the Constitution contains rules aimed at the State organization, in particular on the relationship of federal and state governments and the constitutional authorities, the Federal President, the *Bundestag*, the Federal Government, the *Bundesrat* and the Federal Constitutional Court.

### b. Head of State

The Head of State is the federal President. The President has mainly representative and formal functions, including representing the Federal Republic under international law and appointing the federal ministers upon proposal by the Chancellor. In order for laws adopted by the *Bundestag* to enter in force, they must be signed by the President. Whether the President is entitled to review the compatibility of a proposed law to be signed with the Constitution, is extremely controversial. So far in history, German presidents have refused to sign laws eight times.

### c. Legislation

The legislative body of the Federation is the *Bundestag*. Its members are elected in free, equal and secret elections for four years. The *Bundestag* elects the Chancellor upon the recommendations of the Federal President. The Chancellor, together with the Federal Ministers appointed by the President upon the Chancellor's proposal, forms the Federal Government**.** In addition to the *Bundestag*, there is the *Bundesrat***,** which is composed of members of the state governments. While the *Bundesrat* is not a classic second legislative chamber, it has various rights to participate in federal legislation. Finally, the Federal Constitutional Court, the head of the legislature, decides in particular compliance by state action with the Constitution. It may, upon the initiative of another constitutional institution or a court of law, reject laws as unconstitutional and annul them. Secondly, a person may appeal to the Federal Constitutional Court on the grounds that such person's fundamental rights have been violated by state action.

### d. German states

The separation of powers is found again at the state level. There, state parliaments, state governments and (constitutional) courts exist as well.

### e. Legal sources

In contrast to countries of the Anglo-Saxon system of law, Germany is among the States where the law is initially codified in laws by Parliament and not developed from individual specific precedents. As national sources of law in the strict sense, laws, ordinances, statutes and administrative regulations are to be differentiated at the federal and state levels. Laws are passed by the parliaments, legal ordinances adopted by the governments, statutes are resolved by bodies and institutions, particularly municipalities. Last but not least, there are also the legal instruments of the European Union, such as the Regulation (EC) unfolding direct force of law in Germany and the Directive that basically requires the implementation by the national legislature. Single binding instruments of State action are in particular administrative acts and judicial decisions. Each State act must comply with the Constitution, and acts by the States must also comply with the respective state constitution.

### f. Jurisdiction

Jurisdiction is entrusted to the judges. In certain types of disputes, lay judges participate jointly with professional judges. At the federal level, in addition to the Federal Constitutional Court, there is the Federal Court of Justice as the supreme authority of ordinary jurisdiction, the Federal Labor Court, the Federal Social Court, the Federal Tax Court, the Federal Administrative Court and the Federal Patent Court. The judicial system at state level consists of local courts, regional courts and the appellate courts; here as well, specialized courts exist in addition to the ordinary courts. More generally speaking, the local or regional courts, depending on the amount in dispute and irrespective of whether a violation of federal or state law is alleged, form the first instance. There is always the possibility to have the ruling of the court of first instance reviewed by a court of the next higher instance. Whether an appeal against that decision is then possible, depends on various circumstances.

### g. Business law

Commercial and corporate law is governed by several bodies of law, which for the most part date back to pre-constitutional periods, i.e. entered into force prior to the founding of the Federal Republic. The Commercial Code [*HGB*] was adopted on January 1, 1900. The law relating to German companies with limited liability [*GmbHG*] entered into force on May 19, 1892. The Stock Corporation Act [*AktG*], while redrafted in 1965, dates back to a version adopted on January 30, 1937. In addition, for companies with their origin in European law, there are regulations in European directives and regulations. As an example, Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) contains provisions on the establishment of a European Company (Societas Europaea, SE) that are applicable to all European Union Member States.

The Commercial Code, in particular, contains general provisions on merchant status, on commercial partnerships, on accounting and on individual business transactions. Regulations on individual corporations are found in the aforementioned bodies of law. Cooperatives, governed by the Act on Trade and Industrial Cooperatives [*GenG*] can be characterized with some justification as a mix of corporations and associations. The aforementioned legislation contains provisions from establishing the respective companies, to the rights

and obligations of shareholders and general managers, to changes of the articles of association, and the dissolution of the company.

## 2. Ways in which a foreign company may enter Germany

There are several ways of selling products and offering services on the German market. A foreign enterprise may resort to a self-employed traveling salesman without establishing an office; or incorporate a full-value subsidiary. These options will be discussed in more detail below.

### a. Establishing a separate legal entity

In order to investigate the market and to solicit customers and business partners, establishing an independent branch office is often the first step to breaking into a new market. The key element of medium-term or long-term success, however, is setting up a subsidiary and thereby choosing the appropriate legal form.

German law makes available a number of legal forms, each of which differs in important aspects. For example, a significant consideration is the personal liability of the business owner. A corporation is usually liable only to the extent of its business assets, while its shareholders are not personally liable for its obligations. Creditors may, however, freely pursue the personal assets of a member of a partnership. Another point to be considered is capital demand and transferability of shares. The shares of a joint stock corporation can quite easily be transferred, whereas a public notary has to be involved in the selling and purchasing the shares of a limited liability company.

### b. Establishing a branch office

As an alternative, a foreign business can also establish a German branch that is more or less dependent on the head office. Such a German branch is geographically separate, but still part of the consolidated foreign company.

Although, a branch is not a separate legal entity from that of the company, it nevertheless can independently participate in business transactions. It establishes jurisdiction of the German courts and as a "permanent establishment," this legal form is also generally the starting point for taxation in Germany.

### c. Independent branch offices

Independent branches must be registered with the Commercial Register. The organizational documents of the foreign business must also be submitted and the Articles of Association of the foreign company need to be notarized and authenticated.

A branch can be useful when business activities in Germany will take place over a relatively short period of time. Apart from certain considerations arising under tax and capital markets law, however, it is generally preferable to incorporate a subsidiary with its own legal personality for medium-term or long-term activity in Germany. This is especially true since it is generally not as easy to incorporate as it is to register a branch e.g., a

*GmbH*. Also, it very much depends on the individual case whether the taxation of an independent branch is more favorable in comparison with the taxation of a subsidiary.

**d. Dependent branch office**

As an alternative, a foreign business can also establish a German branch that is dependent on the head office in every respect. Whereas business registration is required, the dependent branch office only will be taxed if it may be considered a permanent establishment under German tax laws.

**e. Distributors and sales representatives**

The easiest way to start doing business in Germany is to assign an external independent commercial agent or authorized dealer, or to set up some other form of cooperation with a third party. A foreign enterprise, cooperating with such an external agent or dealer, does not require a business registration. Also, in this case, no independent business activity is conducted on behalf of the foreign country and there is usually no nexus for imposing German tax on the foreign company.

**f. Personal prerequisites**

i. Self-employment

In order to obtain a residence permit for self-employment, evidence needs to be provided that (i) the business at least meets a regional need, (ii) that positive effects on the German economy can be expected, and (iii) that financing is secured. The first two conditions are usually considered met if EUR 250,000 is invested and five jobs are created. If these numbers fail to be attained, in the development of the business plan, special value needs to be placed on pointing out not only the viability of the business idea and the entrepreneur's experience, but also the impact of the company on the employment and training situation in the region in which the company intends to settle and its contribution to innovation and research. The authorities, however, are required to take into account in their decision most favored nation and goodwill clauses contained in bilateral agreements, as for example, in the Friendship, Commerce and Navigation Treaty entered into between the Federal Republic of Germany and the United States of America.

ii. Gainful employment

As a rule, the Federal Employment Agency approves all residence permits for self-employment. Permission may be granted only for specific activities and usually only if no German workers or equally treated workers from the European Union are available for the place of employment. There are, however, also jobs that require no approval and accordingly no priority check. U.S. citizens and nationals of Andorra, Monaco, San Marino, Australia, Israel, Japan, Canada and New Zealand may moreover be permitted to any employment in the country.

iii. Head of a branch office

Quite often, an employee from the foreign company is asked to run a branch office for some time in order to carry out market investigation and to solicit clients. However, German law of residency is ambiguous as to which provisions are to apply in such a case. Whether a permit of residence valid for more than only three months will be granted very much depends on the applicant's individual circumstances and the aliens' registration authority.

## 3. Regulation of foreign investments

Foreign investors in Germany are legally neither at a disadvantage nor do they receive preferential treatment compared with German investors. Various laws, however, place some requirements on persons involved in the establishment of companies or the handling of financial transactions. For example, the Anti-Money Laundering Act provides that lawyers and notaries involved in the establishment of a company have to check and record the identity of the contractual party prior to an attorney-client relationship is established. If the party is not personally present, usually a notarized copy of an identity document is to be requested, where required with an apostille.

### a. Regulations restricting foreign investment in Germany

Foreign individuals can, in principle, hold unlimited stakes in German companies or freely purchase real property. Furthermore, in Germany there is freedom of trade, so it is usually sufficient to indicate the intended activity at the trade office or regulatory authority. In some industries, however, a business license is required, such as for pharmacies, brokers, banks or restaurants. Applications must be filed prior to commencing work in the competent authority.

### b. Financial incentives available from the government to encourage the establishment of industries in Germany

The Federal Republic of Germany provides German and foreign investors with various funding opportunities.

The special program to promote investment in East Germany is committed to supporting economic development in East Germany. If a project meets the requirements of the program, a legal right exists to subsidies by means of the "investment allowance," which may be provided by direct grant or tax credit. Companies in the manufacturing sector, companies of certain production-related services (such as information technology, data processing, engineering, technical, physics and chemical testing and analysis services, advertising and market research companies) and establishments in the accommodation sector (from hotels to hostels to campsites) may benefit from such investment allowance. Funding is provided for the purchase and manufacture of new depreciable movable fixed assets, such as in the construction of a new permanent establishment serving the extension of an existing one or the taking over of a permanent establishment that had closed or would have closed without the takeover. This applies, however, in simplified terms, only if the investment is made between 2010 and 2014. For the current year 2011, up to 7.5% (15% for "small and medium-sized enterprises") of the acquisition or production costs are subsidized. For 2012, the subsidy amounts to 5% and 10%, in 2013 to 2.5% and 5%.

The investment promotion program "Joint Task Program for the Promotion of Industry and Trade" [*"GRW"*] is not limited to East Germany. Funding is available for the construction of new permanent establishments, the expansion or the diversification of production of an existing company, but also the takeover of a closed establishment or an establishment threatened with closure. Funding may be given in different ways, including by providing grants, soft loans or public performance guarantees. Depending on the area and size of the company, the maximum gross subsidy rate may be up to 50%, with the rate higher for small firms than for medium-size or large firms. The determination of the company size is based on the criteria "number of employees" (mandatory) and "sales" or "total assets" (alternate). Grants may be awarded for the acquisition and production costs of tangible assets or the acquisition costs of intangible assets (patents and operation licenses, but not patented technical knowledge) and for rented or leased assets. Grants may also be given for wage costs. Performance guarantees may be granted up to a maximum of EUR 10 million per case and 80% of the loan total. In addition to the Development Loan Corporation, loans with attractive interest rates may also be requested from banks in the different states.

In addition to these cross-state programs, there are numerous support programs at the local level, promoting the establishment of businesses in a specific community through financial grants, loans or preferential provision of business premises or operating equipment.

## 4. Forms of doing business in Germany

In the discussion that follows, only the most common German corporations and partnerships and their features will be considered. Whereas Germany comprises sixteen states (*"Länder"*) with separate legislative powers, corporate law is federal law adopted by the Bundestag. However, it does not follow that the regional courts with which partnerships and corporations have to be registered have a common registration practice. Since the official language in Germany is German, as a rule, documents have to be submitted in the German language. Nevertheless, some courts accept documents in the English language and do not require them to be translated.

### a. Gesellschaft mit beschränkter Haftung (GmbH)

The *GmbH* has had a long and successful history, which spans back to 1892, the year the first *GmbH* laws were enacted. Since then, the limited liability concept has spread throughout the world, making it one of German law's most successful exports.

The *GmbH* is a German private corporation and is by far the most popular legal form in the country. It is particularly valued by both domestic and foreign investors because it can be set up relatively quickly and its bylaws can to a large extent be tailored to shareholder needs. Moreover, shareholders can direct the actions of business management with binding instructions.

#### i. Establishing a GmbH

A *GmbH* can be established by a single shareholder, regardless of nationality and regardless of whether it is a natural person or a legal entity. In order to have a *GmbH* registered, two certified documents have to be

submitted to the Commercial Register: An operating agreement executed by the shareholders and an application signed by the company's managing director. In the operating agreement, the shareholders determine the company's legal name and registered address, specify its business purpose, and show the amount of the shareholders' ownership interests. In the application, the managing director has to confirm that the share capital has been paid in and that he has not been convicted of certain intentionally committed crimes against property during the last five years.

Both documents must be notarized. A notary, whose education in most of the German states is equivalent to that of a judge or an attorney at law, will authenticate the signature after having discussed the contract's relevant legal issues with the parties and having informed the managing director of his being legally obligated to provide unrestricted information to the Commercial Register as to whether any circumstances of the type described above might oppose his being appointed manager.

Neither the shareholder nor managing director need to be physically present for notarization, allowing for a *GmbH* to be incorporated from abroad. However, further documents, such as a certificate of authority, and apostilles may then be required.

As for costs incurred in addition to the individually negotiated legal fees, there will be costs of registering the company in the Commercial Register, and costs of certifying and filing the articles of association. While costs of registration amount to EUR 150 (EUR 240 on payment of a contribution in kind), the costs of the notary depend on the amount of the share capital and number of shareholders. In the event of a single shareholder and a capital of EUR 25,000, these costs will be around EUR 400 to EUR 500.

Once the contracts have been certified and registered capital has been paid in, the application may be sent to the Commercial Register of the competent local court. Depending on the workload of the local court, it may take a few days to a week or two until the company is registered.

ii. Limited liability

After the incorporation process is completed and the company has been entered into the Commercial Register, the company is liable only to the extent of its business assets. German courts allow veil piercing only under exceptional circumstances.

iii. Management

A *GmbH* may have one or more managing directors. Only natural persons can be appointed. The directors do not need to be shareholders but can be third persons without a financial interest in the company. Whereas the company must have a German business address, the director may, as a general rule, reside outside of Germany. Most courts no longer condition the appointment as director to the ability to enter Germany without a visa, which was the case prior to November 2008. Also, working in Germany as a director of a company does not require the Federal Employment Agency's consent. A special work permit is not necessary if the director will stay less than three months within any twelve month period. Instead, a simple business visa will suffice.

iv. Minimum share capital

A *GmbH*'s minimum share capital is EUR 25,000, to be contributed in cash or tangible assets, though an initial deposit of EUR 12,500 in order to have the company registered is sufficient in the case of a cash contribution. However, the shareholders may be held liable up to an amount equaling the outstanding capital.

Whereas an *"Unternehmergesellschaft (haftungsbeschränkt)"* ("mini-*GmbH*") requires share capital of only EUR 1, the distribution of profits is somewhat restricted: One fourth of a business year's profit has to be allocated to a statutory reserve until the share capital reaches EUR 25,000. This being the case, the mini-*GmbH* can be converted into a traditional *GmbH*.

v. Tax aspects

Under Germany's federal system, taxes are levied either at the federal, state or municipal level. The German constitution guarantees that each citizen can be taxed only in accordance with his or her productivity. The same applies to the requirement that each equally productive citizen or business be taxed at the same level.

German tax law has become increasingly specialized over the years and has reached a correspondingly high degree of complexity, just as in other developed industrial countries. Generalizations or oversimplifications regarding tax rates are therefore of little use for making international comparisons unless deductions potentially available to the individual taxpayer are also taken into account. In each case, the particular circumstances of the individual taxpayer must be assessed.

As a corporation and independent legal entity, the *GmbH* is a separate tax entity and is subject to, among others, corporate tax, local business tax, and, as a general rule, VAT. If profit is distributed to the individual shareholders, they usually must pay income tax at a flat rate of 26.375% including a solidarity surcharge (2011). Corporate shareholders can generally receive profit distributions at 95% tax-free (2011).

vi. Corporate tax

The income of corporations, its management or registered seat located in Germany is subject to corporate tax. The rate is currently 15% (2011) and the total tax burden including the solidarity surcharge is 15.825% (2011). Whether profits remain in the business or are distributed to shareholders is irrelevant for taxation purposes. Other than for partnerships, taxation on two levels results: first, at the corporate level (corporate tax), and in the case of profit distributions, again at the shareholder level (individuals: income tax; corporations: corporate tax). If corporations receive profit distributions, however, there is an exception in that only 5% of the income is subject to corporate tax (2011).

vii. Local business tax

All tradespeople, regardless of the legal form used, as well as all corporations, are subject to local business tax at the municipal level. For taxpayers subject to corporate tax, like the *GmbH*, the local business tax is effectively an additional burden.

The amount of the local business tax varies from municipality to municipality, with the rates ranging between 7% and approximately 17% (2011). A top priority when entering the German market will therefore be selecting

the most suitable location for your business from both a commercial and tax perspective. There are a number of municipalities within direct commuting distance from a large city that allow a business to benefit from all the advantages of the city while enjoying more favorable local business tax rates.

viii. VAT

As is customary in Europe, the German VAT is a classic "all phase net tax with input tax deduction." It taxes both services and the exchange of goods regardless of the legal form of a business. The standard rate is 19% (2011) and the reduced rate for numerous services as well as wares and goods, such as food, newspapers, books and artwork, is 7% (2011). In addition to that, the law provides a generous tax-exemption for various transactions like services of financial institutions, lease of real estate, and medical care.

Business owners must regularly submit to the Revenue Service (monthly or quarterly) VAT estimates in which they have themselves calculated their VAT liability over the course of the year. They may deduct VAT already paid (for example, to a supplier) as an input tax deduction. If a business owner has paid more VAT to its suppliers than it collected from its customers, it can request a refund of the difference from the Revenue Service. Unlike many other countries, in which legal proceedings have to be commenced against the Revenue Service in order to receive the pre-tax input, German financial authorities generally refund the excess amount in a timely manner, without the taxpayer having to take any additional measures. The right of businesses to deduct pre-tax input results in the end user, who cannot deduct pre-tax input, bearing the economic burden of the VAT. The VAT is thus an indirect consumption tax that is levied on the consumer via businesses.

An important exception to German VAT obligations exists for internal European trade in goods and services, provided that the buyer of the goods or services is subject to local VAT in the recipient country. Of particular importance is a VAT identification number, which is issued by every European country and identifies the business owner as a participant in internal European trade in goods and services of a particular country. If a VAT identification number is presented to the seller, it can issue its invoices free of VAT, with certain exceptions.

ix. Particularities

Any subsequent transfer of a *GmbH* ownership interest must be notarized.

**b. Aktiengesellschaft (AG)**

The joint stock company is a public corporation that can be listed on a stock exchange. Similarly to the *GmbH*, it is an internationally significant business form, without which it would be impossible to do business in the modern world. It is often used by larger companies. The advantages of the *AG* over the *GmbH* lie principally in the simple transferability of shares, making equity and debt capital easier to obtain and thus leading to less dependency on credit. It is for this reason that the *AG* is often the first choice for fast-growing mid-sized businesses.

i. Establishing an AG

While an *AG* can be established by one single shareholder, be it a natural person or a legal entity, be it a German citizen or citizen of a foreign country, establishing of a supervisory board with at least three members is mandatory.

As with the *GmbH*, a prerequisite for the establishment of the *AG* is its registration in the Commercial Register. This requires notarized bylaws (see above under *"GmbH"*), which must be signed by the founders and include provisions on company name and domicile, the purpose of the company, the amount of share capital and type of shares. The bylaws also need to designate the founders and their respective shareholdings. Furthermore, the *Aktiengesellschaft* needs to be registered with the Commercial Register. Prior to registration of the corporation, the founders need to appoint the first supervisory board, which in turn is to appoint a board of management. The founders, the board of management and the supervisory board need to sign the registration, and the signatures must be notarized. The registration is to declare, among other things, that the called-up capital is freely available to the board of management. In addition, the members of the board of management must warrant that they have not been convicted of certain property crimes during the past five years. The founders have to report the details of the establishment in a statutory report. It is to present the essential facts on which the adequacy of benefits for non-cash contributions depends, where those are provided. It also needs to be indicated whether a member of the board of management or the supervisory board has stipulated a special advantage, compensation or reward. This statutory report must in turn be examined by the board of management and the supervisory board, possibly by an external third party. All documents must be filed with the application at the Commercial Register by the notary involved.

In addition to the individually negotiated cost of a lawyer for advice and preparation of contracts, costs for the entry of the *AG* into the Commercial Register of EUR 300 per stock corporation are incurred. (In the event of an establishment with contributions in kind, this amount will increase to EUR 360). Furthermore, costs are incurred for the required notarization of documents, with the respective costs also depending on the number of founder members and the amount of capital stock. At least EUR 1,000 should be anticipated.

ii. Limited liability

After the incorporation process is complete and the company has been registered with the Commercial Register, the company is liable only to the extent of its business assets; German courts allow veil piercing only under exceptional circumstances.

As a rule, shareholders only can be held liable if they unlawfully and willfully inflict damage to the company by exerting undue influence on the managing directors or the members of the supervisory board.

iii. Management

Only natural persons may be appointed as managing director or members of the supervisory board. It is not permissible to contemporaneously be a member of the supervisory board and managing director.

Neither the managing director nor the members of the supervisory board need to be German citizens. The company's registered seat must be in Germany; the administrative center, however, may be elsewhere, inside or outside Europe.

iv. Minimum share capital

An *AG's* minimum share capital is EUR 50,000. It can be contributed in cash or in tangible assets. Generally speaking, one fourth of the share capital must be deposited before the company may be registered with the Commercial Register in case of a cash deposit. As a rule, tangible assets have to be made available to the managing director to their full extent.

v. Tax aspects

The *AG* is, as is any corporation, a separate tax entity. Among others, the *AG* is subject to corporate tax, local business tax and, as a general rule, VAT.

If German tax law is applicable, dividends paid out to private persons will, as a rule, be charged with a flat tax rate of 25%, i.e. 26.375% including the solidarity surcharge (2011). In case a corporation is a shareholder, 95% of the dividends will be tax-exempt (2011).

For further discussion, please see the respective paragraph under "*GmbH*."

**c. Cooperative**

The German legislator created the Cooperative (*"eingetragene Genossenschaft," "e. G."*) as a separate legal structure in the 19th century with the objective to strengthen the economic position of small business owners, particularly craftsmen and farmers, in regard to large-scale enterprises emerging at that time. A Cooperative may achieve this purpose by being able to negotiate more favorable terms than any of its members could individually. It pursues the goal to promote the economic activity of its members and therefore is an association of persons or legal entities doing more or less the same kind of business whilst, e.g., the stockholders of an *AG* or the shareholders of a *GmbH* do not need to be involved with the company's business. However, in 2006, the German legislator allowed persons under certain conditions to join a Cooperative by contributing capital with the only objective to obtain interest payments.

i. Establishing a Cooperative

The members of a Cooperative must enter into a written agreement including legal name, registered seat, object of business, provisions regarding the convening of the general meeting and public notifications and, particularly, regulations as to whether the members have to make additional contributions in case creditors cannot be satisfied in the course of insolvency proceedings.

The cooperative must be registered for entry in the Register of Cooperatives. The written agreement, documents regarding the appointment of the board of management and the supervisory board and the certificate of an audit association must be attached. The association will in particular examine whether the

economic conditions of the Cooperative could jeopardize interests of members or creditors of the Cooperative. As with *GmbH* and *AG*, the application must be certified by a notary and is to be filed electronically with the Commercial Register by a notary.

A court fee of EUR 210 is payable for the registration of the Cooperative in the Register of Cooperatives. Notary fees for registration depend among others on whether or not the cooperative has a minimum capital. As a rule, they rarely exceed about EUR 100. Once the registration has been submitted to the Commercial Register, registration and thus the coming into existence of the cooperative will usually occur within a few days up to about two weeks, on a case-by-case basis.

ii. Limited liability

As a rule, the Cooperative is liable only to the extent of its assets. However, as indicated above, the members may determine that in case of insolvency proceedings, members can be asked to make additional contributions. This would then also apply to members who withdrew from the Cooperative during a period of 18 months prior to the opening of insolvency proceedings.

iii. Management

The cooperative is an independent legal entity. Its organization comprises the members' general meeting, at least two managing directors – one may suffice in case the Cooperative has less than 21 members – and the supervisory body which is not mandatory if the Cooperative has less than 21 members. As the supervisory body's purpose is the control of the managing directors, a person cannot be member of both bodies at the same time.

By law, German citizenship is not a prerequisite for membership in a cooperative or for employment as a member of the board of management or the supervisory board.

iv. Share capital

The law does not require making contributions in cash or tangible assets in order to provide the Cooperative with a stock capital. The members are, however, free to stipulate other regulations. As an example, it can be determined that each member will share up to a certain amount in the Cooperative's assets and will have to make an initial contribution on an equity basis. Profits then will be allotted to the members according to their initial contribution and, in the following years, the accumulated credit. The agreement also can arrange for profits to be distributed and stipulate the respective conditions.

v. Tax aspects

As a rule, Cooperatives are subject to corporate and local business tax as well as VAT.

For further discussion including taxation of the shareholders, please see the respective paragraphs under "*GmbH*" and *"AG."*

**d. Partnerships**

The most important types of partnerships are the ordinary partnership (*"offene Handelsgesellschaft," "OHG"*) and the limited commercial partnership (*"Kommanditgesellschaft," "KG")*. Partnerships have limited legal capacity and shareholder liability is unlimited. An exception is made only for the limited partner(s) of a *KG*, whose liability is restricted to the guaranteed amount set out in the Commercial Register.

The popular *GmbH & Co. KG* is a legal form often seen among German mid-sized businesses. It is a special form of the "limited commercial partnership," whose personally liable partners are not natural persons but rather a *GmbH* or even a British private limited company by shares, for example. The purpose of this corporate form is to limit or avoid liability for the persons behind the company without having to forgo the tax advantages of a partnership.

i. Establishing a Partnership

In order to establish a partnership, at least two persons have to intend to do business under a legal name. The partners may be natural persons or legal entities, German citizens or citizens of foreign countries. If the partnership engages in commercial trade on a larger scale and as a result needs commercial facilities, its registration with the Commercial Register is mandatory. The application for entry into the Commercial Register has to be notarized and submitted electronically. The application has to list the partners' full name, date of birth and residential address together with the company's legal name, registered seat, German business address and the partners' power to represent. With regard to the *KG*, the application in addition to the aforementioned information has to identify the limited partners and their contribution.

There are no formal requirements as to the partnership agreement. However, it is recommended to conclude a written agreement that provides information as to the most important issues.

For the registration of a partnership, the Commercial Court charges EUR 100. If the partnership comprises more than three partners, these costs increase by EUR 40 for each further partner to be entered in the Commercial Register. In addition to that, notary fees for certifying the application for registration will accrue. The fee depends on several factors: the number of partners, and, with regard to the *KG*, the amount of the share of the limited partner(s). As to the *OHG* comprising two partners, the fee is EUR 51; for the *KG*, the fee amounts to at least EUR 42.

ii. Liability

It is not only the company with its assets that will be liable for debts of the partnership. In addition, each partner may fully have to account for business debts with his private assets. As the case may be, however, the compensating partner may demand reimbursement of advances from his partners.

As to the *KG*, generally speaking, the limited partners will not be held responsible if they made their contribution, whereas the general partner can be held responsible with private assets without limitation.

iii. Management

The statutory model for an *OHG* provides for the management to be exercised jointly. Each partner is entitled to represent the company. As with the *KG*, the limited partners are not vested with the authority to act on behalf of the company in regard to third persons. The partners, however, may depart from the statutory model to a great extent.

German citizens as well as citizens of other countries may be partners of a partnership, whether vested with managing powers or not.

iv. Share capital

No minimum share capital is required in order to establish or have registered an *OHG*, whereas the limited partners of a *KG* have to make a contribution, the value of which has to be entered into the Commercial Register. It is not mandatory that the contribution have been made in order to have the *KG* registered. If and to the extent to which the contribution was not made, however, the limited partner can be held liable with his private assets.

v. Tax aspects

The partnership is not subject to corporate tax or tax on income. Rather, profit will be apportioned to the partners. Depending on whether the respective partner is an individual person or a corporate entity, tax on income or corporate tax will be imposed.

Tax payable on the income of individual persons is based on rates ranging between 0% and a maximum of 45% (2011). With the addition of the "solidarity surcharge," the highest rate can reach a total of 47.475% (2011). The actual average tax rate is generally significantly lower than the maximum rate, given the availability of numerous deductions and exemptions.

As mentioned earlier, the corporate tax rate for corporations is 15% (2011) and the total tax burden including the solidarity surcharge is 15.825% (2011).

Even though partnerships are not subject to income or corporate tax, they are subject to local business tax. The German system of taxation provides, however, for a tax-free amount of Euro 24,500 annually (2011) for partnerships. Also, the local business tax is credited against the partners´ income tax.

The sale of goods and the offer of services by partnerships are generally subject to VAT. For further discussion on VAT, please see the respective paragraph under "*GmbH*."

**e. Independent branch office**

In comparison with a representative office, which is wholly dependant on the company, an independent branch enjoys certain autonomy, though it is not an entity of its own. Legally and in terms of how it is organized, an independent branch is part of the company. German law does not provide a definition of an independent branch. The German Commercial Code [*HGB*] stipulates, however, that the branch is to be

entered into the Commercial Register of the local court that has jurisdiction over the place where the branch has been established and regulates the requirements for having a branch registered.

An independent branch must be physically separated from the company's headquarters and main place of business and must be intended to exist on a continuing basis. It should be led by a manager entitled to make his/her own decisions in regard to more than marginal issues, have its own accounting system and its own working capital and business accounts.

i. Establishing an independent branch office

Unlike a representative office, an independent branch has to be registered with the Commercial Register; the corresponding application has to be notarized. The company has to provide evidence as to its existence, e.g., a certified and apostilled excerpt from the competent Commercial Register. Furthermore, a copy of the company's agreement has to be submitted as well as evidence as to the representative powers of the person applying for having the branch entered into the Commercial Register. All documents must be certified and apostilled. As a rule, translations are also required.

In addition to the costs of a lawyer, notary fees are payable for the registration of the branch into the Commercial Register. The costs are based on the legal status of the parent company. If it is similar to a corporation, costs similar to the registration of an *Aktiengesellschaft* (see above) are incurred. If it is more of a German limited liability company type, costs similar to the registration of a *GmbH* (see above) are incurred. It should also be noted that costs are incurred for notarization, apostille and translation of documents of the parent company. In particular, the costs of the apostille are determined by the parent company's state of origin.

ii. Liability

Whereas the manager of the branch in regard to business dealings represents the office independently from headquarters, the contracting partner always is and remains the company, i.e. the legal entity or the natural person(s) behind it. Generally speaking, the question as to the conditions under which the company or the company's owners may be held responsible for liabilities is to be determined by the laws, the company's headquarters are subject to.

iii. Management

The registration must include a domestic business address. The registration must also include information on the general managers of the company and their representation authorities.

It is possible to appoint a permanent representative for the branch, who independently of the general managers of the company is authorized to represent the branch in and out of court. The appointment of a permanent representative is not absolutely necessary, though. It is also possible to register a mere receiving agent with a domestic address, who can accept declarations of intent and notifications.

iv. Share capital

An independent branch must be provided with a working capital by headquarters and is also to open a bank account, but no particular amount of capital is required. For registration purposes, no evidence as to capital or account has to be produced.

v. Tax aspects

Germany taxes all profits attributable to "permanent establishments." As long as a branch fulfills the qualifications of such a permanent establishment, the non-resident foreign company is subject to German income tax or corporate tax liability for revenue earned through its German branch. Double taxation may be an issue where the business´s home country taxes all worldwide revenue, including the already taxable revenue of the permanent establishment in Germany. Usually, double taxation treaties provide relief.

Generally, the branch is also subject to local business tax and VAT.

## 5. Digest of the essential double taxation treaties

### a. Double taxation treaties regarding taxes on income and capital

Agreements are effective with:

Algeria, Argentina, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Bolivia, Bosnia and Herzegovina, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Finland, France, Georgia, Ghana, Greece, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, Ivory Coast, Jamaica, Japan, Jersey, Kazakhstan, Kenya, Korean Republic, Kuwait, Kyrgyzstan, Latvia, Liberia, Lithuania, Luxembourg, Macedonia, Malaysia, Malta, Mauritius, Mexico, Moldova, Mongolia, Morocco, Namibia, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Romania, Russia, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syria, Tajikistan, Thailand, Trinidad and Tobago, Tunisia, Turkmenistan, Ukraine, United Kingdom, USA, Uruguay, Uzbekistan, Venezuela, Vietnam, Zambia, Zimbabwe.

### b. Double taxation treaties regarding inheritance and gift taxes

Agreements are effective with:
Denmark, France, Greece, Sweden, Switzerland, USA.

### c. Further information

A list of all double tax treaties currently in effect or intended can be found in German language on the website of the Federal Ministry of Finance at:

http://www.bundesfinanzministerium.de/nn_39818/DE/BMF__Startseite/Aktuelles/BMF__Schreiben/Internationales__Steuerrecht/007__1,templateId=raw,property=publicationFile.pdf

COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN HUNGARY

## 1. A Brief Overview of the Legal Framework of Hungary

According to the Act XX of 1949 of the Constitution of the Republic of Hungary, the economy of Hungary is a market economy in which public and private property shall receive equal consideration and protection under the law. The Republic of Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy. The Parliament is planning to adopt a new Constitution in April of 2011. Its draft text is broadly available to the public. Based on this draft the aforementioned principles will survive.

The abovementioned Constitution is the main legal source in Hungary, but there are also other important regulations which regulate the business and corporate law such as the Act IV of 2006 on Business Associations (hereinafter referred to as the "Company Act"). The Company Act regulates the foundation, organization and operation of business associations with a registered office in Hungary, the rights, obligations and responsibility of the founders and members (shareholders) of business associations, as well as the transformation, merger and demerger of business associations and the winding up of such associations without legal succession.

## 2. Ways in which a Foreign Company may enter Hungary

### a. Establishing a separate legal entity

Foreign investors mostly choose such a company form in which they have limited liability, jointly and severally with the other partners. For this reason the most preferred company forms are the limited liability company "korlátolt felelősségű társaság" (Kft.) and the company limited by shares established privately "zártkörű részvénytársaság" (Zrt.), however there are many other forms of partnership (see clause 4).

### b. Establishing a Branch Office

The Act CXXXII of 1997 on Hungarian Branch Offices and Commercial Representative Offices of Foreign-Registered Companies governs the general conditions and rules for the establishment, operation and termination of branch offices and direct commercial representative offices of foreign-registered companies in Hungary. The Act sets forth the following definitions:

i. Branch Office: an organizational unit of a foreign company, without legal personality, vested with financial autonomy and registered as an independent form of company in Hungarian company registration records as a branch office of a foreign company;

ii. Commercial Representative Office: shall mean an organizational unit of a foreign company that is not involved in business activities in its own name, which organizational unit is registered as an independent business entity in the Hungarian register of companies and is engaged - in the name and on behalf of the foreign parent company - in the mediation, preparation and conclusion of contracts, provision of information to clients and partners and other related client service activities.

### c. Use of Distributors and Sales Representatives

According to the Act CXVII of 2000 on the Commercial Representation Contracts of Self-Employed Commercial Agents, the term "Commercial Agent" shall mean an intermediary acting on the basis of remuneration, who has continuing authority to negotiate the sale or the purchase of goods on behalf of another person, or to negotiate and conclude such transactions whether in the name of the principal or in his own name on behalf of that principal. "Self-Employed Commercial Agent" shall mean when the intermediary pursues commercial agency activities without being bound under an employment relationship. Self-employed commercial agents shall engage in such activities only on the basis of a commercial agency contract. All commercial agency contracts must be made in writing.

Foreign companies may conclude agreements with other Hungarian companies as sales representatives. Foreign companies are also free to enter into arrangements with any Hungarian entities for the purposes of doing distribution activities.

### d. Other

Foreign companies may conclude contracts freely with other Hungarian and foreign companies. There are no special restrictions in this respect. The generally accepted international commercial rules prevail so the parties may stipulate both the governing law and the jurisdiction, where the potential legal disputes are settled including ordinary courts or arbitration.

## 3. Regulation of Foreign Investments

### a. Regulations restricting foreign investment in Hungary

There are no special restrictions, regulations or reports necessary for foreign investment in that the same rules apply to joint ventures of foreign companies incorporated in Hungary as to other Hungarian entities. In other words, companies owned by foreigners enjoy the same treatment as the domestic ones. However, employment of some foreign citizens in Hungarian companies is subject to special licenses.

### b. Financial incentives available to encourage the establishment of industries in Hungary

i. Tax incentives related to investments

According to the Act LXXXI of 1996 on Corporate Tax and Dividend Tax, taxpayers with registered offices or business establishments registered by the court of registry and/or the competent local authorities in socially and economically underdeveloped regions, as established by the Government Decree on the List of Favored Regions of Regional Development, may claim the whole amount of the tax as investment tax allowance in respect of a project for manufacturing products commenced in the region after December 31, 1996, and operated there after starting up, of a value of at least three billion forints, for a period of ten calendar years following the year in which the project was installed.

ii. Special Allowance granted by the Hungarian Government

Foreign companies may apply for special allowances to be granted by the Hungarian government. The allowances are subject to the negotiations between the government and the foreign companies concerned. The measure of the allowances depends on many factors such as the scale and purpose of the investments, the potential to create new jobs, etc.

## 4. Forms of doing Business in Hungary

According to the Company Act, business associations may only be founded in the forms regulated in the Act. The following forms exist: general partnerships (kkt.), limited partnerships (bt.), limited liability companies (kft.) and public and private limited companies (rt.).

### a. The legal process involved in establishing the business form.

i. Definition of Various Forms

1) General Partnership (kkt): By virtue of the Memorandum of Association for the establishment of a general partnership, the members of the partnership shall undertake to jointly engage in business operations with unlimited and joint and several liability, and to make available to the partnership the capital contribution necessary for such activities. The designation "közkereseti társaság" (general partnership), or its abbreviation "kkt.," shall be indicated in the corporate name of the partnership.

2) Limited Partnerships (bt.): By virtue of the Memorandum of Association for the establishment of a limited partnership, the members of the partnership shall undertake to jointly engage in business operations, where the liability of at least one member (general partner) for the obligations not covered by the assets of the partnership is unlimited, and is joint and several with all other general partners, while at least one other member (limited partner) is only obliged to provide the capital contribution undertaken in the Memorandum of Association, and, with the exceptions set out in Company Act, is not liable for the obligations of the partnership. The designation "betéti társaság" (limited partnership), or its abbreviation "bt.," shall be indicated in the corporate name of the partnership.

3) Limited Liability Companies (kft.): The definition of a limited liability company (in Hungarian: korlátolt felelősségű társaság) is as follows: A limited liability company is an economic association established with a primary capital comprising predetermined primary stakes, in which the liability of members vis-à-vis the company shall extend to providing the primary stake and other pecuniary contributions as eventually defined in the Memorandum of Association. Members shall not be liable for the obligations of the company. The term "limited liability company" or its (Hungarian abbreviation: "Kft.") shall be indicated in the firm name of the company.

4) Public and Private Limited Companies (rt.): The company limited by shares is an economic association founded with a share capital (subscribed capital) consisting of shares of a pre-determined number and face value, in the case of which the obligation of members (shareholders) to the company limited by shares extends to the provision of the face value or the issue price of shares. A company limited by shares may be established privately or open to the public and, consequently, may operate in the form of public (nyílt

részvénytársaság, briefly nyrt.) or private limited companies (zártkörű részvénytársaság, briefly zrt.). The designation "részvénytársaság" (company limited by shares) and an indication as to whether it is private or public, that is to say, the abbreviation "zrt." or "nyrt." shall be indicated in the corporate name.

ii. Term

The kkt., bt., kft., and rt. may be set up either for an unlimited period of time or for a determined period of time.

iii. Registration Proceeding

The most preferred company forms are the Kft. and Zrt. Below is a review of these two company forms in connection with the cost of registration and necessary documents.

Two proceedings exist to set up a company. The first is the simplified registration proceedings with standard contract forms (hereinafter referred to as "Option 1"). The second is the ordinary registration proceedings (hereinafter referred to as "Option 2"). The advantages and disadvantages of the two Options are evident in three areas:

1) The standard contract forms in Option 1 offer very limited freedom to companies in elaborating their corporate documents, while Option 2 allows setting forth the provisions in a more sophisticated way in compliance with the clients' demands.

2) Proceedings with Option 1 are swifter. Under Option 1, the registration of the company is in effect within 1 hour, at the latest, from the time the documents are submitted to the Court for Registration. Under Option 2, the registration of the company is effected within 15 days, at the latest, from the time the documents are submitted to the Court for Registration.

3) There are also great differences in the cost of registration between Option 1 and Option 2 (see below).

iv. Cost of the Registration

The following disbursements shall incur when choosing Option 1:

1) Court fees for registration: HUF 15,000, (approx. USD 75,);

2) Translation costs: the Certificate of Incorporation of the mother company should be officially translated, which costs about HUF 20,000 - 40,000, (approx. USD 100, to USD 200,); and

3) Professional fees that are subject to arrangements with a law office.

The following official disbursements shall incur when choosing Option 2:

1) Court fees for registration: HUF 100,000, (approx. USD 500,);

2) Publishing costs: HUF 25,000, (approx. USD 125,);

3) Translation costs: the Certificate of Incorporation of the mother company should be officially translated, which costs about HUF 20,000 - 40,000, (approx. USD 100, to USD 200,); and

4) Professional fees that are subject to arrangements with a law office.

v. List of Documents

When submitting the application for registration (Option 1 and Option 2) with the Court for Registration, the following documents must be attached and/or retained:

- Deed of Foundation (Article or Memorandum of Association);
- Bank certificate on due payment of the initial capital;
- Specimen signature(s) signed by the managing director(s);
- Declaration of acceptance on behalf of the appointed managing director(s), supervisory board members, auditor, and manager, if any;
- Certificate of Incorporation of the mother company with official Hungarian translation;
- List of owners in case of limited liability company (even if there is only one shareholder);
- Power of Attorney for a Hungarian lawyer;
- Permission for use of the real estate as the registered seat of the company.

Subject to the provisions of the Deed of Foundation, some other documents might also be necessary.

**b. Liability of the owners of each business form**

i. General Partnership (kkt.): The members of the partnership shall undertake to jointly engage in business operations with unlimited and joint and several liabilities.

ii. Limited Partnership (bt.): The members of the partnership shall undertake to jointly engage in business operations where the liability of at least one member (general partner) for the obligations not covered by the assets of the partnership is unlimited and is joint and several with all other general partners, while at least one other member (limited partner) is only obliged to provide the capital contribution undertaken in the Memorandum of Association and with the exceptions set out in The Company Act, is not liable for the obligations of the partnership.

iii. Limited Liability Company (kft.): The liability of the members vis-à-vis the company shall extend to providing the primary stake and other pecuniary contributions as eventually defined in the Memorandum of Association. Members shall not be liable for the obligations of the company.

iv. Public and Private Limited Companies (rt.)**:** The obligation of members (shareholders) to the company limited by shares extends to the provision of the face value or the issue price of shares.

**c. Management of the Business Form**

The management of a kkt. and a bt. shall be handled by the member or members entitled thereunto in the capacity of executive officers. The management of a kft. shall be conducted by one or more managing directors. In connection with these business forms no governing/management board exists.

The management of a zrt. or an nyrt. shall be conducted by the management board, except where the powers of the management board are conferred under the Memorandum of Association of a zrt. upon a single executive officer. The Memorandum of Association of an nyrt. may also contain provisions to confer management and supervisory functions upon the board of directors (zrt. or nyrt. operated by the one-tier system). Such a zrt. or nyrt. shall have no supervisory board, and the members of the board of directors shall be treated as executive officers.

The members of the management may equally be Hungarian or non-Hungarian nationals.

**d. Minimum share capital**

No minimum share capital exists when a kkt. and a bt. are set up.

The minimum share capital requirement of a kft. is equal to HUF 500,000, (approx. USD 2500,), and for an rt. is equal to HUF 5,000,000, (approx. USD 25,000,).

**e. Treatment from a tax standpoint**

The abovementioned business forms are treated equally from a tax standpoint, and the same corporate and dividend tax laws are applicable to all of them.

**f. Other Considerations**

i. Supervisory Board

A supervisory board is optional. If established, it should consist of at least three members who may equally be Hungarian or non-Hungarian nationals. A supervisory board is mandatory only if the yearly average number of employees exceeds 200; in this case one-third of the supervisory board members should be elected from among the employees.

ii. Auditor

Appointment of an auditor is optional. Statutory audit of the accounts is required where prescribed by law with a view to the protection of public assets. With the exception set out below, the auditing of accounting documents shall be statutory for all companies keeping double-entry books. In all cases in which an audit is not statutory on the basis of the Accounting Act or another legislation, the company shall be free to decide

whether to employ an auditor to review its accounting documents or not. The auditing of accounting documents shall not be statutory if both of the conditions below are satisfied:

1) the company's annual net sales (calculated for the period of one year) did not exceed 100 million forints on the average of the two financial years preceding the financial year under review, and

2) the average number of employees of the company of the two financial years preceding the financial year under review did not exceed 50 persons.

iii. Fiscal Year

The fiscal year under Optiona l depends on the regulations of the Deed of Foundation. Generally, the fiscal year is the same as the financial year but it may be different.

iv. Subscribed Capital

The subscribed capital is commonly paid in Forint but may be paid in EUR or USD.

v. Assistance of a law firm

In the course of the registration proceedings involvement of a law firm is mandatory.

**5. A List of the Tax Treaties Currently in Effect with Hungary**

Double taxation avoidance treaties are in force between Hungary and more than 70 countries including all the EU member states, the United States, China, Russia, Canada and Japan.

COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN JAPAN

## 1. Ways in which a foreign company can enter Japan.

The choice of the legal frame is the important aspect of starting business operations in Japan. The following is a discussion of the legal framework commonly used for the operation of businesses in Japan including subsidiaries, branch offices, distributors and sales representatives.

### a. Establishing a separate legal entity

The Company Act (*Kaisha Ho*) governs the establishment of a separate legal entity as a subsidiary. The Company Act provides two types of companies with limited liability, a *Kabushiki Kaisha* (commonly called "KK") and a *Godo Kaisha* (commonly called "GK"). KK is the most standard corporate structure, while GK is similar in some ways to a US limited liability company (LLC). KK, as a traditional company form, is the most common business entity under Japanese business practice. GK is a new type of company that was introduced in 2006. Compared to KK, the structure of GK is quite simple and flexible, but is not common in the Japanese business sector.

There are several categories for KKs that are subject to different rules and restrictions. Among those, a "Closed KK" is a KK in which all shares are classified as "transfer restricted shares," whereas an "Open KK" issues freely transferrable shares. An Open KK is designed for a corporation of a larger size, including listed companies. A Closed KK is more suitable for a smaller, closely-held business. For a subsidiary of a foreign corporation, a Closed KK is ordinarily more suitable because the corporate structure, record and notice requirements are simpler than in the case of an Open KK. It is also less burdensome and more cost efficient to maintain a Closed KK. Shareholders (*kabunushi*) of a KK have no personal liability unless the corporate veil is pierced by court in extraordinary circumstances (e.g., in cases of fraud, etc.).

To form a subsidiary in Japan, certain legal procedures must be taken including registration in the Commercial Registry and reporting to the government, as more fully discussed below.

### b. Establishing a branch office

The option of establishing a branch office is also available within the legal framework. A branch office does not have a separate legal personality from its head office; a foreign corporation and its branch office in Japan are deemed to be the same and undivided legal entity. From a tax perspective, the difference between a liaison office and a branch office is important. A liaison office is a fixed place of business established by a foreign corporation solely for the purpose of engaging in advertisement, publicity, offering and gathering information, market research, etc. on behalf of its head office. A liaison office cannot engage in any "profit-making" business activities and is, therefore, not subject to Japanese taxation. On the other hand, a branch office may engage in "profit-making" business activities, but it becomes subject to taxation. For example, if a liaison office conducts negotiations with prospective customers in Japan leading to the conclusion of sales contracts, such activities would be deemed as "profit-making" and tax would be imposed on the office.

A branch office with a representative who resides in Japan may open a local bank account and enter into a tenant agreement under the name of the branch.

**c. Use of distributors and sales representatives (sales agencies)**

Japanese Civil Code and Commercial Code governs sales agencies and distributorships in the absence of an agreement specifying a foreign law as the governing law. In principle, parties to agency or distributorship agreements may freely determine their rights and obligations.

One caveat is a certain limit on termination of sales agencies and distributorships. A manufacturer's freedom to terminate a Japanese agent or distributor depends upon whether the agreement sets forth a continuous and unlimited term or not. If a manufacturer enters into an agency or distributorship agreement with a continuous and unlimited term, the manufacturer cannot terminate the agreement unilaterally without justifiable cause. This protection may not be waived by the Japanese agent or distributor. To avoid the severity of this rule, the parties typically agree upon a definite term and specify a series of grounds for termination such as bankruptcy, insolvency, attachment of properties or appointment of a receiver.

Transactions involving the movement of goods and services between Japan and foreign countries are subject to the Foreign Exchange and Foreign Trade Law, which establishes banking rules, import quotas and various reporting requirements.

**d. Formation of KK and Branch Office**

i. KK

1) Formation

A KK must be formed by at least one promoter, who shall prepare and obtain notarization of the KK's Articles of Incorporation. The Articles of Incorporation must specify the KK's trade name, the address of its principal office, the name and address of its promoter and such other items as required by the Company Act.

There is no minimum capital requirement. A KK can be established with a paid-in capital of JPY 1, even though this will in most cases not be recommended from a business perspective.

A KK must appoint at least one director. A KK may have a board of directors with at least three directors. Certain types of KKs must establish a board of directors. If a KK has only one director, such a director is authorized to decide and perform the KK's businesses. If a KK has a board of directors, one or more representative directors must be selected among the directors. A KK may appoint, or if a KK has a board of directors, such KK must appoint, at least one statutory auditor who has authority to oversee the director's performance. There is no legal requirement of citizenship for directors, although at least one director (or if a KK has a board of directors, one representative director) must be a Japanese resident with a residential address in Japan.

Within two weeks of the initial general shareholders meeting, the KK must be registered with the Legal Affairs Bureau of the Ministry of Justice. At formation, the KK must pay a one-time registration tax of 0.7 percent of all paid-in capital or JPY 150,000, whichever is greater.

Finally, with certain exceptions, a submission of a report of acquisition of the shares by a foreign corporation to the Bank of Japan is required to be made within fifteen days after the date of the acquisition of the shares. Pre-investment examination may be required if the business to be conducted falls into restricted categories (such as agriculture, leather, arms, aircrafts).

2) Internal Governance and External Relations

The KK form has no formal officers, and titles such as president, executive director and chairman are given for business purposes only. Instead, control over the affairs of a typical KK is concentrated in five sources:

- the Articles of Incorporation, which may provide for preferred or non-voting shares, define a specific dividend policy, subject the transfer of shares to the approval of the board of directors or shareholders meeting, and otherwise specify the KK's procedures and operations;
- general shareholders meetings, which are held either annually or as necessitated by emergency and cover such matters as the approval of financial statements, alteration of the Articles of Incorporation, the approval of mergers and other organic changes, and the dismissal of a director or statutory auditor;
- meetings of the board of directors, called by any director and held at least once annually, at which the board convenes to make decisions on such matters as the alteration of management structure or the disposition of major assets, to exercise supervision over directors entrusted with the management of each of the KK's divisions, and address other issues concerning the operation and management of the business. In the case of a Closed KK, one or more directors must be appointed each of whom represents the KK but no board of directors is required;
- representative director(s), representing the KK in all matters, whether commercial and/or legal; and
    - statutory auditors who monitor the board's performance, demand annual business and financial reports from management and employees, and call meetings of the board of directors if a director is believed to be engaging in activity detrimental to the KK. A Closed KK is not required to have a statutory auditor.

ii. Branch Office

1) Formation

Since a branch office is not an independent legal entity, the procedures of the establishment of a branch office by a foreign corporation are simple. The procedures require submission of documents to relevant authorities and the appointment of a representative in Japan who must be a Japanese resident with a residential address in Japan. The following documents must be submitted to the Japanese Government at the time that the branch office is established:

- Notice of Establishment of Salary Paying Office

This notice should be filed with the competent national tax office within one month after the establishment of the branch office. This notice is related to withholding taxes on the salaries paid to the personnel of the branch office.

- Reports concerning Labor and Welfare Matters

  Depending upon the number of people employed by the branch office, there may be additional requirements pertaining to compulsory programs supervised by the Ministry of Welfare and Labor. For example, any office with five employees or more is required to file reports under the Welfare Annuity Law, as well as under the Health Insurance Law. In addition, for such an office there are reports which must be filed under the Unemployment Insurance Law with the local Employment Security Office of Labor. For an office with ten employees or more, Rules of Employment must be adopted and filed with the competent Labor Standards Supervisory Office pursuant to the Labor Standards Law.

- Application of Registration

  Within fourteen days of its establishment, a branch office must be registered with the Legal Affairs Bureau. In this registration, information pertaining to the foreign corporation must be disclosed, such as trade name, address of head office, governing law, number of authorized and issued shares, capital amount, names of directors and so on.

- Report of foreign investment

  Within fifteen days of the establishment of a branch office, a report must be filed with the Ministry of Finance and the Ministry of Economy, Trade and Industry. This report should be filed through the Bank of Japan. Pre-investment examination may be required if the target business to be conducted falls into restricted categories (such as agriculture, leather, arms, aircrafts).

2) Internal Governance

Since a branch office is not an independent legal entity, the internal governance must be handled by the head office of the foreign corporation.

iii. Comparison of taxation of a KK and a branch office

There are certain differences between the taxation of a KK and a branch office:

- A branch office may remit earnings to its head office of the foreign corporation, free of Japanese withholding tax. A KK is subject to a 20% (or lower treaty rate) withholding tax on dividends paid to a foreign corporation or a parent company. The US treaty, for example, reduces this rate to 10% or 15% depending on various factors. Thus, the effective tax rate on fully remitted earnings of a KK will be higher than on the fully remitted earnings of a branch office.

- A KK may not deduct bonus payments made to directors or statutory auditors. Payments made on a level basis throughout the year (normal salary, for example) would be deductible.
- A branch office may provide its head office with certain tax advantages. For example, it may be possible for the head office to deduct the branch office's start-up losses against its other income.
- A branch office may allocate a portion of its head office administrative expenses against the branch office activities and obtain a tax benefit in Japan. Administrative expenses cannot be allocated from a parent company to a KK. They may only be charged to the KK when it can be demonstrated that they were incurred for the benefit of the KK. This usually requires that there be a written agreement under which the KK requests that the services be performed before the performance takes place.

Based on these differences, a branch office may enjoy a tax advantage compared with a KK. However, a KK form is still the most common form of doing business in Japan because there is a possibility that the Japanese Tax authority will review the books and records of the branch office, as well as the head office.

**2. Tax treaties and incentives for foreign direct investments**

As of October 31, 2010, Japan has entered into tax treaties with 59 countries and regions. Certain tax, loans with lower interest rates, consultation services and other benefits may be available for foreign direct investments in Japan. For more information, please visit the following websites listed below:

Ministry of Economy, Trade and Industry (METI):
http://www.meti.go.jp/english/policy/index_FDI_into_Japan.html

Japan External Trade Organization (JETRO):

http://www.jetro.go.jp/en/invest/index.html

COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN THE NETHERLANDS

## 1. A brief overview of the legal framework of the Netherlands

The Netherlands is a perfect business location for foreign entrepreneurs (2,000 subsidiaries in Amsterdam, employing 140,000 people). Our country is the gateway to the densely populated Western Europe and has a well-developed logistic and technical infrastructure. Its highly skilled, multilingual and flexible work force, favourable tax regulations for businesses, stable political climate and high standard of living make The Netherlands the ideal place to start a business. Furthermore, the economy is open to foreign investors and is not restricted by specific government regulations.

Dutch law is based on the continental European civil law tradition and is – The Netherlands being a founding member of the European Union – highly influenced by the laws of the European Union. This means that the law is mostly written, but one should not underestimate the relevance of legal precedents as the Dutch Civil Code (from 1992) is updated frequently with new case law.

## 2. Ways in which a foreign company may enter the Netherlands.

### a. Incorporating a Dutch entity

The most important legal entities under Dutch Law for international commercial trade are the Besloten Vennootschap ("B.V.": private company with limited liability) and the Naamloze Vennootschap ("N.V.": public limited company).

In general the B.V. and the N.V. share basic characteristics, but there are also important differences:

i. A B.V. can only issue registered shares, whereas a N.V. can issue both registered and bearer shares;

ii. The articles of association of a B.V. must contain share transfer restrictions, while this is not compulsory for a N.V.;

iii. The minimum share capital for a B.V. is € 18,000, the minimum share capital for a N.V. is € 45,000;

iv. Only a N.V. can be listed at the Euronext stock exchange in Amsterdam.

The incorporation procedure of a B.V. or a N.V. requires the involvement of a Dutch civil law notary. Together with the founders of a company, the notary will draft a deed of incorporation (articles of association) in the Dutch language. The (minimum) costs for these deeds are approximately € 1,350 - € 1,750 (excluding 19% V.A.T. and dues) for a standard entity. The articles of association contain, among others, the name of the company, the company's registered office address, the authorised capital of the company, and – in case of a B.V. – share transfer restrictions.

In addition, a declaration of no-objection needs to be obtained from the Ministry of Justice. The cost for this declaration is approximately € 100. The declaration will be provided as soon as the credentials of the founders (e.g. legalised passport copies, legalised deed of incorporation of the foreign parent company) have been verified. It normally will take seven working days to obtain the declaration, but it could be a more time consuming process if the credentials of the founders are hard to trace.

It is also recommended to conduct a trade name search in order to find out whether the intended company name or a similar name has already been registered with the Chamber of Commerce. Because of intellectual property regulations, prior registrations of a similar trade name could result in an objection to use the company name. After execution of the deed of incorporation, the company must be registered with the Dutch Chamber of Commerce, which finalises the incorporation procedure. The Chamber of Commerce will charge a minimum annual fee of € 120.

**b. Structure of a Dutch entity; Board of Directors and General Meeting**

Each B.V. and N.V. has a Board of Directors (minimum 1 director). There are no legal restrictions as to who can become a managing director on the Board (i.e. Dutch residency or nationality is not required). The articles of association may contain specific requirements about the eligibility of possible directors. Each managing director has to be registered with the Chamber of Commerce.

The Board of Directors is charged with the management of the company and represents the company. Unless the articles of association or law provide otherwise, the power to represent the company is unlimited and each individual managing director is authorised to do so. Usually, the articles also prescribe that certain major management decisions (including the appointment of managing directors) are subject to the prior approval of the General Meeting of Shareholders or – in case of a two-tier management board – the Supervisory Board. Directors usually are appointed and dismissed by the General Meeting.

**c. Supervisory Board**

Dutch corporate law is known for its two-tier management system. Although the B.V. and the N.V. are only obliged to install a Supervisory Board in specific cases, many entities do have one. In this two-tier management system, there are two different executive bodies in addition to the General Meeting: the Board of Directors and the Supervisory Board. The Board of Directors conducts the company's daily business. The Supervisory Board oversees and advises the Board of Directors independently and actively. The Supervisory Board is usually appointed by the General Meeting. Except for board members anyone can have a seat on the Supervisory Board.

**d. Participation of employees**

An entrepreneur who has 50 or more employees should establish a works council. The employees can participate in the decision-making process of the company through this body. According to the law the works council has, depending on the subject at issue, the following rights: 1. the right to render advice; 2. the right of approval; and 3. the right of information, consultation and initiative.

### e. Liability

As mentioned above, the completion of the incorporation could take several weeks. In the meantime the company can already do business. The B.V. or N.V. has to be registered with the Chamber of Commerce as a B.V. or a N.V. in the stage of incorporation. When the incorporation is completed, the B.V. and the N.V. can ratify all transactions realised during the incorporation period. As long as the ratification has not taken place, founders or directors are bound jointly and severally to these transactions on behalf of the B.V. or the N.V.

When the incorporation is finalised, the shareholders are only liable for their share in the company. In principle, the managing directors are not liable for debts of the company. They will be liable, however, if serious negligence by the managing directors has been proven.

### f. Other Options: Branch Offices, Distribution, Agency, Franchise

As an alternative to incorporate a Dutch entity, a foreign entrepreneur may establish a branch office in The Netherlands. In this case it is not necessary to incorporate a Dutch legal entity. A branch office can also be established as, for example, a British Ltd, a German GmbH or a Delaware Corporation. Entities outside of the European Economic Area (the 27 countries of the European Union plus Norway, Iceland and Liechtenstein) have to comply with specific regulations to meet the levels of Dutch corporate law. Among others, these entities also need to file their annual financial reports (approved by an accountant) and meet the minimum capital requirements. All branch offices have to be registered with the Chamber of Commerce.

Furthermore, it is possible to enter the Dutch market by appointing a distributor, an agent or a franchisee:

A distributor is a separate entity which will buy goods or services from the foreign entrepreneur and will sell them at its own risk to clients in The Netherlands. The foreign entrepreneur will only agree upon a distribution agreement with the distributor.

A foreign company can also choose to appoint an agent in The Netherlands. This agent will mediate between the foreign company and possible new clients in The Netherlands. If the entrepreneur agrees with a new client, a contract will be concluded between these parties. The agent is not included in the contract; the agent normally receives a commission for each new client he or she gains for the entrepreneur.

Lastly, one can choose a franchise agreement with a company based in The Netherlands. This company will be allowed to use the image of the foreign franchisor to sell the products or goods in The Netherlands. The foreign entrepreneur will receive fee from the Dutch company, while this company bears the economic risk.

### g. Mergers

The Dutch Merger Code of the Social and Economic Council ('SER') provides a specific merger 'law' to protect the interests of employees during mergers. The Code is applicable to all mergers involving an entity established in The Netherlands and an entity that has at least 50 employees. The merging parties will have to consult their employees in case of a merger.

### h. Corporate Governance

Furthermore, foreign entrepreneurs should take notice of the Dutch Corporate Governance Code (known as Code Frijns, formerly known as Code Tabaksblat). This Code stipulates the principles of good governance in The Netherlands, such as regulations on bonus systems, and mergers and financial statements. Although the Code is in principle only applicable on stock listed Dutch companies, recent case law shows that courts also apply the Code on non-listed Dutch companies.

#### i. Employment law

As a foreign employer in The Netherlands it is important to know that there are many legal provisions that protect the interests of the employee both Dutch and foreign. There are, among others, provisions regarding holidays, minimum wages, working hours and employment of disabled employees. Dutch law is unique for its preventive dismissal assessment.

In The Netherlands, employees are protected if the company they work for is transferred to another company. If a foreign entrepreneur is acquiring a Dutch entity, one should bear in mind that in principle all rights and obligations deriving from the labour agreements will be transferred to the acquiring company.

### 3. Contract law

We would like to point out several striking issues of Dutch commercial contract law:

Firstly, foreign entrepreneurs should be aware of the major consequences that may arise when breaking off negotiations in The Netherlands. A party can be held liable if the party breaks off negotiations during the pre-contractual phase and the other party had the legitimate expectation that a contract would be concluded. This liability can lead to the obligation to compensate the other party for the costs made during the negotiations or even for the lost revenue which could be expected if a contract had been formed. This can be avoided, however, by making certain reservations during the negotiation stage.

Secondly, Dutch law stipulates that not only the literal meaning of a contract is relevant for the interpretation of a contract. The Dutch Supreme Court ruled that also the parties' intentions and the meaning they can reasonably give to their behaviour and statements are decisive for the interpretation. This is referred to as the "Haviltex-criterion".

#### a. General Terms & Conditions

Furthermore, foreign entrepreneurs should take notice of the strict rules Dutch law has with respect to the application of general terms and conditions. The party applying general terms and conditions has to give the contracting partner a reasonable opportunity to take notice of the terms and conditions. This can be done by handing over (also possible by e-mail) the terms and conditions before or at the time of contracting.

Consumers are protected by law against unreasonable, onerous clauses in general terms and conditions. The Dutch Civil Code stipulates several clauses which are void ('black list') and clauses which can be declared void ('grey list'). In principle, companies cannot make use of clauses from the black and grey list. This, however, does not mean that all other clauses in general terms and conditions are allowed. If a clause is in conflict with

the principles of reasonableness and fairness, it could still be declared void. However, if one clause is declared void, the rest of the General Terms & Conditions may still be valid.

### b. Lease law

Moreover, a foreign entrepreneur might want to lease business accommodations in The Netherlands, meaning that one has to deal with Dutch lease law. Generally, the lease period is five years with an option to renew the lease for another term of five years. At this stage it is impossible to provide all the specific legal lease pitfalls; therefore, we would advise foreign entrepreneurs who would like to lease in The Netherlands to contact an attorney.

If a foreign entrepreneur decides not to lease accommodation in The Netherlands, a trust office could provide the entity with the required postal address.

COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN ROMANIA

## 1. A brief overview of the legal framework in the country

The main legislative source is Law No. 31/1990 on trading companies ("**Company's Law**"), initially published in the Romanian Official Gazette No. 126/1990, as subsequently amended and supplemented.

Other relevant pieces of legislation include: Law No. 26/1990 on the Register of Commerce, as amended and supplemented ("**Law No. 26/1990**"); Law No. 359/2004 on the simplification of the formalities for the registration with the Register of Commerce of the individuals, associates and legal entities, the fiscal registration thereof as well as the authorization of the functioning of the legal entities, as amended and supplemented ("**Law No. 359/2004**"); Law No. 1/2005 on the organization and functioning of the cooperatives ("**Law No. 1/2005**) and Council Regulation No. 2157/2001 on the Statute for a European company ("**Regulation No. 2157/2001**").

Furthermore, Government Decision No. 753/2003 regulates the organization and functioning of the National Agency for Small and Medium Enterprises and Cooperatives ("**Decision No. 753/2003**") while the Decree-Law No. 122/1990 provides rules regarding the authorization and functioning of companies and foreign economic organizations ("**Decree-Law No. 122/1990**").

## 2. A discussion of ways in which a foreign company may enter Romania:

### a. Establishing a separate legal entity

Foreign investors, either individuals or legal entities, may legally establish Romanian companies. There are no legal limitations with respect to the citizenship of the shareholders and/or directors of Romanian companies.

The Romanian companies established by foreign investors are Romanian legal entities, registered and operating under the provisions of Romanian law.

In order to establish a Romanian Company, the foreign investors must prepare and obtain a series of documents such as:

i. the decision of the foreign investor regarding the establishment of such company;

ii. excerpts for the competent Trade Registry Office comprising the essential details of the foreign investors legal entities or copies of the identification documents for foreign individual investors;

iii. the notarized affidavits of the founders and directors appointed to operate and manage the company and their specimen of signature;

iv. proof of payment of the share capital;

v. proof regarding the availability of the Romanian company's name;

vi. the Articles of Association of the company; and

vii. documents attesting the right to use the headquarters, etc.

The procedure of registering a Romanian company is described in detail at point 5 below.

**b. Establishing a branch office**

Branch offices may be legally established in Romania by foreign legal entities. Such branches are dismemberments of the mother companies without legal personality, and must be registered with the Trade Registry Office which is competent in the jurisdiction where such branches are intended to operate.

The establishment of branch offices involves the drafting and obtaining of the necessary documents, such as:

i. the decision of the mother company regarding the establishment of such branch,

ii. the Articles of Association of the mother company;

iii. the latest registered financial situations of the mother company;

iv. excerpt for the competent Trade Registry Office regarding the essential details of the mother company;

v. the notarized affidavits of the person appointed to operate and manage the branch office and the specimen of signature; and

vi. documents attesting the right to use the headquarters of the branch etc.

After obtaining all such documents, the founders must prepare a file to be registered with the Trade Registry Office. After such registration, the branch may legally commence performing its activity in Romania.

The branch will operate in accordance with both the provisions of Romanian law and with respect to the applicable laws of the state in which the mother company is organized. In this respect, the branch may only perform the operations which are permited to the mother company in its state of origin and the activity of the branch shall cease at the time of the dissolution of the mother company.

**c. Use of distributors and sales offices**

Pursuant to the Decree-Law No. 122/1990, trading companies and economic organizations may open distribution offices in Romania on the basis of a license issued by the Ministry of Foreign Trade subsequent to a request of the applicant in this respect. Foreign trading companies and economic organizations may also incorporate such offices.

Such a company or an economic organization will submit a series of deeds, along with the request for license:

- A certificate issued by the Chamber of Commerce or other competent body from the state where the company or organization is headquartered for the purpose of confirming their legal existence, object of activity and share capital;
- A letter of good-standing from the bank where the company holds its bank accounts and performs the financial operations;
- The statute or any other deeds proving the form of organization and the functioning mode of the company or organization; and
- The notarized power of attorney issued by the foreign company to the representative(s) assigned to manage the activity of the representative office.

The offices will perform, on behalf of the foreign company, only legal formalities in accordance with the object of activity established by the functioning license. According to practice, such offices may issue and receive offers or orders; negotiate and conclude trading agreements on the basis of the power of attorney given by the holding company; provide information and commercial advertising; provide technical assistance for the machinery the holding company delivers to their Romanian partners; render services similar to those provided by the holding company in the origin state; and render specific services of the foreign tourism and press offices and other commercial activities for the purpose of promoting and support of the activities of the holding company in Romania.

Furthermore, the financial-banking operations of such are performed through accounts in foreign currency, according to law.

## 3. Regulation of foreign investments

### a. A discussion of regulations restricting foreign investment in the country

Two general observations should be made regarding this topic:

The first observation resides in the economical and political situation of Romania, an EU member-state since 2007. Due to its position as EU member-state and for reasons concerning the cohesion with the common European market, Romania provides within its jurisdiction a comprehensive, stable, favorable and easy to implement legal framework in order to sustain investments of any kind.

A second observation is that there are no special provisions regarding fields in which investments are prohibited.

As will be presented in more detail under Section B below, there are several provisions ensuring that foreign and national investors may receive incentives and benefit from state-aids regardless of their state of origin, nationality or citizenship and benefit from all available advantages and exemptions of any nature, under certain conditions.

There are, however, certain regulatory supplemental conditions that foreigners have to fulfill while opening a legal entity in Romania. For instance, investors need to obtain licenses and approvals for performing activities in the case of enterprises acting in the field of energy, mining or petroleum or those acting on the capital markets.

For these reasons, we may say that Romanian regulations are not restricting foreign investments in any way; this will be more evident in the next section where a brief legal framework regarding the financial incentives is also presented.

**b. A discussion of financial incentives available from the government to encourage the establishment of industries in the country**

Over the years, various tax incentives aimed at fostering foreign investment have been provided by Romanian legislation. The foreign investment regime has been affected by continuously changing legislation, particularly in view of the country's accession to the European Union.

Consequently, several programs were implemented and various funds designed to reduce regional disparities and to promote economic and social cohesion within the European Union (*e.g.* European Social Fund, European Regional Development Fund, European Agricultural Fund for Rural Development etc.). Such programs were accessed in view of enhancing foreign and national investments.

Thus, financial incentives are regulated in the Romanian jurisdiction by several laws, government decisions, as well as other legal deeds related to this topic, as follows:

- Law No. 332/2001 on promoting the direct investments with a serious impact on economy ("**Law No. 332/2001**");
- Law No. 246/2004 regarding the stimulation of the founding and the development of the small and medium enterprises ("**Law No. 246/2004**");
- Emergency Government Ordinance No. 117/2006 regarding the national procedures in the state aid field ("**G.E.O. No. 117/2006**");
- Order No. 296/2007 on approval of the regional state-aid scheme granted for the investments in industrial parks ("**Order No. 296/2007**");
- Government Decision No. 1165/2007 for stimulating the economic growth by supporting the accomplishment of investments ("**Decision No. 1165/2007**");
- Government Decision No. 1164/2007 on granting *de minimis*[1] incentives for development or modernizing the enterprises ("**Decision No. 1164/2007**");
- Government Emergency Ordinance No. 85/2008 on stimulation of investments ("**G.E.O. No. 85/2008"**);

[1] The state aid that does not exceed, during a certain period of time, the aid ceiling provided by the European regulations in force.

- Government Decision No. 753/2008 for establishing a state aid scheme on the regional development through the stimulation of investments ("**Decision No. 753/2008**");

- Government Decision No. 1680/2008 for establishing a state aid scheme on the insurance of the development of the sustainable economic development ("**Decision No. 1680/2008**");

- Government Emergency Ordinance No. 92/1997 on stimulation of direct investments ("**G.E.O. No. 92/1997**"), as subsequently amended and supplemented;

- Order No. 479/2008 on the approval of the state aid scheme "Incentive for consolidation and modernization of the productive sector through investments performed by the large enterprises" related to operation a) "Incentive for consolidation and modernization of the productive sector on tangible and intangible investments," priority axis 1 "An innovative and eco-efficient production system" of the district operational Program "Enhancement of the economic competition" ("**Order No. 479/2008**");

- Law No. 76/2002 regarding the unemployment social insurance system and employment stimulation ("**Law No. 76/2002**");

- Law No. 72/2007 regarding student employment stimulation ("**Law No. 72/2007**");

- Order No. 387/2008 approving *de minimis* state aid scheme "*De minimis* aid for supporting innovative START-UPs[2] and SPIN-OFFs[3] ("**Order No. 387/2008**").

For the purpose of an apprehensible overview of investments, a few general appreciations will be made hereafter in this respect.

In accordance with G.E.O. 85/2008 an *investment* is the use of the capital for one of the following purposes:

- Acquisition of tangible or intangible assets related to the incorporation of a new entity; extension of an existing entity; the diversification of the production of an entity by creation of new products; the fundamental change of a global production process of an existing entity; the acquisition of fixed assets directly linked to an entity; closing down the entity or it is considered to have been closed down without the respective acquisition; purchase of the assets by an independent investor;

- Initiation of research and development and innovation projects;

- Creation of new jobs and/or professional training of employees;

- Initiation of projects related to the capitalization of the renewable energy, environmental protection and sustainable development.

[2] START-UP: a company/ enterprise incorporated 3 years before the moment that implements a result obtained from a research project or a patented idea;

[3] SPIN-OFF: a company/enterprise recently incorporated or to be incorporated on the basis of a result obtained from a research project of a public research organization or a university.

Pursuant to G.E.O. No. 92/1997, there are two types of investments: (i) direct investments and (ii) portfolio investments. Initially there was a third category of "new investments", referring to investments registered with evidence of the economic agent subsequent to the entering into force of G.E.O. No. 97/1997, which was however repealed.

*Direct investments* refer to the participation to the establishment or extension of a company (under any of the forms provided by the law) by financial contributions, in the national currency (RON) or in a convertible currency; or by contribution of real estate and/or movable assets (tangible and intangible).

*Portfolio investments* are represented by those acquisitions of securities traded on organized and regulated capital markets which do not permit direct participation to the administration of a company.

Law No. 332/2001 introduces the term of *direct investments with a serious impact on the economy* as those investments with a value of at least the equivalent of a million US dollars, performed under the conditions provided by law.

Investments made in Romania are subject to several stipulations which provide investors, regardless of their place of residence or nationality/citizenship (as per art. 9 of G.E.O. No. 92/1997), with certain common rights and guarantees.

Investors may make investments in any field and under any form of the legal entities as provided by law, whereat equal treatment (fair, equitable, nondiscriminatory) must be observed.

The law guarantees customs and fiscal exemptions, as well as the right to convert in the investment's currency the amounts in RON that emerge from the investment and to transfer the currency to the state of origin according to the currency regime regulations.

Further, specific fiscal exemptions are available, such as the possibility of: accelerated depreciation; deduction of the expenses made for the purpose of advertisements and publicity out of the taxable profit; and of reporting the registered losses during a financial exercise on the account of the following taxable financial exercises, etc.

Investors also have the right to assistance during the execution of administrative formalities, as well as to choose the competent courts of law or arbitrary courts for resolving conflicts in litigation.

Regardless of the above-mentioned common conveniences, investors not residing in Romania have the right to transfer abroad without any restrictions subsequent to the payment of all legal taxes and dues, incomes in free convertible currency such as: the quota or benefit obtained from a company – Romanian legal entity; the income obtained by a joint venture, as well as the income obtained by selling the shares in the aforementioned; the amounts obtained by the liquidation of a company according to Law No. 31/1990 or by the liquidation of a company according to the bankruptcy procedure, as provided by the special Romanian legislation in this respect. Foreign investors may also transfer abroad amounts obtained as compensation following expropriations or the application of certain measures with similar effect or any further income pursuant to the form of carrying out of the investments.

According to G.E.O. 92/1997, investments cannot be nationalized, expropriated or submitted to any similar measures unless they are cumulatively: (i) necessary for a public utility cause; (ii) non-discriminatory; and (iii) performed according to the provisions of law and are carried out subsequent to a prior adequate and effective compensation.

i. Financial incentives

Financial incentives are granted pursuant to the foregoing Romanian regulations, some of which basically implement the most relevant regulations of the institutions of the European Union, *i.e.* Council Regulation No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (related to state aids); Commission Regulation No. 1628/2006 on the application of Articles 87 and 88 of the Treaty to national regional investment aid; and Commission Regulation No. 1998/2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid.

State aids are allocated for the purpose of regional development by means of consolidation and development of enterprises (registered in Romania in accordance with Law 31/1990), as well as by stimulation, thereof, in view of investment and creation of employment.

*Grosso modo*, incentives which are allocated essentially for the performance of initial financial investments stand on an average for a duration of 3-4 years with the possibility of prolongation within the annual budgetary limits established for respective period of time.

They are subsidized further to a request for financing in this respect submitted to the competent granting authority which evaluates it together with the necessary annexed documentation according to the criteria provided by law.

As a general rule, <u>state-aids are not granted to</u> (i) enterprises which are considered to be in a difficult situation from the perspective of the European directory legislation on state-aid for safeguarding and restructuring the companies in such situation; or to (ii) enterprises against which a decision for the recovery of a certain state-aid has been issued and has not yet been executed according to the law. In addition to this, requests of state-aids or incentives are usually submitted in view of participation in only one program of such, in the sense that once a state-aid has been granted it may not be cumulated with one of a different type (very few exceptions exist).

Moreover, companies must fulfill all the eligibility criteria required for any economic operator such as: the good standing of the company and of its legal representatives, the registration with the Romanian Trade Registry and the headquarters in Romania, having fulfilled in due time all obligations towards the State Budget (*i.e.* all taxes and social security contributions, etc.).

Companies must not have received loans guaranteed by the state in the past and must not be engaged in a liquidation or bankruptcy procedure. Should, for instance, the liquidation procedure occur as of the companies' own request, these companies will be obliged to pay all the due taxes according to law for the whole duration of the investment, including any penalties applied on the late payment of the aforementioned obligations, that should have been paid in the absence of the incentives and/or tax exemptions.

These incentives are provided in multiple fields by the competent authorities in the respective areas of expertise (renewable energy resources harnessing, regional sustainable development and reduction of emissions, investment in industrial parks, environmental protection, consultancy and training, consultancy services in the field of e-Economy[4], research and development and innovation, promotional activity, international fairs and exhibitions, economic missions and promotion activities abroad, farming, aquaculture, apiculture, etc.). The competent bodies are either ministries (as the Ministry of Public Finance, the Ministry of Agriculture and Rural Development etc.), national agencies under the control of such Ministries, such as the National Agency for Payments and Intervention in Agriculture, the Romanian Agency for Foreign Investment, the Romanian Agency for Employment, etc. or different authorities managing the respective operational programs.

From a pecuniary point of view, the incentives depend firstly on the total amount of money awarded through the respective programs of investment stimulation. Secondly, as mentioned before, state-aids depend on the annual budgetary schemes in the respective aforesaid programs and of the maximum aid ceiling granted per economic operator.

The eligibility criteria of applicants are usually presented in applicants' guides, which are published yearly and correspond to the openings of the sessions of receipt of projects. They are however, subject to alterations according to every year's State Budget.

Serving as example of the manifold of financial investments, we will mention below part of them:

- Financial investments regarding the creation of new jobs and hiring of the unemployed vary between 5 and 30 million EUR according to the number of new jobs implemented, *i.e.* starting from a minimum of 50 new jobs created for a first category of investments and ascending to a minimum of 300 jobs for the most complex category of the kind.

- Pertaining to the regional development, financial incentives are granted solely to big enterprises, under the circumstances of fulfillment of three conditions: (i) the initial investment exceeds 100 million EUR (RON equivalent); (ii) the investment eligible costs are of over 50 million EUR (RON equivalent); and (iii) a minimum of 500 newly created jobs result of the initial investment.

- Initial investments harnessing renewable energy resources for the production of electric and thermal energy (renewable energy sources: sun, wind, waves, micro-hydro (systems with installed power <10 MW), biomass, biogas, geothermal etc) implemented by large, medium size and small enterprises benefit from an aid intensity calculated in a variable percentage (up to a maximum of 50%) of the total eligible expenditure with several ceiling increases depending on the type of enterprises (small, medium, etc.).

The same method of calculation and conditions apply to initial investments implemented in all industrial sectors and the energy sector (with the exceptions provided by the law), concerning activities of electric and thermal energy production and consumption.

[4] Economy based on knowledge, where competition is created throughout information technologies and communications

## 4. Forms of doing business in the country

Establishing and operating a company is the main form of doing business in Romania.

According to the provisions of the applicable law, the companies are either public (the share capital is owned entirely by the state), mixed (the share capital is owned by private individuals together with the state) and private (owned entirely by private individuals).

As the participation of the state within a company is subject to distinct legal provisions, the private legal entities are the most common and simple forms of doing business in Romania.

Romanian companies are divided into the following categories:

- Companies based on the prior understanding and relationship between shareholders (*Societati de persoane*). Such companies are relationship oriented. The contribution of each shareholder to the share capital may be in cash, in kind and in labor/services provided by the shareholder. Such category is comprised of two distinct types of companies, collective partnership and limited partnership companies.

- Companies oriented not on the relation between shareholders but on the amount of the contribution to the share capital (*Societati de capital*). Such contribution of each shareholder may be only in cash or in kind. The two types of *capital companies* are joint stock limited partnership companies and joint stock companies.

- Mixed companies, comprising both the characteristics of the persons companies, implying a relationship between the shareholders but also providing limited liability for such. The limited liability company ("**LLC**") is the only type of mixed company.

Whilst the collective partnership companies, the limited partnership companies and the joint stock limited partnership companies imply that all or some of the shareholders are jointly and unlimitedly liable for the company's obligations, in view of the latest developments and amendments to the commercial regime, such companies no longer offering any safety or advantages and are, as such, rarely, if ever, used.

Therefore, the two main types of companies providing the required operational form for doing business in Romania are the joint stock companies and the LLC.

As a general rule, the founders of a company may freely choose its legal form. Nonetheless, there are certain activities such as insurance, financial operations, banking etc., that may only be performed by joint stock companies.

### a. The legal process involved in establishing the business form

The procedure and conditions of establishing such companies are slightly different based on the type of company.

There are two general steps of establishing a company: the *pre-incorporation step*, when the founders must agree upon the essential details of the company, such as corporate name, headquarters, contribution to the company's share capital, objects of activity, etc. and prepare the necessary documents; and the *incorporation step*, referring to the procedure of registration with the Trade Registry Office and to the Fiscal Authorities. All companies, regardless of their type, must be registered with the Trade Registry Office in order to obtain legal status. The Trade Registry Office will grant the new company its registration certificate with the unique sole registration number, together with the required authorizations for the performance of its business activity.

The establishment of both types of companies follows certain general rules as it concerns the essential details to be decided by the shareholders such as, corporate name, headquarters, share capital, object of activity etc.

The corporate name is represented by one or several words or letters. After agreeing upon such corporate name, the founders must first verify with the Trade Registry Office its availability and then proceed with formally reserving such name. The process is performed by submitting a standard application with the competent Trade Registry Office and providing for three alternative names in order of preferences. If one of the provided corporate names is available, the Registry Office will issue a proof of availability and reservation of name, which is valid for a period of three months.

If the founders agree upon a name containing words such as "Romania," "Romanian," "authority," or derivates of such, it will be necessary to also obtain the prior written approval of the General Secretary of the Romanian Government.

Certain words, such as "university," "academy," "school" or other derivatives of such cannot be used within the corporate name.

The headquarters of the company must be a location appropriate for the company's activity. After agreeing upon the headquarters, the founders must draft and conclude the necessary documents attesting the right to use such location. Such documents shall be presented to the Trade Registry Office within the incorporation file. The headquarters of the company must always be registered with the Trade Registry Office.

Regarding the share capital, the amount of such is agreed upon by the founders, with respect to the limits provided by the applicable law. The share capital must be subscribed and paid in by founders in cash, in kind and/or with receivables contribution; all contributions must be economically assessable.

Whilst in-cash contributions are mandatory for the establishment of any type of company, in this regard, it is necessary that the founders open a bank account for the company, at any desired bank. The founders shall pay their contributions in cash to such bank account, and a bank account excerpt must be obtained as it is necessary within the incorporation procedure with the Trade Registry Office.

The foreign founders must provide standard declarations of foreign investments to the Trade Registry Office, for statistical purposes.

Cash contributions, regardless of the currency in which they are disbursed, must always be stated in RON within the company's Articles of Association.

The company's objects of activity must be codified according to the Order 337/2007 on National Classification of Economic Activities (NCEA) issued by the National Statistics Institute. According to such Order, each activity has an NCEA code that must be mentioned in the Company's Articles of Association. The object of each activity is expressed by NCEA groups of three figures for the field of activity and four figures for the main and secondary objects of activity. Certain activities cannot be performed by private companies whilst others require specific authorizations, such as the production, export, import and commercialization of firearms, or security activities etc.

After agreeing upon such details, the founders must draft and conclude all other relevant documents such as standard notarized affidavits signed by the founders and directors attesting the fulfillment of the legal obligations regarding their qualifications as shareholders and directors of the company. Foreign founders/directors must declare in the standard affidavit that they are not residents of Romania and have no fiscal debts towards the Romanian state budget. For Romanian founders/director, the Trade Registry Office will obtain a fiscal certificate attesting whether they have debts towards the state budget.

The appointed director of the company must conclude a standard declaration regarding the activities to be performed by the company. Based on such a statement, the Trade Registry Office shall issue the authorization for the activities to be performed by the company with regards to labor protection, environmental protection, and sanitary-veterinary legislation.

Also, the appointed directors together with any other persons entitled to represent the company must provide notarized signature specimens.

The main documents attesting the essential details of the company are the by-laws and the contract of association which may be concluded in one single document, the Articles of Association. Such document must be concluded in writing and executed by all founders or by attorneys of such. As a general rule, such documents are concluded under private signature, or are certified by a lawyer. Nonetheless, it is mandatory to conclude such documents in authentic form if there is an in-kind contribution to the share capital consisting of land.

The Articles of Association must provide certain essential clauses regarding the operations of the company, such as complete identification details for all the founders, type of company, corporate name, headquarters, stating the main field and the main activity, as well as secondary activities, as desired by the founders, the company's share capital, mentioning the nature and amount of the contribution of each shareholder together with the number of correspondent shares, the identification data of the directors, powers, limitations, each founder's share for profit and loss, duration of the company and method of dissolution.

The Articles of Association may also provide special clauses regarding the necessary quorum/majority for adopting a resolution by the general meeting of shareholders, pre-emption rights given to a shareholder in case of assignment of shares or other relevant provisions, with respect to the legal framework set out by the applicable legislation.

The incorporation step consists of preparing a file that will contain all the company's relevant documents mentioned above, together with a declaration regarding the fiscal status of the company stating whether the company is registered for VAT purposes and regarding any tax to be paid by the company and a standard incorporation request.

Such file shall be registered by one of the founders or by an attorney of such to the Trade Registry Office in the jurisdiction where the company shall have its headquarters.

Within approximately 4 working days after the submission of the file, the registration of the file shall be finalized and the competent Trade Registry Office shall issue a registration certificate which provides the company's unique registration code issued by the Ministry of Public Finances, together with the relevant authorizations for performing the company's object of activity.

The company shall acquire legal personality as of the registration date.

There are distinct provisions regarding the establishment of the two types of companies.

With respect to establishing an LLC, the number of founders may range from one to 50. Although single member LLCs are not regarded by law as a distinct type of company, the legislation contains special provisions for such category, such as the possibility for a natural or legal person to hold the position of sole shareholder in an LLC, or the interdiction for a LLC having a sole shareholder to act as a sole shareholder in its turn within another LLC.

The incorporation procedure shall follow the general phases provided above, and the registration of the company within the Trade Registry shall be finalized in approximately 4 working days after the date of submitting the file.

The costs for establishing a LLC include the fees for the notarization of the affidavits and signature specimens, and the Trade Registry Office fees, and are estimated up to RON 1.200 (approximately EUR 300).

With respect to the establishment of a joint stock company, such entity must have at least two shareholders but the applicable legislation does not provide a maximum number of shareholders.

Furthermore, additional specific information must be included within the company's Articles of Association, such as the number and nominal value of the shares, specifying whether they are nominative or bearer shares; whether there is one or several classes of shares; the number, nominal value and rights associated with each class of shares; any restriction with regard to the transfer of shares; provisions relating to the management, administration, control of management and operation of the company; the number of the directors and method to determine such number; and powers of representation granted to directors etc.

The incorporation procedure shall follow the general phases provided above, and the registration of the company within the Trade Registry shall be finalized in approximately 5 working days after the date of submitting the file.

The incorporation procedure implies preparing a file with the documents mentioned above together with the detailed Articles of Association and shall be finalized within 5 working days as of the date of submitting the file.

The estimated costs for establishing a joint venture company include notary fees and Trade Registry Office fees at an approximately RON 1.200 (EUR 300).

**b. Whether the business form provides for limited liability for its owners**

The shareholders of both LLC and joint venture companies are liable only up to the value of their subscribed contribution to the share capital.

**c. A description of the management of the business form including whether the business form must have citizens as members of its governing board or whether foreign nationals may hold such offices**

The relevant legislation does not make any distinction between Romanian and foreign citizens in regards to the establishment of a company, and there are no special requirements with respect to the citizenship of a member of the management.

The management of a company is performed by the General Meeting of Shareholders ("GMS") and the directors, solely or jointly, within the Board of Directors.

With respect to the GMS, the main decisional body of the Company, with full competence, the applicable law distinguishes between joint stock companies and LLC in what concerns the quorum requirements and challenge of resolutions.

In case of joint-stock companies, the company law provides for two types of GMS: (i) ordinary general meetings; and (ii) extraordinary general meetings. There are also some situations when special meetings of the shareholders who own shares with a dividend-related priority may take place.

The ordinary general meeting shall be held at least once a year, within five months after the end of the financial year. In order for the ordinary general meeting to be validly assembled, at first call, the presence of at least one-fourth of the total number of voting rights is required. If this quorum is not obtained, at second call, the shareholders may resolve, regardless of the number of shareholders present at the meeting.

Extraordinary general meetings are held whenever necessary, for taking decisions regarding amendment of the company's Articles of Association. On first call, the attendance of shareholders representing at least one fourth of the number of voting rights is required for valid decisions to be passed (one fifth, at second call).

In both types of general meetings, the shareholders adopt resolutions with the majority of the expressed votes, in case the bylaws do not stipulate a higher majority. However, resolutions regarding the amendment of the company's main activity, the capital stock increase or decrease, a change in legal form, and the split-off or dissolution of the company require a majority of at least two thirds of the voting rights held by the attending partners.

Any resolutions of the GMS, which breach the legal provisions of the company's Articles of Association may be challenged in court, within 15 days after the publication in the Official Gazette of Romania, by any shareholder who did not attend the meeting or who voted against and requested that this be recorded in the minutes of the meeting. Moreover, the right to challenge the resolutions is not subject to any time limitation and can be filed by any interested party when the challenge is grounded in absolute nullity.

With respect to the LLCs, according to the applicable legislation, the GMS is the decisional body of the Company. As a general rule, at first call a unanimous vote of all shareholders is required to amend the Articles of Association. At second call, the decision can be taken, regardless of the number of shareholders attending the assembly or their capital stock percentage.

With respect to the adoption of resolutions, a majority of both number of shares and number of shareholders is required before valid resolutions can be passed. However, such rule is only applicable if the Company's Articles of Association do not provide otherwise.

According to the applicable legislation, resolutions regarding amendments of the Articles of Association require all shareholders to vote, except as otherwise provided by the bylaws of the company.

Under the same conditions as in the case of joint liability companies, the shareholders of LLCs have the right to challenge the resolution of the GMS provided that the 15-day period commences as of the date the shareholder acquires knowledge of the resolution of the GMS.

The directors may not challenge the resolutions of the GMS approving their revocation.

Regarding the directors, joint-stock companies may be managed in two different ways: either by a unitary system or by a dualist system which incorporates two bodies: (i) the directorate and (ii) the supervisory board.

If a joint-stock company has opted for the unitary system, the company is managed by one or several directors (the number is always odd). If several directors are appointed, they form a board of directors.

The revocation of a director is decided by the GMS.

If a joint-stock company opts for the dualist system, the supervisory board includes three to 11 members elected by the GMS, and the directorate consists of an odd number of members that are appointed by the supervisory board. The members of the directorate cannot act as members of the supervisory board. The directorate represents the management body of the company, whose activity is overseen by the supervisory board.

Under the dualist system, the decision to remove the members of the supervisory board is also taken by the GMS, while the members of the directorate are removed by a decision of the supervisory board.

A director's mandate cannot exceed four years, except for the first directors' mandate term which cannot exceed two years.

LLCs are managed by one or several directors. Where several directors are appointed, they form a board.

The revocation of a director is decided by the general meeting of shareholders or, as the case may be, by the sole shareholders. The legislation does not provide for limitations as regards the term of the director's mandate.

Regarding both types of companies, the directors may be removed without a specific cause, although they may be entitled to compensation. However, the company cannot be compelled to reinstate a director. The directors may resign, usually by giving a notice period, according to the management agreement concluded with the company.

While acting within the limits of their mandate, in principle, the directors may not be held responsible towards third parties. Considering that the directors represent the company towards third parties, the duties performed by the directors in the course of their mandate shall bind the company.

Moreover, Law No. 85/2006 on insolvency procedures provides for certain conditions under which the directors of a company may be compelled to bear a part of the company's debts.

The directors of either joint-stock company or LLC must act in good faith and in accordance with the obligations of non-disclosure and confidentiality. Under company law the directors of the company cannot disclose any confidential information and trade secrets, to which they had access in their capacity as directors. This duty continues after the termination of their mandate. Furthermore, the directors shall loyally exercise their mandate, considering the company's interest. These duties can also be stipulated within the management agreement to be concluded with the company.

**d. Whether a minimum share capital is needed in order to establish the business form**

The company law provides distinct minimum share capital for each of the two types of companies.

The minimum share capital to be subscribed in full before registering the LLC is of RON 200 (approximately 50 EUR).

The share capital is divided into shares of equal value of at least RON 10 each. Any paid share gives the right to one vote in the GMS, unless otherwise provided in the Company's Articles of Association.

In the situation when a share is owned by more than one person, the owners must appoint a representative.

In regards to the share capital for joint stock companies, the law provides for a minimum of RON 90.000 (approximately EUR 21.000).

For joint stock companies, each shareholder must pay at least 30% of the subscribed share capital on incorporation, whilst the remaining must be paid within a maximum of 12 months of the company registration date for in-cash contributions and within two years as of the registration date for in-kind contributions.

Furthermore, a shareholder whose contribution consists of receivables is not released from obligations attached to the contribution until the company has received the specific amount.

A joint company's shares may be ordinary or preferential. Ordinary shares give the holder the right to vote within the GMS and to receive dividends proportionately to the percentage of the share capital owned, whilst preferential shares award the holder priority for dividends, but without voting rights.

The ordinary shares are classified into nominative or bearer shares. The nominative shares may be issued in material or dematerialized form. If the company has not issued material shares, at the request of the shareholder it must issue a shareholder's certificate, providing relevant information regarding such shares.

If the value of the net assets of a company fall to under half of the value of the share capital, the partners of the company may decide to dissolve the company or to decrease the value of the share capital in a ratio which would render the value of the net assets to above the half of the value of the decreased capital stock.

No intervention is required provided that the net assets are replenished to exceed half of the share capital within the fiscal year following the year where the losses were recorded. If the share capital is found to have decreased, it must be replenished or reduced prior to any profit allocation or distribution.

If the ratio between the long-term debt and the total value of the capital stock of a company is less than three, the interest paid by the company is fully deductible. If it is higher than three, the interest paid by the company is not deductible during that fiscal year, but will be carried over to the following years, until it is fully deducted; however, this rule does not apply to the interest paid by the company to banks and/or other credit or financial institutions, for any loans obtained.

**e. A discussion of how each business form is treated from a tax standpoint**

There is no difference between the two types of companies from a fiscal point of view.

Romanian companies are classified, based on their turnover, into micro-enterprises, small, medium and large enterprises.

Such classification is important when observing the competent fiscal authority and, in certain conditions, for observing the means of calculating the annual tax fee (whether it is calculated as tax on revenues or profit tax.)

In regards to VAT, if the activities of the company are taxable for VAT and the forecast turnover exceeds 35.000 EUR, the company must be registered for VAT purposes with the proper fiscal authority.

In such a case, the company must submit an application to the competent fiscal authority for a VAT payment certificate.

Furthermore, according to the new European legal provisions, companies that perform business outside the country or with foreign partners must also be registered, for VAT purposes, to the Intra Comunitary Operators Registry.

**f. Other considerations**

Another form of doing business in Romania consists of establishing and operating a European Company, in accordance with the provisions of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) and with the provisions of Company's Law.

Such European Companies with headquarters in Romania must also be registered with the Trade Registry Office. They shall acquire legal personality as of the registration date.

**5. A list of tax treaties currently in effect with the country**

A brief list of international treaties in force:

- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, December 13th, 2007, published in the Romanian Official Gazette No. 107/2008, entered into force on February 12th 2008 (the "Lisbon Treaty");

- Treaty between Romania and Hungary on the regime of the Romanian-Hungarian state frontier, the mutual cooperation and assistance, published in the Romanian Official Gazette No. 519/2006 and entered into force on January, 6th 2007 (the "Romanian-Hungarian Treaty");

- Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments;

- Agreement between the European Community and the Principality of Andorra providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments;

- Agreement between the European Community and the Principality of Liechtenstein providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments;

- Agreement between the European Community and the Republic of San Marino providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments;

- A series of conventions for avoiding double taxation, prevention of fiscal evasion and regarding tax on income and capital gains, concluded between Romania and several countries, i.e. South Africa, Albania, Algeria, Armenia, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Bulgaria, Canada, China, Cyprus, North Korea, South Korea, Croatia, Denmark, Ecuador, Switzerland, United Arabian Emirates, Estonia, Russia, Philippine, Finland, France, Georgia, Germany, Greece, India, Indonesia, Jordania, Iran, Ireland, Israel, Italy, Japan, Kazakhstan, Kuwait, Leonia, Lebanon, Lithuania, Luxemburg, Macedonia, Malaysia, Malta, Great Britain, Morocco, Mexico, Moldavia, Namibia, Nigeria, Norway, Holland, Pakistan, Poland, Portugal, Qatar, R.S.F. Yugoslavia (applying to Bosnia-Herzegovina), R. F. Yugoslavia, San Marino, U.S.A., Singapore, Syria, Slovakia, Slovenia, Spain, Sri

Lanka, Sweden, Sudan, Thailand, Tunisia, Turkey, Turkmenistan, Ukraine, Hungary, Uzbekistan, Vietnam, Zambia

In regards to the national regulations, the following would be the most important ones:

- Law No. 571/2003 on the Fiscal Code, published in the Romanian Official Gazette No. 927/2003 ("**Law No. 571/2003**") – the Fiscal Code;
- Decision No. 44/2004 for the approval of the Methodological Norms for the enforcement of Law No. 571/2003 on the Fiscal Code, as subsequently amended and supplemented ("**Decision No. 44/2004**");
- Law No. 390/2002 on the establishment, organization and functioning of the Romanian Agency for Foreign Investments, published in the Romanian Official Gazette No. 443/2002, as amended and supplemented ("**Law No. 390/2002**");
- Government Emergency Ordinance No. 117/2010 on amendment and completion of Law No. 571/2003 and regulation of certain financial-fiscal measures ("**G.E.O. No. 117/2010**");
- Government Ordinance No. 24/2001 on taxation of microenterprises, as amended and supplemented ("**G.O. No. 24/2001**");

COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN SOUTH KOREA

**I. Overview: The Illegal Framework of South Korea Investors**

From 1910 to 1945 Korea was occupied by Japan and as a result, the Korean legal system strongly resembles the Japanese legal system. Since the occupation however, the Korean legal system, although based on the civil law system, has borrowed many aspects from the American legal system and has taken on many democratic reforms.

The Korean Constitution was adopted on July 17, 1948. Korea has three government branches: executive, legislative, and judicial. Although Korea's legal system is based on codified law (civil law), decisions of the Supreme Court of Korea have a strong legal impact existing as precedent. Moreover, international treaties are interpreted at the level of Korean domestic statutes, holding great weight as well.

There are six basic codes in the Korean legal system. They are: the Constitution, the Civil Code, the Commercial Code, the Code of Civil Procedure, the Criminal Code and the Code of Criminal Procedure. The Commercial Code was first promulgated to meet the needs of new, socio-economic constraints, particularly in the field of economic regulations. This memorandum will focus mainly on the Commercial Code and the laws regarding legal entities such as corporations, partnerships, and how a foreign national may be involved in establishing such operations in South Korea.

A foreigner, or a foreign corporation, may freely carry on investment activities in Korea without being subject to any special restrictions unless otherwise specified by the Foreign Investment Promotion Act (the "Promotion Act") or other related laws and regulations. Under the Promotion Act, a foreigner is not to be restricted from foreign investment other than in the following cases: (1) where it threatens the maintenance of national safety and public order; (2) where it causes harm to the health and safety of nationals or is markedly contrary to public morals and decency; or (3) where it violates Korean laws and regulations. In the past, foreign investment adversely affecting the Korean national economy could also be restricted, but this concept was considered too abstract, and has since been removed.

Additionally, there is no residency or nationality requirement to become a member on a board of directors within the Korean Commercial Code. According to the Korean Commercial Code, a resolution by the board of directors shall be adopted by 1) the presence of a majority of directors in office and 2) affirmative votes of the majority of directors present at the meeting. However, the voting threshold may be increased if stipulated in the company's articles of incorporation. With increasing technological developments in society, a board of directors may now also allow directors to participate in the adoption of a resolution by means of a simultaneous visual and auditory communication system in place of physical attendance, unless otherwise provided in the articles of incorporation. In such a case, the relevant directors shall be deemed to have been present at the meeting for voting and attendance purposes.

When a foreigner decides to make an investment in Korea, the foreigner must report their investment to the Minister of Knowledge Economy. In practice, the function of receiving such reports is to delegate reports to specified foreign exchange banks or the Korean Trade Investment Promotion Agency (KOTRA). In the past, the Minister of Finance and Economy had the task of determining whether or not to accept a report, but through the enactment of the Foreign Investment Promotion Act, the reporting/acceptance system has evolved into an automatic system. One caveat, however, is that if a foreigner wishes to engage in foreign investment through the acquisition of existing shares of a corporation carrying on business in the defense industry, the foreigner must obtain a prior permit from the Minister of Knowledge Economy.

In principle, when a foreigner disposes of securities listed on the Korean Stock Exchange or registered securities of the Korea Securities Dealers Association, the foreigner shall do so only through the Korean Stock Exchange or KOSDAQ unless otherwise provided under relevant regulations. This is provided for so that such restrictions shall not be applied to the acquisition or disposal of securities acquired by means of the Foreign Direct Investment in accordance with the provisions of the Promotion Act.

Turning to registration, a foreign investor must register the details of their investment to the Financial Supervisory Commission prior to the acquisition or disposal of their listed or registered securities. This process must be completed when the foreigner acquires or disposes the listed or registered securities for the first time. Additionally, the foreigner must have the acquired securities within custody of a depository institute such as: the Korean Securities Depository, a foreign exchange bank as defined by the Foreign Exchange Transaction Act (the "FX Transactions Act"), securities companies, securities trust companies as defined by the Securities Investment Trust Business Act, or an internationally recognized foreign depository. Thereafter, the foreigner must have the depository institute deposit the securities into the Korean Securities Depository.

Article 93 of the Corporate Tax Act governs income implications in Korea. For example, interest income earned in Korea, dividend income earned in Korea, income generated from domestic real estate, income generated by a foreign corporation in Korea, income generated from transfer of equity stock, subscription certificates, and other financial instruments issued by a domestic corporation are all considered as income from sources within Korea. However, in regards to income generated from the transfer of securities, there are some exceptions.

First, the income obtained by a foreign corporation from the sale of the securities which are listed in the Korean securities market shall not be subject to Korean taxation if the foreign corporation (including persons having a special relationship thereto) owns less than 25% of the total amount of the equity stock during the past five years (Article 132 (7) 2 of the Presidential Decree of Corporate Tax Act). In the event that the securities to be sold are not listed in the Korean securities market, then the income derived from the sale of such securities shall be subject to Korean taxation. In such a case, the foreign corporation having permanent establishment shall pay the Korean tax subject to the tax treaty between Korea and the United States. In the event that the foreign corporation does not have a permanent establishment, then an appropriate Korean tax shall be withheld by the Korean resident who pays the purchase price to the foreign corporation. However,

note that the actual tax rate and the amount of tax shall be determined in accordance with the governing tax treaty.

Under Korean law, a partnership or limited partnership is not considered as a "non-taxable pass-through entity" as it is in the United States. Instead, Korean laws recognize the limited partnership entity as the valid legal entity, which is subject to tax. Thus, when making investments under the name of a limited partnership, the appropriate tax obligation shall be levied on the limited partnership just as it is for a corporation.

Under Article 147 of the Act on the Capital Market and the Financial Investment Companies (the "Capital Market Act"), any person who holds upwards of 5% of voting stocks of a listed or registered corporation shall report the situation of their holdings to the Financial Supervisory Commission and the Stock Exchange or Association. If the rate of that person's holding changes by 1% or more in regards to the total number of the corporation's stocks, such corporation shall report the contents of such change to the Financial Supervisory Commission, and the Stock Exchange or Association.

Lastly, South Korea has "short swing profits" rules similar to those found under the Securities Act of 1934 in the U.S. Under Article 172 of the Capital Market Act, officers, employees, or major shareholders, of a listed or registered corporation shall not sell stock certificates, or the like, unless they own the stock certificates. Officers, employees, or major shareholders, refers to those who hold stocks or contribution certificates of 10% or more of the total number of voting stock issued. Moreover, where officers, employees, or major shareholders, gain any profit by selling stock certificates, or the like, of the corporation within six (6) months after purchasing them, the corporation may request such officers, employees, or major stockholders, to give such profits to the corporation.

## II. Ways in Which a Foreign Company May Enter South Korea

### A. Establishing a Separate Legal Entity

In Korea, there are four types of companies: (1) joint stock company ("Jushik Hwesa"); (2) limited liability company ("Yuhan Hwesa"); (3) unlimited partnership ("Hapmyung Hwesa"); and (4) limited partnership ("Hapja Hwesa"). Although the most commonly used entity in Korea is the joint stock company, the limited liability company ("LLC") has emerged as a favorable entity choice, provided the requisite limited number of participants is applicable to the business. We hereby explain key procedures and steps for the establishment of a joint stock company as the joint stock company is the most commonly used type.

### B. Key Processes and Steps for Forming a Company.

Generally, the required steps in forming a company are: (i) preparation of incorporation documents; (ii) foreign investment filing; (iii) capital contribution; (iv) registration of incorporation at the court registry; and (v) obtaining a tax certificate. The following sections will address each step in order.

1) Document Preparation

The documents required for forming a company are: (i) self-governing documents of the company such as the articles of incorporation; (ii) documents presenting the identity of its shareholder, director, representative director, and statutory auditor, if any); and (iii) documents authorizing the attorney-in-fact to incorporate and register the company on behalf of the founding members of the company.

To prepare the articles of incorporation, among other things, one must decide the following matters: (i) the name of the company; (ii) the purposes of the company; (iii) the names and addresses of the shareholders; (iv) the authorized capital; (v) the paid-in capital; (vi) the numbers of units (equivalent to the shares in the joint stock company) to be issued and its face value; and (vii) the address of the company. Moreover, matters relating to the self-governance of the company, such as the general meetings of its shareholders must also be established. Note: self-governing rules will be subject to the relevant laws of Korea such as the Korean Commercial Code.

Next, documents relating to the identity of Korean shareholders, directors, and the statutory auditor, if any, showing the names, addresses, nationality and resident identification numbers must be prepared. Similarly, the same, including a certificate of residence and copy of passport for the foreign shareholders, directors, and the statutory auditor, in any, must be prepared as well. On the other hand, if the shareholder is a corporate entity, documents presenting its establishment and existence such as a certificate of incorporation or certificate of good standing will have to be provided. Lastly, Korean shareholders, directors and the statutory auditor, if any, must provide a certificate of seal and certified copy of the resident registration. For foreigners, a notarized certificate of signature, a notarized certificate of residence, and copy of passport are required.

2) Foreign Investment Filing

The establishment of a company in Korea by a foreigner requires filing in accordance with the Foreign Investment Promotion Act of Korea (the "Promotion Act") before registering the company with the court. If a foreigner has 10% or more of the total paid-in capital of the company, the company will be qualified as a foreign capital invested company, which in turn will be entitled to enjoy certain tax benefits, if meeting all related qualifications. For a foreign investment to be eligible under the Promotion Act, the minimum investment amount must be at least KRW100,000,000.

The information and material required for filing under the Promotion Act are as follows: (i) foreign investment notification form; (ii) power of attorney authorizing its representative in Korea to perform

the necessary acts required for the filing of the foreign investment; and (iii) documents showing the identity of the foreign investor such as certificate of incorporation, certificate of good standing or documents of similar nature. Time for filing will take only a day provided all the required documents are properly prepared.

3) Capital Contribution

A shareholder of a company will pay his/her portion of the initial capital by remitting his/her capital amount to the company bank account which is temporarily opened only for the purpose of receiving capital contribution from its shareholders. The capital amount will have to be received, and evidence of payment of the capital contribution must be submitted before registering incorporation of the company in court.

4) Court Registration

Upon incorporation of the company and receipt of capital contribution, the company will register its incorporation in a court having jurisdiction over the geographical area where the company is addressed. Registration will only take one or two days, provided that all the required documents are prepared.
To successfully register incorporation of the company, the following documents must be submitted to the court: (i) articles of incorporation; (ii) documents showing capital contributions have been made in full; (iii) minutes of the inaugural general meeting of shareholders; (iv) consent letters regarding the appointment of director and statutory auditor; (v) documents presenting identity of the directors and statutory auditor, if any, (here, copies of passport and certificate of residence are necessary for foreigners); (vi) documents establishing that the seal or signature are genuine via certificate of seals or certificate of signature; (vii) other miscellaneous documents. Moreover, the inaugural general meeting minutes, consent letters of appointment, certificate of signature, and certificate of residence should all be notarized.

5) Tax Certificate

Upon incorporation of the company, the company needs to register the company at the relevant tax office and obtain the appropriate tax certificate for tax purposes. Recently, the tax office has taken a strict approach in issuing these tax certificates. For example, now, a tax office agent will physically visit the place of business to ascertain that the proposed business is actually taking place before the tax office issues the tax certificate. It usually takes no more than a week for a newly incorporated company to obtain their tax certificate.

6) Average Time for Each Step

The average time required for each step primarily depends on how long it takes to prepare the necessary documents. Once all of the required documents are ready, the incorporation, registration, and foreign investment filing do not take much time. As a general rule, a completed incorporation of the company can be accomplished within a week if all relevant documents are fully prepared and capital investment has been paid.

**C. Establishing a Branch Office**

There are two types of branch offices that a foreign company may establish in Korea: (a) a regular branch office and (b) a liaison office. The regular branch office is allowed to conduct profit-making activities. Conversely, the liaison office may not carry on profit-generating activities. Instead, the liaison office merely undertakes non-profit making functions such as conducting liaison for business affairs, market research, and research and development.

In comparison with a full-fledged incorporation of a company, it is relatively simpler and easier to form a branch office. Generally, the key steps in forming a branch office are: (i) filing establishment of a branch office; (ii) registration of the branch office at a court of jurisdiction; and (iii) reporting with the applicable tax office.

1) Filing Establishment of a Branch Office

The establishment of a branch office in Korea by a foreign company requires filing in accordance with the FX Transactions Act. This filing will usually be made with a designated foreign exchange bank within Korea. However, the filing shall be made with the Ministry of Planning and Finance if the branch office is established to carry out: (i) certain finance-related business other than the banking business; (ii) securities and insurance related business; and (iii) other business which are not permitted under the relevant laws such as the Promotion Act.

For purposes of filing establishment of a branch office, the following documents must be submitted: (i) an application for the establishment of a branch office in the prescribed form; (ii) documents showing name, place of business, and the content the foreign company's business; (iii) documents proving that relevant permits or approval have been obtained, if required under the relevant laws of Korea; and (iv) documents specifying the content and scope of business to be carried out within Korea.

2) Court Registration

After obtaining a bank's acceptance regarding the filing of an establishment of a branch office in Korea, the branch office should then be registered with the court having jurisdiction over it. This process also completes registration. As a result, this process constitutes legal existence of a foreign corporation and the branch office becomes legally established.

For purposes of court registration, the required documents include: (i) a certificate of corporate resolution approving the establishment of the branch office by the foreign company; (ii) a letter of consent by the branch office representative for his/her appointment; and (iii) a report of seal of the branch office.

3) Report with the Relevant Tax Office

Upon completing registration of the branch office with the court, the branch office must then be registered with the tax office that has jurisdiction over it. Thereafter, the tax office will issue a business certificate that identifies the branch office for specific tax purposes. Note that a copy of the lease agreement, among other documents, must be submitted at the time of application and registration with the tax office.

4) Legal Status of Branch Office

A subsidiary established by a foreign company is a legal entity separate from the foreign company that established it. Unlike a subsidiary, a branch office is not a separate entity but part of the foreign company only with a different location. Therefore, while the legal liability of the subsidiary will not extend to the foreign company, any wrongdoing made by the branch office may cause the foreign company to be held responsible.

5) Cost Analysis at the Time of Establishment

From a cost perspective, establishment of a branch office is much more advantageous compared to establishing a new company altogether. The main cost items that are relevant to establishing a completely new entity are: capital contribution requirements, taxes, and fees to be paid to advisors such as attorneys. In regards to these main cost items, establishing a branch office proves advantageous in all three areas.

First, when setting up an entirely new company, the company will be subject to the minimum capital requirement. Under the Promotion Act, the foreign company must make a capital contribution in the amount of at least KRW100,000,000 for the new entity to be qualified as a foreign capital invested company. However, a branch office is not subject to such a minimum capital requirement. A foreign company may remit any amount of money to the branch office on a need basis.

Second, a new company must pay taxes in connection with its incorporation. Such taxes include a registration tax and a local education tax. The amount of the registration tax is determined based on the size of capital. Currently, 0.4% of the capital amount is to be paid as a registration tax if the company is set up in a non-metropolitan area, while the registration tax would be tripled (i.e., 1.2% of the capital amount) if incorporated in a metropolitan area. In addition, the company must pay a local

education tax, which amount is 20% of the registration tax. That is, the local education tax would be 0.08% of the capital amount if incorporated in a non-metropolitan area and 0.24% if incorporated in a metropolitan area. Note also that the registration tax and local education tax are to be paid when the company increases its capital after its incorporation. A branch office on the other hand has no obligation to pay such taxes.

Lastly, fees to be paid to outside advisors in connection with an establishment of a branch office would be smaller because the process of establishing a branch office is relatively simpler and easier than that of a full-fledged incorporation.

6) Tax Implication Analysis after Establishment

After establishment, both the branch office and the company are subject to taxation under the laws of Korea. However, tax implications are somewhat different when comparing a foreign invested company, and a branch office of a foreign company.

First of all, the method of calculating taxable income is different. For a foreign invested company, all income generated by it, regardless of source of income, domestic or overseas, are accounted. However, for a branch office, only the income generated from domestic sources are accounted.

Once taxable income is derived, corporate taxes are applied equally to both the branch office and the foreign invested company. Currently, corporate tax rates are up 10% to taxable income of KRW 200,000,000 and 22% of the taxable income in excess of KRW 200,000,000.

It is important to note that dividends which are declared and paid by a foreign invested company to its foreign parent company are subject to taxation in Korea. According to the Tax Treaty between Korea and the U.S., the Korean government is entitled to impose a tax upon dividends up to 15%. However, income of the branch office to be remitted to the foreign company will not be subject to such taxation except in a certain limited number of countries with which Korea has executed tax treaties containing the provision of branch taxation. Therefore, income remitted from the branch in Korea to the foreign parent company which is located in the country whose tax treaty contains no provision of the branch taxation will not be taxed. For your information, the countries with which Korea has executed tax treaties containing the provision of branch taxation and the applicable branch tax rate are as follows: Canada (15%), France (5%), Australia (15%). Indonesia (10%), Philippines (10%), Kazakhstan (5%), Brazil (15%) and Moroco (5%).

**D. Tax Benefits Available to Qualified Foreign Invested Companies**

If a foreign investor ("FI") is eligible for a tax exemption under the relevant laws of Korea, the FI will enjoy certain tax benefits. However, no such tax benefits will apply to a branch office. Therefore, a review of eligibility for a tax exemption is in order.

To be eligible for tax benefits, a FI must meet the requirements under the Promotion Act and the Restriction of Preferential Taxation Act (the "Preferential Taxation Act").

1) Eligibility under the Promotion Act

First, the investment in question must be qualified as a foreign investment under the Promotion Act. To be qualified, the foreign investment must be made in the amount of not less than KRW 100,000,000 in the form of acquisition of shares or lending of loans. Such qualified foreign investment under the Promotion Act shall include:

(i) acquisition of not less than 10% of shares of a foreign invested company in Korea to take part in the management of such company;

(ii) acquisition of less than 10% of shares of a foreign invested company and the occurrence of any of the following events: (a) dispatch of officers to the foreign invested company, (b) execution of a sales agreement for raw materials or finished goods for a term of not less than one (1) year with the foreign invested company, or (c) execution of an agreement for technical assistance and a license or joint research and development.

Be advised, however, that all qualified foreign invested companies are not immediately eligible for tax benefits. To be eligible for tax benefits, the foreign invested company must also meet the requirements prescribed in the Preferential Taxation Act. The Preferential Taxation Act, in setting forth eligibility for tax benefits, specifically excludes a foreign invested company made in the form of acquisition of existing shares, stock swap or the lending of a loan.

2) Eligibility under the Preferential Taxation Act

To be eligible for tax benefits under the Preferential Taxation Act, the foreign investment must be made in one of the following categories:

(i) industry supporting a service business ("Industry Supporting Business") vital to the strengthening of international competitiveness for the domestic industry or a business accompanying highly advanced technology ("Business Accompanying Advanced Technology");

(ii) business conducted by a foreign invested company which is located in a foreign investment zone under the Promotion Act; or

(iii) business for which tax benefits is unavoidable for the foreign invested company as determined by the Presidential Decree of the Preferential Taxation Act.

Businesses provided in categories D(2)(ii) and D(2) (iii) are related to certain free trade zones. However, if foreign investment is not located in such free trade zone, only businesses provided in the category D(2)(i) are relevant for review.

The Presidential Decree of the Preferential Taxation Act provides definitions for businesses provided in category D(2)(i) above. Under the Presidential Decree, Industry Supporting Business means a service business with a high added value and a great effect in supporting the development of other industries, such as providing support to the manufacturing business, etc. This type of business is deemed necessary for strengthening the international competitiveness of domestic industries. Businesses Accompanying Advanced Technology is defined as business accompanying technology that has a low level of domestic development or has not been developed yet which is deemed necessary for strengthening the international competitiveness of domestic industries.

The Presidential Decree further provides that businesses under the category D(2)(i) above shall accompany technology falling under any of the following: (i) technology that has great economic or technical diffusive effects on the national economy, thus essential to enhancing the industrial structure and strengthening industrial competitiveness; (ii) technology for which three (3) years have not elapsed since the date of its initial introduction in Korea or if three (3) years have elapsed, technology that has an economic effect or has greater technological capacity than those already introduced; and (iii) technology for which the processes thereof required is to be carried out mainly in Korea.

If all the requirements of a foreign investment for the purpose of tax incentives prescribed in the Preferential Taxation Act have been met, the corporate tax, income tax, acquisition tax, registration tax, property tax and aggregate land tax shall be reduced or exempted.

Corporate tax or corporate income tax on any foreign invested company shall be reduced or exempted. Such reduction or exemption applies only to income generated by a business which is the subject of reduction and exemption of tax during a taxable year which ends within five (5) years from a taxable year. This income accrues for the first time from such business beginning from its commencement. The amount reduced or exempted during the initial five years will be an amount in full, of corporate tax or income tax equivalent, on such business income multiplied by the ratio of foreign investment. For each taxable year, which ends within the following two (2) years, the tax amount shall be reduced or exempted by 50% of the tax amount which is to be reduced and exempted in the first seven years.

Corporate tax or income tax on dividends of stocks or investment equities acquired by any foreign investor shall also be reduced or exempted in proportion to the income accrued from the foreign invested company, provided the company actually carries out a business subject to reduction or exemption.

For acquisition tax, registration tax, property tax, and aggregate land tax on any property acquired and held by a foreign invested company to carry out its reported business, such tax amount shall be reduced or exempted, or a certain amount deducted, from its tax base. During the initial five (5) years, the amount of reduction or exemption shall be determined by multiplying the calculated tax amount for the property by the ratio of foreign investment in full. A 50% tax amount will be reduced or exempted within the following two (2) years.

## III. Forms of Doing Business in South Korea

### A. Brief Overview on Legal Processes for Korean Business Entities

As noted earlier, there are four types of companies in South Korea. (1) joint stock company ("Jushik Hwesa"); (2) limited liability company ("Yuhan Hwesa"); (3) unlimited partnership ("Hapmyung Hwesa"); and (4) limited partnership ("Hapja Hwesa"). This section provides a brief overview of the legal processes involved in establishing each business form. A more detailed analysis of establishing or incorporating more popular entities such as the joint stock company in Korea is addressed in Part II.

Hapmyong Hwesa (partnership companies) are incorporated jointly by at least two members. No member of a Hapmyong Hwesa can transfer his or her shares to other persons without the consent of the other members. No member can become a member or director with unlimited liability at another company with a similar business purpose as well. If no specific managing member is designated at the company's outset, each member must represent the company. If assets of the company are insufficient to fully satisfy obligations of the company, each member will be jointly and severally liable to carry out the company's obligations. In Korea however, consent of all members of the company can allow the company to transform into a Hapja Hwesa (limited partnership company).

A Hapja Hwesa (limited partnership company) is composed of members with either limited or unlimited liability. Members of a Hapja Hwesa cannot provide contributions, credits, or personal services. Every member having unlimited liability automatically assumes the responsibility and duties of managing company affairs unless provided otherwise within the company's articles of incorporation. Conversely, members with limited liability cannot transact business within the class of business carried out by members with unlimited liability without consent of other members or directors. Additionally, members with limited liability may not conduct business affairs for another company having the same kind of business purpose as the former. Lastly, members with limited liability may transfer their shares provided all members with unlimited liability grant consent which could in turn transform the company into a Hapmyong Hwesa (partnership company).

A Jushik Hwesa (joint stock company) must be incorporated jointly by at least one person. At the time of incorporation, important determinations must be made such as, the total number of shares authorized to be issued, the par value per share, and the total number of shares. In regards to each determination, specific decisions and procedures must follow. For example, the number of shares to be issued at the time of incorporation must be no less than one fourth of the total number of shares authorized to be issued by the company. Additionally, there used to be the minimum capital requirement of KRW50,000,000, which requirement was abolished recently. Now, no minimum capital requirement exists. Next, the par value per share must be at least KRW 100, and shares may be transferred. Provided that a foreign investor shall invest at least KRW100,000,000 to get the foreign invested company qualified under the Promotion Act. In terms of management, a Jushik Hwesa shall have a general shareholders' meeting consisting of the directors, the board of directors, auditors, and an audit committee. The general shareholders' meeting shall be the highest function within the company. This is where minority shareholders may propose certain matters such as issues to be resolved. Minority shareholders are those who hold no less than three hundredths of the total issued and outstanding shares. Finally, the directors, and the board of directors, will be the main managers in regards to the general affairs of the company.

A Yuhan Hwesa (limited liability company) must be incorporated jointly by at least one member with the total number of members not exceeding fifty. Moreover, the total amount of capital must be at least KRW 10,000,000, with the amount of each unit of contribution being no less than KRW 5,000. Provided that a foreign investor shall invest at least KRW100,000,000 to get the foreign invested company qualified under the Promotion Act. For liability purposes, each member should be limited to the amount of his or her contribution to the company. Finally, a member may transfer his or her shares pursuant to the resolution of a general members' meeting, with the company allowing one or more directors who may represent the company.

**B. Foreign Directors in South Korea**

The total number of foreign directors serving on boards within Korea has been increasing steadily. Since the presence of foreign directors creates diversity, this development has been seen as a positive development. Nevertheless, regardless of the fact that foreign directors can infuse diversity in a positive aspect, the primary factor is whether the directors remain independent from the principal and controlling shareholders and act on behalf of shareholders equally. In some cases, the development of foreign directors have proven to be more helpful in some sense due to the fact they are much more willing to withstand external pressures from politicians, creditors, and regulators. However, in other cases, foreign directors have fallen easily susceptible to controlling shareholders interests. One example can be the selection of outside directors being elected to boards after being directly nominated by controlling shareholders. In short, foreign nationals may hold offices such as director of a board within South Korea and their increasing presence has been seen a positive influence overall.

## VI. Regulation of Foreign Investments

**A. Overview**

Tax incentives granted to foreign direct investment under the Preferential Taxation Act are aimed primarily at attracting high-technology and large-scale manufacturing investment, which includes partial and full exemptions on individual and corporate income taxes as well as local taxes. Full exemptions ranging from customs duties, special excise taxes, and value added taxes, may also be granted in regards to imported capital goods.

To be eligible for tax incentives provided for under the Preferential Taxation Act, a foreign investor must either retain at least 10% of the outstanding shares of the invested company (foreign-invested company). Where the ownership of the outstanding shares is less than 10%, the foreign investor must exercise managerial control by an investment agreement or a similar arrangement with the foreign-invested company.

**B. Tax Incentives for Foreign Direct Investment**

The Preferential Taxation Act expanded its scope on foreign direct investment to be eligible for tax incentives in the form of tax exemptions and reductions by extending the duration for which these tax incentives stay in effect. For the detailed tax incentives, please refer to Section II.D of this memorandum.

**C. Tax Incentives for Foreign Investment Zone**

In an effort to attract large-scale foreign investment, the Preferential Taxation Act also introduced a foreign investment zone system. In the past, the national government granted tax incentives to foreign direct investment in pre-designated areas. Now, the Preferential Taxation Act grants local governments the autonomy to designate foreign investment zones for foreign direct investment upon request from foreign investors based on the amount of investment and the number of jobs expected to be created from the foreign direct investment.

Tax benefits granted under the Preferential Taxation Act for foreign direct investments which receive foreign investment zone designation are similar to those granted to foreign direct investment in advanced technology and high-technology service businesses. With respect to national taxes, a foreign direct investment which receives the foreign investment zone designation is eligible for full exemption on individual and corporate income taxes for the first three to five years and 50% reduction for the next two years. Local taxes are exempted or reduced for the duration of up to 15 years. Imported capital goods used by foreign-invested companies in foreign investment zone are exempt from customs duties as well.

**D. Income Tax on Foreign Nationals**

A foreign national working in Korea under a technology inducement agreement is eligible for 50% reduction from individual income tax for two years for the income earned by providing their services to the domestic company.

## V. Tax and Accounting

### A. Overview of the Korean Tax System

The Korean tax system has undergone a number of revisions in recent years. Tax reforms have been instituted almost every year. At present, principal taxes affecting business enterprises in Korea include corporation tax, income tax, individual income tax, value added tax, customs duties, and inhabitant and education tax surcharges levied on the corporation tax.

Tax collections constitute the Korean government's largest source of revenue. Among these, taxes on goods and services produce the most revenue, followed by taxes on income. Set forth below is a brief outline of national and local taxes:

1) National taxes (levied by the central government):

- Direct Taxes: individual income tax, corporation tax, inheritance and gift tax, assets revaluation tax, excess profits tax.

- Indirect Taxes: value added tax, special excise tax, liquor tax, telephone tax, stamp tax, securities transaction tax, customs duties, transportation tax, education tax, special tax for rural development.

2) Local taxes (levied by local governments):

- City and Country Taxes:
  - Ordinary Taxes: inhabitant tax, property tax, automobile tax, farmland tax, tobacco consumption tax, butchery tax
  - Earmarked Taxes: city planning tax, workshop tax

- Provincial Taxes:
  - Ordinary Taxes: acquisition tax, registration tax, license tax, horse race and pari mutual tax
  - Earmarked Taxes: community facility tax, regional development tax

### B. Administration of the Tax System

The Tax Bureau of the Ministry of Finance and Economy is responsible for drafting tax laws, negotiating international tax treaties, and preparing the tax revenue section of the national budget.

The National Tax Service, an agency of the Ministry of Finance and Economy, is in charge of the assessment and collection of internal taxes. There are seven regional tax offices and 134 district tax offices under the National Tax Service.

The appeal of a contested tax assessment may begin at the district tax office level or at the regional office level of the National Tax Service, or the taxpayer may ask for a review directly from the National Tax Service. If these procedures do not resolve the dispute, the taxpayer has the right to file an appeal with the National Tax Tribunal, also an agency of the Ministry of Finance and Economy, but separate from the National Tax Service. If a decision of the National Tax Tribunal is adverse to the taxpayer, the taxpayer may file an action with the High Court, at which point the issue will be reviewed in a trial, de novo. Lastly, an appeal from the High Court may be taken to the Supreme Court.

An alternative procedure is to appeal a tax assessment directly to the Board of Audit and Inspection, an independent agency directly under the president. An unfavorable ruling before this body may be reviewed by the High Court with the right of appeal to the Supreme Court, however, this appeal procedure is rarely used. The primary function of the Board of Audit and Inspection is to audit the operations of other government bodies. Its power to review tax assessments is only a small part of its authority. The National Tax Tribunal, on the other hand, is involved exclusively in the hearing of tax appeals.

The taxpayer is entitled to interest at the statutory rate on any refunds found to be owed to the taxpayer. Interest runs from the due date of payment, or actual payment date, whichever is later, until the date a vested right to refund is created at law.

In addition to the remedial procedures available under Korean statutes, a resident taxpayer may request the National Tax Service's Assistant Commissioner (International), to initiate mutual agreement procedures (also referred to as "competent authority assistance procedures") if the taxpayer believes that a foreign tax authority (in a jurisdiction with which Korea has a tax treaty in force) has taken a position conflicting with provisions of the treaty. Pursuant to these procedures, the taxpayer may request that the district tax office delay issuance of a tax payment notice, or extend time to pay tax after a tax payment notice has been given. Further, the taxpayer may request the authorities to extend time to appeal to the National Tax Service or the National Tax Tribunal. The terms of settlement at the competent authority level may be enforced, irrespective of the running of the statute of limitations, within one year from the date of the settlement.

The tax assessment authority is required to issue a pre-determination notice to the taxpayer before issuing a notice for tax payment. This gives the taxpayer an opportunity to file a complaint with the district tax office based on the notice before an actual tax assessment is made.

## C. Filing and Payment

A corporate taxpayer must file a tax return and pay corporation tax as set out below:

1) Corporations Required to File Tax Returns

Filing is required of: (i) any domestic corporation having its main office in Korea; (ii) any foreign corporation which maintains a domestic place of business in Korea; and (iii) any foreign corporation which has a domestic source of income from real estate or from forestry.

2) Kinds of Tax Returns to Be Filed

Two types of returns are required: (i) returns for each complete fiscal year; and (ii) returns for each six-month period commencing on the first day of the fiscal year of a corporate taxpayer. The former are referred to as "corporate tax returns," and the latter as "semi-annual tax returns." Whenever a taxpayer's fiscal year exceeds six months, other than the first fiscal year, a semi-annual and corporate tax return must be filed.

3) Documents to Be Submitted

A tax return consists of a corporation tax and a taxable income report form. Other detailed schedules as specified in the Presidential Decree of the Corporation Tax Act, and financial statements prepared in conformity with the Korean Business Accounting Principles must be submitted with the tax return as well. Among financial statements required are: a balance sheet, profit and loss statement, and a statement of appropriation of earned surplus (or statement of disposal of deficit). Corporate taxpayers having transactions with foreign parties having specific special relationships during the fiscal year are required to report such transactions to be filed with the annual return.

4) Deadline for Submission

A corporate taxpayer preparing their own tax return, or prepared by an approved preparer, is required to file within three months from the end of its fiscal year.

5) Payment upon Filing of Tax Returns

As a general rule, corporation tax must be paid upon filing the tax return and no later than the deadline for filing. A corporate taxpayer may elect to pay the tax on an installment basis if the corporation tax payable exceeds 10 million won. In such a case, a portion of the corporation tax may be deferred for 30 days from the date of filing the tax return. Certain small corporations, as defined in the statute, may defer payment of tax for up to 45 days.

6) Semiannual Tax Returns

A corporate taxpayer is required to file a semi-annual tax return if its fiscal period exceeds six months. Corporation tax payable on filing a semi-annual tax return is based on 50% of the corporation tax paid in the preceding fiscal period. This amount may vary if the preceding period is not a full calendar year. If a taxpayer determines that the amount of corporation tax to be paid, based upon the 50% rule, is greater than the amount of corporation tax based on the actual profit or loss shown on its books for the pertinent 6-month period, then the taxpayer may file the semi-annual tax return on the basis of its financial statements and pay corporation tax on the computed taxable income. For interim payments, filing and payment is required within two months after the end of each six month period.

7) Amended Tax Returns

A taxpayer may file an amended tax return showing entitlement to a tax refund, or an increase in loss, within one year from the statutorily determined deadline for filing the initial tax return. On the other hand, an amended tax return showing an additional tax payment, or a decrease in loss, may be filed at any time before the tax office advises the taxpayer of an adjustment pursuant to the re-determination process. Filing an amended tax return may permit the taxpayer to reduce certain tax penalties.

**D. A List of Tax Treaties Currently in Effect with South Korea**

Albania, Algeria, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Croatia, Czech, Denmark, Egypt, Estonia, Fiji, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kuwait, Laos, Latvia, Lithuania, Luxemburg, Malaysia, Malta, Mexico, Mongolia, Morocco, Myanmar, Nepal, Netherlands, New Zealand, Norway, Oman, Pakistan, Papua New Guinea, Philippines, Poland, Portugal, Qatar, Romania, Russia, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Tunisia, Turkey, U.A.E, U.S.A., Ukraine, United Kingdom, Uzbekistan, Venezuela, Vietnam.

COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN SWITZERLAND

## 1. Overview of the legal framework of Switzerland

Switzerland is one of the world's leading financial centres. The main factors which helped Switzerland to attain this position are a stable political situation, the country's capacity to facilitate savings, a stable currency with minimum transfer restrictions, traditionally low interest rates, and highly sophisticated and secure financial institutions. The principles of freedom of trade and industry as well as the freedom of contract ensure that domestic and international investors encounter a favourable financing climate.

Swiss law does not distinguish between Swiss-owned and foreign-owned business entities, and, in principle, there are no registration or local agent requirements. According to the Swiss Private International Law, companies are subject to the law under which they were formed. When establishing a Swiss company or a Swiss branch office the **Swiss Code of Obligations** (CO, SR 220) is the main body of law which regulates the different business entities.

Free and fair competition is strengthened by a strict **Cartel Act** (SR 251). Cartels are not illegal per se but abuses are prosecuted. The Swiss Anti-Trust Commission (www.weko.admin.ch) is responsible for applying and enforcing these stipulations.

Commercial enterprises doing business in Switzerland are obliged to register in the **commercial register**. Its central focus is its public disclosure role. Accordingly, the Central Business Names Index (www.zefix.ch) is open to anyone for inspection and can respond to inquiries as to whether a company name is available. It also specifies each company's extent of liability and its authorized representatives but not the annual statements. As a rule, it is only after registration in the commercial register that legal entities receive their own legal personality and status.

The state has a federal structure and is divided into three political levels: federal, cantonal and municipal. The Swiss **tax system** mirrors this characteristic by various levels of direct taxation: direct federal tax, cantonal and municipal taxes. The accomplished reform of the income tax system in recent years provided harmonization of the formal aspects of the various cantonal tax legislations. Another specific characteristic of the Swiss tax regime is that it is quite simple and very common to request an advance tax ruling. Discussions with the tax authorities are conducted informally in a climate of mutual trust and, in general, lead to a result satisfactory to both the taxpayer and the tax authorities. More information is available under www.estv.admin.ch.

Concerning regulations on immigration visas, residence and work permits are strictly controlled in Switzerland. Since there are no agreements on the free movement of persons, non-EU/EFTA citizens, in particular U.S. nationals, who wish to work and live in Switzerland, have to fulfil certain conditions. For EU/EFTA citizens a more liberalized regulatory framework applies. The Federal Office for Migration publishes the latest requirements for entering the country on its homepage (www.bfm.admin.ch).

## 2. Ways to enter Switzerland

There are two ways to enter Switzerland: By establishing a separate Swiss legal entity (see II. A.) or by forming a branch of a foreign company (see II. B.). Business relationships can, of course, also be set up on a purely contractual basis, e.g. as that of an agency or sole distributorship. There are numerous ways to structure agreements of that kind under Swiss contractual law, which recognises only a small number of restrictions regulated by compulsory law (see. II. C.).

### a. Establishing a separate legal entity

The so-called "Aktiengesellschaft (AG)" in German, "Société anonyme (SA)" in French, and "Società anonima (SA)" in Italian, is the most important type of business entity in Switzerland. It is an appropriate legal form not just for large companies but also small and medium-sized for-profit-businesses. It is the customary type of corporation for holding companies and financial enterprises. In addition, it is often chosen by foreign companies as the legal form for their subsidiaries.

The AG's corporate structure is similar to a corporation in the United States or a public limited company in the UK. It has its own legal personality and its own name. The registered share capital is determined in advance and subdivided into shares. The liability is limited to company assets. The owners of the shares (the shareholders) exercise their rights at the General Meeting of Shareholders. Actual management of the AG is the exclusive responsibility of the Board of Directors and the executive officers who are appointed by that Board.

To form an AG one or more private individuals or legal entities are required. If the shareholders are private individuals, it is irrelevant from the point of view of Swiss corporate law whether they are Swiss nationals or foreigners. On the other hand, a new formation can become somewhat more complicated if one or more of the founding shareholders are foreign companies. It is therefore advisable either to authorize private individuals by proxy to set up the company or – after incorporation by private individuals – to transfer the shares to a foreign company.

The text of the Limited Company Law is available under www.admin.ch/ch/d/sr/c220.html (Article 620 et seq. CO; in German, French, Italian).

### b. Establishing a branch office

A foreign company may also establish one or several branch offices in Switzerland. The advantage of a branch office is that it is simpler and less expensive. Branch offices have a certain organisational and financial autonomy from the principal enterprise on which it depends: under Swiss law, a branch office can enter into contracts and execute and settle transactions in its own name, and can sue and be sued at its place of business. Legally, however, the branch office is part of the foreign parent company and not a separate legal entity. If the foreign parent is liquidated or becomes insolvent, the effects of such liquidation or insolvency also extend to the Swiss branch office.

### c. Use of agents, distributors and travelling sales persons

A foreign supplier can also choose to enter the Swiss market by selling his/her products through agents, distributors or travelling sales persons. The different channels of selling are subject to different legal frameworks.

Agency contracts are governed by article 418a to 418v Swiss Code of Obligations (CO). Article 418a CO defines the agent as a person who is contractually obliged, on a continuous basis and without being an employee, either (i) to act as an intermediary on behalf of one or several principals in business transactions (application agent), or (ii) to conclude such transactions in their names and for their accounts (underwriting agent).

Although an agent in the aforementioned sense is acting in the name and for account of a third party (the principal), he always performs his work independently, that is in a self-employed capacity. He may organize his work and dispose of his time freely. Swiss law does not permit a principal to inspect the books of his/her Swiss agent. In practice, commercial agents and insurance agents play a decisive role in business. To insurance agents, additional rules of the Swiss Insurance Contract Law (SR 221.229.1) apply.

If a person or a company acts independently, like an agent, but on a case by case basis or on a single deal basis rather than continuously, such arrangement is not to be qualified as an agency contract but constitutes a brokerage contract. Brokerage contracts are governed by different legal rules (article 412 et seq. CO). On the other hand, even if a commercial agent is working only on a part-time basis, but continuously, the provisions concerning commercial agency agreements (article 418a et seq. CO) are applicable, unless the parties have stipulated something different in writing (article 418a para. 2 CO).

A person or company undertaking, against payment of a commission, to sell and/or purchase goods in his own name rather than in the principal's name, although acting on the principal's account, is not a (commercial) agent, but a commission agent, again subject to a different legal regime (article 425 et seq. CO)

Distribution agreements are not regulated by statute in Switzerland. A distributor is defined as a person or a company who is contractually obliged to buy the supplier's products in order to resell them in a particular territory on an exclusive or non exclusive basis. A typical duty of the distributor is the duty to perform sales promotions. In contrast to an agent who only acts as an intermediary of the principal, a distributor is legally independent and acts on his own behalf and for his own account and risk. Thereby, the ownership of the contractual goods shifts from the supplier to the distributor. Accordingly, the distributor bears the whole marketing risk.

A travelling sales person (Handelsreisender, article 347 CO) is subordinated to his/her employer and is obligated to strictly perform work according the employer's instructions. Such a person acts as an intermediary or concludes business transactions outside of the premises of the employer, similar to a commercial agent, but he or she is acting under an employment contract and not as an independent business person. A travelling sales person is entitled to a fixed salary, with or without commission, and reimbursement of travel and entertainment expenses. If a foreign supplier chooses to sell his/her products in Switzerland through travelling sales persons or other employees who are not Swiss nationals, a work permit is required prior to immigrating and/or working in Switzerland. Both, the foreign supplier and his/her travelling sales person(s) (employees) may become subject to Swiss social security legislation. If travelling sales persons buy

products from a stock maintained by the foreign supplier in Switzerland, such activity may qualify as permanent establishment under Swiss tax law, subjecting the foreign supplier to Swiss taxes on his Swiss earnings.

## 3. Regulation of foreign Investments

Switzerland welcomes foreign investment and accords it national treatment. Foreign investment is not hampered by significant barriers.

### a. Restrictions on foreign investment

In general, there are no restrictions on foreign investments.

### b. Financial incentives

i. National tax incentives:

Financial incentives (e.g. loan guarantees and interest subsidies) and federal tax holidays or reduced federal taxes for up to ten years may be granted to businesses making major investments or creating jobs in areas in need of economic development. The incentives as well as the regions for which such incentives are available are specified in the so-called "Lex Bonny Decree."

ii. Cantonal tax incentives:

In order to attract new enterprises and thus strengthen regional economies, cantons may grant investment and tax incentives to newly established corporations. Incentives include tax holidays or reduced taxation for up to ten years at the cantonal/municipal level, interest subsidies, job-related subsidies or special guarantees. Incentives can be granted to both manufacturing and service enterprises and usually depend upon the type and amount of investment, the number of employment opportunities created and the region where the new enterprise is to be established.

Apart from tax incentives, there are no direct state subsidies for foreign investment.

## 4. Forms of doing business in Switzerland

### a. The "Aktiengesellschaft (AG)"

The main steps in establishing an AG are as following:

- Draft the articles of association in the presence of a notary public, who notarizes the personal and corporate signatures on the application form and authenticate the articles of association and the public deed of incorporation;
- Place the paid-in capital in an escrow account with a bank; it is important to note that during the procedure of inscription in the commercial register, the share capital remains blocked. The inscription procedure ends when the corporation is formally registered in the commercial register. The paid-in

capital will, however, continue to be blocked until the bank receives an extract from the commercial register, proving that the new corporation has been duly inscribed;

- File the deed certifying the articles of association to the local commercial register to obtain a legal entity;
- Pay stamp tax at post office or bank after receiving an assessment by mail;
- Register for VAT;
- Enrol employees in the social insurance system (federal and cantonal authorities).

The following plan serves to give an approximation of the **time** required in order to form a new AG:

| | |
|---|---|
| Clarification – acceptability of company name | 1 to 5 days |
| Preparation of foundation documents with annexes (foundation document, articles of association, application to commercial registry, etc.) | 1 to 5 days |
| Clarification of domicile and auditors | |
| Paying in of capital | |
| Meeting of founding shareholders/ members | less than 1/2 day |
| Inscription in commercial register | 3 to 7 days |

The following incorporation **costs** are likely to arise when setting up a new AG with a share capital of CHF 100,000.

| | |
|---|---|
| Notary fees | 2% of share capital (min. CHF 500.-) |
| Registration fees (Commercial Register) | approx. CHF 800.- |
| Advisory fees (depending on requirements) | approx. CHF 4,000.- to 7,000.- |
| Federal stamp duty (1%) | the first CHF 1,000,000.- of capital is exempt |

| | |
|---|---|
| Other costs (general expenses) | individual by needs |

The following founding documents are needed to form the company:

- Personal data of the founders (or their representatives), members of the board, the authorized representatives of the company and the auditors;
- Application for registration in the commercial register signed by two members of the board of directors or by one member with power of proxy and the corporate signatures of all authorized signatories. All signatures must be officially certified;
- Deed (notarized document) of incorporation;
- Clear and unequivocal articles of the association containing the details required in legislation (in particular the name of the company, its registered domicile and purpose);
- Declaration of acceptance of the appointments by the members of the board of directors if this is not apparent from the deed of incorporation;
- Minutes of the constitutional meeting of the board of directors, stating who was elected chairman and what signing authority has been given;
- If shares are paid in cash; confirmation from a Swiss bank;
- If the company does not dispose of a legal domicile where it is registered: Declaration by the domicile holder that the company has been granted a legal domicile where it is registered (c/o address);
- Declaration by the founders to the intent that no other payment in kind exists and that shareholders have not be granted and privileges other than those mentioned in the documents (Stampa Declaration);

If contributions in-kind are made, or if such are to be made, or if special privileges are granted to shareholders, the following documents also have to be submitted:

- Contracts for contributions in-kind including the necessary documents (inventories and/or acquisition balance sheets);
- Take-over contracts including the necessary documents (inventories and/or acquisition balance sheets);
- Founders report (signed by all founders);
- Unreserved confirmation of an audit by a state supervised auditing company, accredited auditing specialist or auditor.

i. Liability and risk limited to capital

The shareholders have no personal liability beyond the share capital. A shareholder's liability is restricted to the amount of subscribed for share capital.

Founders, members of the board of directors and all persons who participated in the foundation become liable to the company, as well as to shareholders and obligated company employees, for any damage caused by indicating intentionally or negligently incorrect or misleading information in breach of the legal requirements and their duties in general.

ii. Management

The board of directors is the management body of the AG. The board of directors consists of one or more members. The law confers the board of directors with un-transferable and inalienable duties (e.g. overall management of the company, definition of the management structure, control of employees entrusted with management functions, preparation of the annual report, etc.). There is no requirement for a board member to be a shareholder. If it so wishes, the board can, by means of internal organisational regulations and based on corresponding articles of association nominate individual members (delegates) or third parties (managers, authorized clerks), to carry out those functions of management which can be delegated. Those people authorized to sign on behalf of the corporation must be entered in the commercial register.

There are generally no restrictions with respect to the nationality of the shareholders; however, one member of the board of directors authorized to represent the company must reside in Switzerland. When appointing members of management, it is important to note that it may well be necessary to obtain work permits for non-Swiss people.

iii. Minimum share capital

An AG has to have a share capital of at least CHF 100,000.–. The share capital can be divided into bearer and/or registered shares. The nominal value of those shares must be at least CHF 0.01. When establishing the corporation, each share must be paid up to at least 20 % of its nominal value, but the total paid-up share capital must amount to at least CHF 50,000.–.

A part of the share capital can also be issued in the form of so-called participation certificates. Essentially, these are shares without voting rights.

iv. Taxation

1) Income tax:

*The Swiss Federation* levies corporate income tax at the flat rate of 8.5% on profit after tax of corporations such as the AG. The basis for determining taxable income is the worldwide income pursuant the statutory accounts, with exception of income attributable to foreign permanent establishment or foreign immovable property. Such income is excluded from the Swiss tax base and is only taken into account for rate progression purposes in cantons that still apply progressives rates. Apart from the participation exemption for dividend and capital

gains income, various adjustments required by tax law and the use of existing loss carry-forwards (the loss carry-forward is seven years), there are very few differences between statutory profit and taxable profit. The most common deductions allowed are depreciation, tax expense, interest expense and management and service fees/royalties. The last two are deductible to the extent that they are in accordance with the arm's-length principle. Furthermore, the Swiss Federal Tax Administration has issued safe harbour rules for thin capitalization purposes. Given the tax harmonization on *the cantonal and municipal levels*, most tax rules are identical or very similar to the rules on the federal level. Nevertheless cantonal tax laws offer special tax regimes differentiating between the operating company, the holding company, the domicile company and the mixed company.

2) Capital tax:

On the *federal level* no capital tax is levied. The basis for the calculation of *cantonal/municipal* capital tax is in principle the company's net equity (i.e. share capital, paid-in surplus, legal reserves, other reserves, inappropriate retained earnings). The taxable base of an AG also includes any provisions disallowed as deductions for tax purposes, any other undisclosed reserves, as well as debt that economically has the character of equity under the Swiss thin capitalization rules. Some cantons even provide for crediting the cantonal corporate income against capital tax. The tax rates vary from canton to canton and depend on the tax status of the AG. It equals 0.01% of the taxable equity with a minimum of CHF 250.-, multiplied by the current cantonal and communal multiplier.

3) Withholding Tax:

The distribution of a AG's profits, e.g. in the form of dividends or other kinds of distribution, is subject to the federal withholding tax. This tax is levied at source and is currently at a rate of 35 %. A refund of this tax depends on whether the double taxation treaty between Switzerland and the country of residence of the recipient provides for a refund. In a relationship between a Swiss parent and a Swiss subsidiary, the company which is paying out a cash dividend can choose between delivering up the (withholding) tax or applying the notification procedure.

4) Value-added tax:

Within the framework of business activity, it is important to note that supplies of goods and services within the territory of Switzerland give rise to value-added tax (VAT) which is levied on gross sales. Liability for VAT begins as soon as domestic gross sales reach a level of CHF 100,000.– per annum. The normal rate is 8.0 %, which is low in an international comparison. Turnover derived from the supply of goods and services to customers abroad is exempted from VAT.

5) Issuance stamp tax:

The tax on the issuance (and the increase) of shares of a Swiss AG is 1% on the fair market value of the amount contributed, with an exemption on the first CHF 1 million of capital paid in, whether it is made in an initial or

subsequent contribution. Issuance stamp tax is further levied in respect of some debt instruments such as bonds and money market papers at a rate of 0.06% or 0.12% on the nominal value of such instruments for each year or part thereof till maturity of such instrument. Special rules apply for instruments that run for less than one year.

**b. The "Zweigniederlassung" (branch office)**

i. Foundation procedure:

All foreign companies must register their branch offices with the register of commerce in the canton in which they are domiciled. Further, a representative with full power of representation who resides in Switzerland must be appointed for the branch office.

A branch office must have the same company name as its head office and may contain additional wording in its name that is valid only for the branch office. In addition, the company name of a foreign branch office must include the place of its headquarters, the place of the branch office and the explicit designation as a branch office.

ii. Liability and risk limited to capital

The liability of a branch office is not limited as such. It is the foreign main company which is jointly liable for debts of its branch office.

iii. Management

The branch office is managed by local managers, although the main company can exercise influence directly. At least one member authorized to represent the branch office must reside in Switzerland.

iv. Minimum share capital

When setting up a branch office no separate equity is required. The capital resources of the foreign main company are sufficient.

v. Taxation

Branches of foreign corporations are in general treated the same way as legal entities for tax purposes. They are however not subject to issuance stamp tax upon formation. Profits of a Swiss branch office are exempt from taxation (Swiss withholding tax) in the partner-nation under many double-taxation agreements which Switzerland has signed with most industrial nations.

vi. Visas, residence and work permits

Switzerland has basically a dual system for the admission of foreign potential workers/residents which distinguishes between EU/EFTA citizens and third country citizens.

1) Third country citizens:

Generally a valid travel document recognized by Switzerland is sufficient to enter the country. Only citizens of certain countries need an *entry visa* (e.g. China, India, Russia, but not the U.S.). A *residence and work permit* is needed in any case for a stay of over three month and people working in Switzerland during their stay. They are still subject to existing admissions regulations (priority of nationals, control of wages, quotas), but they have been granted significantly more mobility in the interest of labour market flexibility. Residence and work permits are issued by the competent Cantonal Authorities who examine the application and – if a visa is needed – inform the competent Swiss Embassy abroad to issue a visa as soon as the Cantonal Authority is ready to issue a residence and work permit. As a rule, the application for a work permit has to be filed by the future employer. In all cases, a written employment contract is required by the authorities. In principle, the employer has to demonstrate that no local employee and no employee from the EU/EFTA can fill the vacant position. He must document that he has searched for possible employees on the local market in vain. However, this principle of the priority of local employees does not apply in some exceptional cases as e.g.:

- executives or qualified specialists of internationally operating firms within the scope of an intercompany transfer; and
- executives or highly qualified specialists who are indispensable for important research projects, or essential for the fulfilment of extraordinary assignments.

ii. EU-citizens:

(i.e. Belgium, Denmark, Germany, Finland, France, Greece, Great Britain, Ireland, Italy, Luxemburg, the Netherlands, Austria, Portugal, Sweden, Spain, Norway, Cyprus and Malta): regardless of their qualifications they are granted easier access to the Swiss labour market under the Agreement on the Free Movement of Persons. EU-citizens may stay in Switzerland as tourists for up to three months without a residence permit. If EU-citizens plan to stay in Switzerland for longer than three months, or if they plan to work in Switzerland, a residence permit is needed.

**5. Tax treaties**

The following list shows the Swiss double taxation agreements currently in effect with Switzerland (source: Federal Department of Finance, www.efd.admin.ch):

| **Agreements in force** | | | | | |
|---|---|---|---|---|---|
| Albania | Côte d'Ivoire | India | Liechtenstein[2] | Pakistan | South Africa |
| Algeria | Croatia | Indonesia | Lithuania | Philippines | Thailand |
| Armenia | Czech Republic | Iran | Luxembourg | Poland | Trinidad and Tobago |
| Australia | Denmark[1] | Ireland | Malaysia | Portugal | United |

| | | | | | |
|---|---|---|---|---|---|
| | | | | | Kingdom |
| Austria | Ecuador | Israel | Morocco | Rumania | Tunisia |
| Azerbaijan | Egypt | Italy | Macedonia | Russia | Ukraine |
| Bangladesh | Estonia | Jamaica | Mexico | Sweden | Hungary |
| Belarus | Finland | Japan | Moldavia | Serbia | United States |
| Belgium | France | Kazakhstan | Mongolia | Singapore | Uzbekistan |
| Bulgaria | Germany | Kyrgyzstan | Montenegro | Slovakia | Venezuela |
| Canada | Ghana | Korea (South) | New Zealand | Slovenia | Vietnam |
| Chile | Greece | Kuwait | Netherlands | Spain | Qatar |
| China | Iceland | Latvia | Norway | Sri Lanka | |

| **Signed agreements (not yet in force)** | | | | | |
|---|---|---|---|---|---|
| Argentina[3] | Colombia | Georgia | Hong Kong | Malta | Tajikistan |
| Turkey | Uruguay | | | | |

| **Initialled agreements (not yet signed)[4]** | | | | |
|---|---|---|---|---|
| Costa Rica | North Korea | Oman | United Arab Emirates | Zimbabwe |

1) Including extension to the Faroe Islands.

2) The agreement with Liechtenstein is not a comprehensive DTA. It basically governs only certain issues concerning the taxation of income from gainful employment.

3) The agreement has been applied provisionally since 2001.

4) Initialling: approval of a contractual text by appending initials. Negotiators can in this way provisionally draw up the negotiated contractual text of DTAs (and other agreements based on international law).

COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN ENGLAND AND WALES

## 1. Overview of the Legal Framework of the United Kingdom

The United Kingdom of Great Britain and Northern Ireland (UK, in short) consists of four distinct countries: England, Wales, Scotland and Northern Ireland. However, the UK is a unitary state and not a federation (like the United States of America, Germany or Russia) or a confederation (like Switzerland or the former Serbia and Montenegro).

The UK is also a parliamentary democracy that is a constitutional monarchy (i.e. it has a constitutional Sovereign, currently Queen Elizabeth II, as its Head of State). The Executive is drawn from and accountable to the Parliament of the United Kingdom, and constitutional convention is that the executive power is exercised by the Sovereign's Government which has a democratic mandate to govern. The cabinet of the Executive consisting of the Prime Minister and various ministers is an executive committee of the Privy Council, which in turn advises the Sovereign on the exercise of prerogative powers and certain functions assigned to the Sovereign and/or the Privy Council by Acts of Parliament.

Whilst Scotland, Wales and Northern Ireland posses their own legislatures, as of 2001 England does not. The authority of these regional legislatures is dependent on primary legislation known as the Acts of Parliament of the Parliament of the UK in Westminster and in principle can be abolished at the will of that Parliament. The UK's Parliament consists of the Sovereign, the House of Lords and the House of Commons.

There are also three separate judicial systems in the United Kingdom: that of England and Wales, that of Scotland and that of Northern Ireland. However, in the UK, the final court of appeal for all cases, other than Scottish criminal cases, is the Supreme Court of the United Kingdom (whose functions were previously performed, until recently, by the House of Lords, a chamber of the UK's Parliament). For Scottish criminal cases, the final court of appeal remains the High Court of Justiciary. In all matters appeals may be made to the European Court of Justice in matters of EU law binding in the UK (see para 1.6.3 below for more details). In England and Wales civil cases at first instance are heard in the County Courts (for claims under £25,000) or the High Court (for any amount of claim). There are also specialist tribunals that have jurisdiction to hear claims. (such as the Employment Tribunal for employment related claims).

The UK does not have a codified written constitution as is the case, for example, with the United States of America. There is no single document that describes, establishes or regulates the structures of the state and the way in which these relate to the people.

The sources of law are as follows:

### a. Acts of Parliament

Acts of Parliament are laws (statutes) that have received the approval of the UK's Parliament. Approval of both the House of Commons and House of Lords, as well as royal assent from the Sovereign, is required for an

Act of Parliament to pass and become law. On rare occasions the House of Commons uses the Parliament Act 1911 and/or the Parliament Act 1949 to pass legislation without the approval of the House of Lords.

In theory the Sovereign has the right to refuse royal assent (operating essentially as a veto) but this has not been exercised in recent times. The royal assent was last refused by Queen Anne in 1709 for the Scottish Militia Bill 1708, on the advice of her ministers.

Acts of Parliament are amongst the most important sources of the UK's so called "unwritten" constitution. According to the traditional view, Parliament has the ability to legislate however it wishes and on whatever it wishes, with all parliamentary legislation in principle being of equal validity and effectiveness.

Acts of Parliament usually authorise subordinate legislation known as "statutory instruments" to be passed by the appropriate Secretary of State in the form of orders or regulations.

The interpretation of legislation is for the courts when they hear cases. In a conflict between legislation and common law, legislation prevails.

**b. Orders in Council** and **Orders of Council**

Orders in Council, which are made by the Sovereign in Privy Council meetings, are a form of primary legislation (if made under a royal prerogative power of the Sovereign such as to approve or reject petitions or legislation of Crown dependencies) and secondary legislation (if made under statute to, for example, give effect to UN measures or sanctions).

Orders of Council are orders that do not require personal approval by the Sovereign but which can be made by the Lords of the Privy Council (i.e. ministers). Again these can be made under the authority of the royal prerogative (such as those orders made to approve regulations made by regulatory bodies such as the General Medical Council) or statute (such as orders made to approve amendments to by-laws by chartered bodies such as the Chartered Institute of Surveyors).

**c. Treaties**

Treaties do not on ratification automatically become incorporated into law in the UK. However, important treaties and consequential international laws have been incorporated into domestic law through Acts of Parliament. For example, the European Convention on Human rights to a considerable extent has been incorporated into domestic law through the Human Rights Act 1998. More generally, the laws of the European Union (including one of the main treaties known as The Treaty on the Functioning of the European Union) are binding in the UK by virtue of the European Communities Act 1972.

**d. Common Law**

The United Kingdom uses the common law legal system (except in Scotland where some civil law is incorporated) and court judgements also commonly form a source of the UK's "unwritten" constitution: generally speaking, the judgements of the higher courts form precedents or case law that binds the lower courts and judges.

Unlike civil code based systems, in a common law system the judges make the law in the decision they reach relying on established precedent (the principles laid down in older cases) but always subject to legislation.

**e. Conventions**

Conventions (that is, rules of constitutional practice) are regarded as binding in operation but not formally enforceable in a court of law. They are observed essentially due to political convenience. Some examples of conventions are: the Sovereign shall grant the royal assent to all Bills passed by Parliament, the Sovereign shall act on the advice of his or her ministers and all ministers are to be drawn from the House of Commons or House of Lords.

**f. Works of Authority**

Works of authority is the formal name for works that are sometimes cited as interpretations of the UK's "unwritten" constitution. Most are works written by 19th or early 20th century constitutionalists, in particular A.V. Dicey, Walter Bagehot and Erskine May. For example, A.V Dicey in the Introduction to the Study of the Law of the Constitution (1915) identified that "the electorate are politically sovereign" and Parliament is legally sovereign.

**2. Ways in which a foreign company can enter the country**

If a foreign company wishes to enter any particular market in the UK it may do so under the following options:

***Option 1:*** setting up and registering and trading through a "UK Establishment."

***Option 2:*** incorporating or acquiring a company or other body corporate as a wholly owned subsidiary undertaking and trading through that subsidiary undertaking.

***Option 3:*** incorporating a joint venture company or limited liability partnership or other body corporate with a local undertaking which in turn will be partly owned by the foreign company.

***Option 4:*** entering into a distribution, agency, franchise or licensee arrangement with a local established undertaking.

***Option 5:*** a combination of the above.

The actual option for the foreign company will depend on the commercial objectives and factual matrix involved. Some issues to consider are as follows:

- whether the foreign company is prepared to expose itself to direct legal liability to customers in the UK;
- the tax consequences of doing business through a particular structure or arrangement;

- the level of control the foreign company wishes to have as to the marketing, sales and after sales activities and affairs in the UK; and
- the capital, financial and administrative requirements (including matters such as public disclosures and filings) involved in each option.
- Whilst paragraph 4 of this Compendium considers each form of business in more detail, it is observed that Option 1 also gives the most control over the management of the business activities and affairs in the UK as the people engaged in the UK Establishment will be directly engaged by the foreign company and so directly accountable to it.
- If 100% "ownership" of the UK business is to be retained by the foreign company, or if the foreign company wishes to be entitled to 100% of the profit after tax made from end customers in the UK, then Option 1 or Option 2 may be considered.
- If the foreign company only wishes to deal with one undertaking in the UK, who in turn can deal with the end customers, then Option 2, Option 3 or Option 4 may be considered.

**a. Merger Control – relevant for Option 2**

A key consideration in deciding to acquire a company under Option 2 is the merger control regime (in addition to points raised in paragraph 3 below).

The Office of Fair Trading (also known as the OFT) obtains and reviews information relating to merger situations and, where necessary, refers any relevant mergers to the Competition Commission for further investigation. Both anticipated and completed mergers are covered by the regime.

The OFT refers completed and anticipated mergers to the Competition Commission for further investigation if it believes on a balance of probabilities that it is or may be the case that: (1) a relevant merger situation has been or will be created, and (2) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets for goods or services in the UK or a substantial part of the UK (with the area or areas considered being of such size, character or importance as to make it worth consideration for the purposes of merger control).

For a relevant merger situation essentially: (1) two or more enterprises must cease to be distinct (i.e. brought under common ownership or control); and (2) either the value of the UK turnover of the enterprise being acquired must exceed £70 million (the turnover test) or as a result of the merger the combined market share must exceed 25% or, if already more than 25% pre-merger then the combined market share must increase post-merger (the share of supply test); and (3) the merger must either not yet have taken place, have taken place before the reference is made or has taken place no more than 4 months before the reference is made.

In respect of the substantial lessening of competition in the UK or the substantial part of the UK, the merger is considered in terms of its effect on rivalry over time in the market or markets affected by the merger. There is a

substantial lessening of competition if the relevant merger has a significant effect on the rivalry over time, and therefore on the competitive pressures on firms to improve their offer to customers or become more efficient or innovative. The consideration involves the comparison between the prospects for competition with the merger against the competitive situation without the merger (the latter being the "counterfactual").

The OFT may, however, decide not to make a reference if it believes that: the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Competition Commission; any relevant customer benefits in relation to the creation of the relevant merger situation outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned; or in the case of an anticipated merger, the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference to the Competition Commission.

While most mergers will raise no issues relating to a substantial lessening of competition, the merger control process is designed to allow the OFT to identify those where such issues may arise, so that they may be examined in greater detail through a reference to the Competition Commission.

Whilst there is no positive obligation to notify a relevant merger situation to the OFT, a foreign company may seek legal certainty by informing the OFT about a prospective merger in advance so as to obtain clearance.

If a reference is made to the Competition Commission it has 24 weeks to complete its investigation and make its decision on remedies. Often undertakings have to be given to do or not to do something to allow the merger to take place or continue to exist if already taken place.

The European Commission is Brussels will also have an interest in mergers that have an EU dimension.

The Enterprise Act 2002 introduced a new criminal offence for those who dishonestly engage in cartels (price fixing, market sharing, limiting production or bid rigging). The cartel offence carries the possibility of a custodial sentence and an unlimited fine.

The acquisition of a public company (with or without shares listed on the UK Official List in the UK or admitted onto the Alternative Investment Market) is also governed by the City Code on Takeovers and Mergers (the Takeover Code). The Takeover code consists of 6 general principles for the good conduct of takeover bids such as equality of treatment for target shareholders; providing sufficient information to target shareholders; and the target board being required to act in the interests of the target as a whole. The Takeover Code also contains detailed rules in a number of areas including setting out restrictions on, and disclosures of, acquisitions of shares and interests in shares; when a company takeover bid has to be made; the timetable for a takeover bid; the terms of the bid; and the contents and circulation requirements of the announcements and documentation produced by the bidder and target. The spirit as well as the letter of the Takeover Code must be observed.

### b. Option 4 - Distribution

Distribution arrangements are typically used as a low risk means of expanding business into new markets or territories. The distribution could be on an exclusive basis (so only the distributor can be a distributor of the foreign company in the UK) or non-exclusive. It could also be as part of a selective distribution system, where additional distributors or sub-distributors could be engaged if certain criteria are met.

On a sale to a distributor, risk in the products sold passes to the distributor who in turn passes it on to its own customers on a resale. Whilst risk is passed to the distributor, the foreign company would have very little if any control over the final pricing or other terms of the resale by the distributor.

For example, Article 101(1) of the Treaty on the Functioning of the European Union (which is EU law that is binding in the UK) prohibits arrangements that prevent, restrict or distort competition in the EU (e.g. price fixing, or limits or controls on production, markets, technical development or investment). If a distribution agreement is in breach of Article 101(1), it may nonetheless avoid prohibition if it satisfies the criteria set out in Article 101(3), namely that the restriction is indispensable for the achievement of certain economic benefits (or "efficiencies") that will be passed on to customers and consumers, and does not eliminate competition in respect of the goods or services concerned. Certain categories of agreement are considered sufficiently benign that they will almost always satisfy the Article 101(3) criteria. As a result, they are covered by a block exemption - an EU regulation that acts to automatically exempt agreements that fall within its scope from the application of Article 101. Agreements falling outside the scope of a block exemption are not necessarily prohibited; rather, they must be assessed individually for compliance with Article 101. For example, it is permitted to include a restriction of "active sales" into an exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer.

Similar competition law restrictions are contained in the Competition Act 1998 known as the Chapter I prohibition.

Some key advantages of using a distribution over an agency arrangement are that:

- In selling to a distributor, the supplier may be able to pass on a large degree of the risk associated with the products.
- A distributor should be more motivated to sell the stock it purchases from the supplier, since the distributor takes on greater risk of failing to sell.
- A supplier will not generally be liable for any liability incurred as a result of the distributor's activities, whereas the principal is liable for the acts of his agent.
- The appointment of a distributor will avoid the need for a supplier to have an established place of business within the distributor's territory, which will reduce the supplier's administrative costs, and may also be beneficial for tax reasons.

- The supplier will not need to monitor accounts with a number of customers, but only with the distributor.

- In the UK, no compensation or indemnity is payable to a distributor on termination of the distribution agreement under the Council Directive (EEC) No. 86/653 on Commercial Agents and, accordingly, the UK Commercial Agents (Council Directive) Regulations 1993 (*SI 1993/3053*). This means that there are no statutory compensation or indemnity payments to be made to distributors under such laws on termination of the distribution as is the case with commercial agents (dealt with in paragraph 2.8 below).

Some key draw backs of using a distributor over an agent are as follows:

- A supplier has less control over the activities of a distributor than the supplier would over an agent. Therefore a distributorship may not be suitable for products where the supplier or manufacturer requires contact with the ultimate customer (for example, tailor-made products), or where the supplier wishes to maintain tight control over the marketing and pricing of the products.

- Where the supplier appoints an exclusive distributor for a territory, the supplier's entire credit risk in respect of sales into that territory is concentrated on the distributor, rather than with each customer, as would be the case with an agency arrangement. Letters of credit, bank guarantees or other forms of security should therefore be considered.

- A distribution agreement is far more likely to be at risk from competition law problems than an agency agreement. EU courts have held that, where the agent bears no significant financial or commercial risk for the activities for which the agent has been appointed as an agent by the principal, the European competition regime under Article 101(1) mentioned above will not apply to those aspects of the agreement that restrict the manner in which the agent may sell the principals goods or services.

**c. Option 4 – Agency**

An agent is an intermediary involved in making a contract between his principal and the principal's customer. Accordingly, for most purposes, the acts of the agent are deemed to be the acts of the principal.

If the agent only markets the principal and introduces a customer to the principal then the agent is likely to be only a “marketing” agent. However if the agent sells products and/or services on behalf of the principal then the agent is likely to be a “sales agent.”

The risk of an agent doing anything more than pure marketing and introductions is that the agent could be seen to be a “commercial agent” with Council Directive (EEC) No. 86/653 on Commercial Agents and, accordingly, the UK Commercial Agents (Council Directive) Regulations 1993 (*SI 1993/3053*) then imposing

various statutory obligations onto the agency arrangement: one of which is the need to pay the commercial agent compensation or an indemnity payment on the termination of the agency.

An agency could be useful in the following scenarios:

- If the supplier wishes to retain greater control of the terms of sale of his products. The imposition of resale price maintenance on a distributor is unlawful under UK and EU competition law and the national competition law of most countries; but, selling through an agent, the principal can validly (and almost always will) retain the freedom to fix his own prices for sale.

- If the supplier wishes to restrict the agent's freedom to choose the customers with whom the agent will deal. There are limits in most jurisdictions on the extent to which a supplier can restrict its distributors in the latter's free choice of customers, while it is of the essence of agency that the principal can retain the freedom to pick and choose with whom he wishes to deal and with whom he wishes the agent to deal. Generally, fewer competition law issues will arise with agency than with distributorship.

- Where direct contact between manufacturer and customer is important (for example, because of bespoke design work or highly specialised after-sales service which can only effectively be provided by the manufacturer or supplier of the product).

- Where close control over the methods of marketing is important (for example, because brand image is a crucial factor).

- Where the manufacturer wishes to retain the financial risk of stock (consignment stock with an agent normally remains the property of the principal). If the manufacturer cannot find anyone on whom to off-load this risk (a distributor), it may have to settle for an agent.

- Typically the commission paid to an agent is lower than the margin which a distributor will earn (since the distributor is taking a greater financial risk). Agency will therefore, at least in everyday terms, probably cost the supplier less than a distributorship. In situations where The Commercial Agents (Council Directive) Regulations 1993 (*SI 1993/3053*, as amended do not apply, the exit route from an agency relationship, if things do not work out well, may be cheaper for the supplier than that from a distributorship.

- Agents have a number of duties applicable under the law in addition to contractual duties, such as: to obey lawful instructions of the principal, only to act within the scope of authority granted, to use reasonable diligence and care and not to put itself in a position to have interests conflicting with those of the principal.

Some disadvantages of an agency are as follows:

- If a third party is aware that an agent is acting as agent on behalf of an identified principal and the agent acts within the scope of its authority (actual or ostensible): direct contractual relations will be

established between the principal and the third party; the agent is not liable on the transaction to the third party unless he agrees to be so (expressly or through trade custom); and only the principal can sue or be sued on the contract. However, if the agent has acted outside the scope of its authority (actual or ostensible) without the principal ratifying the agent's acts, and the third party is aware of this, the principal is unlikely to incur liability to the third party for the agent's unauthorised acts. It is therefore important to identify clearly the scope of an agent's authority.

- Rights to lump sum payments for agents on termination of agency agreements, regardless of breach of contract by the agent, arise in many countries, including the UK. This is not the case in the UK for distributorships, and the position in most other countries is similar (although in the Netherlands, for example, the courts tend to equate distributors with agents in this respect).

- Tax factors are often important. Sometimes a principal can be regarded as trading in a territory if it has an agent there, whereas the appointment of a distributor should not give rise to this problem. It may be relevant whether the agent is a sales or marketing agent and whether the agent holds stock and has a permanent distribution depot. In each case, the relevant local laws and double taxation arrangements will need careful study.

**d. Option 4 – Franchising/Licensing**

A franchise typically has the elements of: (1) the franchisor allowing the franchisee to use a name which is associated with the franchisor; (2) the franchisor exercising continuing control over the franchisee; (3) the franchisor providing assistance to the franchisee; and (4) the franchisee periodically making payments to the franchisor.

Licensing on the other hand essentially involves intellectual property rights and/or know-how being licensed to enable another manufacturer/seller to produce and/or sell goods. Therefore, a licensor simply imposes quality control restrictions in relation to the goods to be produced pursuant to the licence; whereas, a franchisor will try to regulate the way in which the franchisee operates its business in much more detail with the use of the franchise agreement and an operations manual.

Many franchisees operate from retail premises. Franchisees are often small entities with no track record, and a franchisor may have to take the head lease of premises and grant a sub-lease to its franchisee in order to satisfy the landlord's requirements. A franchisor would need to ensure that on termination of the franchise, the franchisee vacates the premises and does not continue in occupation under the terms of a lease which is not coterminous with the franchise agreement. Sometimes temporary “licences to occupy” are granted in the franchise agreement or in a standalone document, but care needs to be taken to ensure that they are genuine licences to occupy (which establish no interest in land) and not leases/tenancies (which establish interests in land and have potential associated difficulties in evicting the tenants).

Advertising is important in a franchising context. Not only are a franchisor's products and services advertised - invariably the franchise agreement requires the franchisee to pay an advertising levy to the franchisor to enable the franchisor to undertake national advertising. However, the franchisor will also advertise for

prospective franchisees. Advertising is now regulated under the Consumer Protection from Unfair Trading Regulations 2008 (which cover advertising to consumers) and the Business Protection from Misleading Marketing Regulation (which cover advertising to traders and comparative advertising)

On 1 April 2010, the CRC Energy Efficiency Scheme (CRC) came into force. The CRC is a new UK-wide mandatory emissions trading scheme, created by the CRC Energy Efficiency Scheme Order 2010 (Order) which was introduced under the Climate Change Act 2008. The purpose of the CRC is to make organisations more energy efficient and reduce their CO2 emissions. Under the CRC, organisations that meet the relevant qualification criteria have to report on CO2 emissions associated with their energy use and buy enough allowances to cover the amount they have emitted. The reason for the inclusion of franchises in the CRC is that, as a franchisee trades under the corporate image and direction of the franchisor, the UK government considers that the franchisor has the potential to influence the way in which the franchisee consumer energy. The government also thinks that making the franchisor responsible under the CRC for its franchisees will maximise the reputational drivers in the performance table (league table).

There is a European Code of Ethics for Franchising (ECEF) with which members of the British Franchise Association (and other bodies which are part of the European Franchise Federation) must comply. However, in the UK membership of the British Franchise Association is voluntary and so non-members are not required to comply with the ECEF. In short, the ECEF requires a franchisor to: (1) have operated a pilot operation previously, (2) own all the brand names and trademarks associated with the franchise, and (3) provide initial and continuing training to franchisees.

Similar competition law obligations apply to franchise arrangements as to distribution arrangements covered in paragraph 2.7 above.

**3. Regulation of foreign Investments**

**a. Regulations restricting foreign investment in the country**

In the UK there are no exchange control or currency regulations affecting inward or outward investment, the general repatriation of income or capital, the holding of currency accounts or the settlement of currency trading transactions. The exception is in relation to money laundering.

In addition to competition law (discussed in brief in paragraph 2 above) the following should be considered:

i. Money Laundering

Over the last decade the UK anti-money laundering regime has expanded to regulate systems and controls in a number of sectors in order to detect, disrupt and deter money laundering and the underlying criminal activity.

Under the Proceeds of Crime Act 2002 (POCA) there are three principle money laundering offences: (1) concealing, disguising, converting or removing criminal property for the jurisdiction; (2) engaging in an arrangement which facilitates the acquisition, retention, use or control of criminal property; and (3) acquiring, using or possessing criminal property. To prevent a commission of an offence, which carries a potential

custodial sentence and/or an unlimited fine, the suspected money laundering must be reported and consent sought from a constable for the affected transactions to take place. A disclosure report can be made to: (1) a police officer, (2) the HMRC, or (3) if the business (such as solicitors) has a Money Laundering Reporting Officer (MLRO) to the MLRO - who in turn reports to the Serious Organised Crime Office (SOCA) which in turn can then consent to or block the affected transactions.

The Terrorism Act 2000 as amended prohibits all forms of terrorist financing and fund raising, as well as laundering the proceeds of terrorist activity.

There are a number of statutory instruments that make it an offence to provide financial services to individuals on proscribed lists which are published by, amongst others, the Bank of England.

The Money Laundering Regulations 2007 require relevant persons to establish and maintain appropriate and risk sensitive policies relating to persons by, amongst other things: training employees, internal control, customer due diligence, ongoing monitoring of business relationships etc.

ii. Restrictions on Acquiring a Regulated Business

There are specific rules governing acquisitions of companies in regulated business areas such as financial services, banking, media, broadcasting, telecoms, energy and utilities.

For financial services businesses the requirements are contained in Part XII of the Financial Services and Markets Act 2000, its subordinate legislation and the FSA's Handbook of Rules and Guidance published on the website of the Financial Services Authority (FSA) in the UK. In particular, written notice for the approval must be made to the FSA if more than 10% of the shares or voting power is to be acquired.

The European Union public procurement rules, as implemented through UK regulations, govern the way in which public bodies and certain regulated utility businesses place their contracts for supplies and services. For example, water companies, electricity distributors, railway and airport operators are covered by the regulations. The regulations do not apply to the acquisition of the regulated business itself but impact on the way in which such a business selects suppliers and/or contractors. For example, the regulations restrict award of contracts to parent or affiliated companies without first advertising those contracts and calling for competition.

Companies providing telecoms, internet and broadcasting networks and services, or television or radio services, are regulated by the Office of Communication (Ofcom). Licences from Ofcom to television or radio services companies will generally require companies to notify Ofcom of any change in shareholding or control, and certain disqualifications and restrictions of holding such a licence apply.

Companies involved in the generation, supply, transmission or distribution of electricity, or the supply, shipping, distribution of gas ***onshore*** in Great Britain, or the operation of an interconnector, require a licence from the Office of Gas and Electricity Markets (Ofgem). Such licences, particularly ones for those companies carrying out monopoly activities, are likely to include conditions that are triggered by a change of control or corporate restructuring (such as for the company's ultimate controller to provide certain undertakings and the

requirement to hold an investment grade credit rating). Other conditions may impact on a proposed acquisition, such as restrictions on asset disposal and granting security, prohibitions on cross-subsidy and financial ring-fencing obligations. ***Offshore*** oil and gas exploration or production services are regulated by the Department for Energy and Climate Change (DECC), and structural changes could trigger a revocation if, for example, the licensed company ceases to have its central management and control in the UK.

The Water Services Regulation Authority (Ofwat) regulates water or water sewage undertakers. Similar restrictions as to onshore gas companies apply.

See paragraph 3.1.3 below for financial services companies.

iii. Financial Services Regulation

The providers of financial services in the UK are heavily regulated by UK and EU laws. The Financial Services and Markets Act 2000 (or FSMA for short) provides the framework for the UK regulatory regime, with the FSA being the regulator.

There is a general prohibition in section 19 of FSMA preventing anyone carrying on a regulated activity in the UK unless authorised by the FSA or exempt from such authorisation requirements. Regulated activities include accepting deposits, dealing in investments as principal/agent, arranging deals in and/or managing and advising on investments, and effecting contracts of insurance. The definition of investment covers deposits, shares, government securities, options, futures and contracts for differences. Breach of the general prohibition is a criminal offence, with any resulting agreement entered into subject to being voided at the discretion of the courts and the FSA being entitled to impose a fine and/or issue public statements if misconduct.

There is a general prohibition in section 21 of FSMA preventing unauthorised financial promotions (i.e. in the course of business someone inviting or inducing another person to engage in investment activity in circumstances where the inviter/inducer is not an authorised person or someone using promotional materials approved by an authorised person or someone who does not benefit from a financial promotion exemption). A breach of section 21 of FSMA is a criminal offence and may render the resulting investment agreement unenforceable. Exemptions include approaches made to: (1) investment professionals (which could include authorised firms); (2) high net worth companies, a certified high net worth individual or self-certified sophisticated investor (if the financial promotion relates to an investment in an unlisted company or a fund which invests wholly or predominantly in unlisted companies), or (3) a sophisticated investor certified as experienced in relation to the investment or fund which the broker/dealer is promoting. Overseas communications (and generic communications which do not name any particular product/provider) also benefit from certain limited exemptions.

Under section 238 of FSMA there are limitations on the type of collective investment schemes (also known as mutual funds or funds) which may be promoted to the public by an authorised person.

Insider dealing is a criminal offence under section 52 of the Criminal Justice Act 1993, as amended, and market manipulation is a criminal offence under section 397 of FSMA. Both carry the possibility of custodial sentences.

iv. EU Duty/origin rules

The EU, amongst other things, is a customs union with a combination of 27 customs territories of the member states including the UK. Whilst no customs duties are imposed on trade between member states of the EU, there is a common customs and trade policy that applies to trade between EU member states and countries outside of the EU. The precise amount of duty depends on the import product and/or country of origin in question. Also, imports from certain non-EU countries may be subject to anti-dumping duties.

**b. Financial incentives available from the government to encourage the establishment of industries in the country**

The UK coalition government in the past year has implemented a national austerity program in order to substantially reduce the national debt which it inherited from the past government. On 23 March, 2011 it issued its new budget for the financial year starting in April, 2011. One of the primary focuses was to encourage UK businesses to remain in the UK, and to encourage companies to set up/expand their businesses in the UK.

There are a number of new Budget changes. The following summarizes some of the more important changes.

One of the new changes will be the lowering of the UK company tax to a level where it will be one of the lowest rates in the G20. Company net income in excess of £1,500,000 will be subject to tax at 26%, for the year commencing April, 2011, and drop 1% per year until 2014 when the rate would be 23%. Company tax on net income less than £300,000 will drop to 20% in April, 2011. Net income between £300,000 and £1,500,000 is taxed at an effective rate of 27.5%. It is expected company tax rates will be reduced further over the four year remaining term of this current Parliament.

Several commentaries have said the lower rates and clarity of future rates will encourage businesses to move to/expand their businesses in the UK.

Another business friendly change in the Budget was the increase in the Entrepreneurs' Relief by providing that capital gains on the sale of a business will only be taxed at 10% to the shareholder individual rather than 28% on the first £10,000,000 of lifetime capital gains (it was previously only on £5,000,000). There are certain conditions that must be met to avail oneself of this favourable 10% tax rate.

Other important changes were made to the Enterprise Investment Tax Scheme ("EIS"). Generally, UK taxpayers can invest in certain types of businesses and receive a 20% tax credit on share investments up to £500,000 in any given year, hold the shares for three years, and then sell the shares with no capital gains tax on any capital gains. The 20% rate was increased to a 30% credit commencing for years starting in April, 2011 or later. The size of the companies which can be invested in will increase in April, 2012 to no more than £15,000,000 in gross assets (was £7,000,000), and no more than 250 employees (was 50). The £500,000 annual cap per investor per year will increase to £1,000,000 in April, 2012. There will be an increase from £2,000,000 to £10,000,000 in 2012 for the maximum amount that can be invested annually in an EIS company. The UK is adopting the European Union EIS rule in April, 2011 where foreign companies can just set up offices in the UK, maintain their foreign locations for their business operations, and qualify for EIS. In addition EIS companies

can be traded on certain UK public stock exchanges such as the Alternative Investment Market. Given the favourable tax rates for shareholder investors in EIS companies, the ability of foreign companies to just set up offices in the UK, and the opportunity to publicly float on the AIM, it is expected certain foreign companies will be interested in this structure.

Another change is the creation of 21 new Enterprise Zones, where companies will be able to get up to a 100% business rate discount for five years if they are located in such areas.

In the Budget it was stated that legislation will be introduced to deliver a package of interim improvements to the controlled foreign company rules as a first step to make the rules easier to operate ahead of full reform in 2012. Such interim rules will be effective 1 January, 2011. Other favourable rules affecting profits from foreign branches of UK companies to qualify for opt-in exemption from corporation tax will also be promulgated.

## 4. Forms of Doing Business in the Country

### a. Introduction

There are a number of different business forms that may potentially be used by a foreign company wishing to carry on business in the UK as follows:

- UK Establishment
- Private company limited by shares
- Public company limited by shares
- Company limited by guarantee
- Community Interest Company
- Limited Liability Partnership (LLP)

### b. UK Establishment

Companies incorporated outside of the UK and Gibraltar are referred to in companies legislation as "overseas companies." When overseas companies carry on business in the UK, they must register that presence with the Registrar of Companies at Companies House. They are also subject to ongoing filing and disclosure requirements for certain matters.

The concept of "UK Establishment" applies to both branches and places of business of foreign companies in the UK.

- A branch is an establishment of the foreign company which allows business to be conducted through local representatives rather than being referred to an overseas office. It must appear to be permanent and capable of dealing with the business itself through appropriate management and a physical presence.

- A place of business is established if the business has a physical or visible connection with premises (e.g. a sign outside an office), or if business is regularly carried out at a particular premises by the foreign company directly and not through a sub-contractor or independent agent. A place of business is therefore a less significant presence than a branch. A hotel, for example, that is used occasionally by a director of the foreign company on his or her visits will not be a place of business or a branch.

Within 1 month of the EK Establishment being opened in the UK, a Form OS IN01 needs to be completed and filed with the Registrar of Companies at Companies House to register the UK Establishment, with the form duly signed by a director or company secretary of the overseas company or the permanent representative of the overseas company engaged in the UK Establishment.

- The return is a detailed document requiring the following information about the overseas company: (1) its name and any alternative name that the company wishes to use in the UK; (2) the type of company and its registration in its home country; (3) the accounting requirements in its home country, if applicable, alongside a certified copy of the latest filed accounts and a certified translation of the accounts if not already in English; (4) its constitution together with a certified copy and a certified translation if not already in English; and (5) its officers.

- The name and address and details of the permanent representative of the UK Establishment also need to be provided.

The overseas company will be subject to the UK rules on company names. Therefore, whilst the company name may be properly and lawfully registered and used in the company's home country, it may not be registrable for use as part of the UK Establishment in the UK. For example, a corporate name similar to one already used by a company in the UK will not be registrable (hence the need to suggest an alternative name in the Form OS IN01).

The filing fee is £20 for registration in around 8 days, or £50 for a same day service.

Failure to file Form OS IN01 as required renders the overseas company and every officer or agent in default liable to a fine.

There are ongoing filing requirements at Companies House for changes in the registered details of the UK Establishment and/or the overseas company and/or for winding up/insolvency. If the overseas company fails to update registered details or notify required details about winding up or insolvency, the overseas company and every officer or agent of it who knowingly and wilfully authorises or permits the default is liable to a fine. Accounts, with a filing fee of £30, must be filed for each accounting year otherwise every director in default is liable for a fine.

Charges and mortgages of an overseas company over property in the UK must be registered with Companies House and there is a requirement to keep a register of charges.

In terms of trading disclosures:

- The overseas company must display its name and country of origin at every business location in the UK and the service address of every UK resident authorised to accept service of documents on the overseas company's behalf - in each case so that the display is legible to the naked eye, easily seen by a visitor to the business location and displayed continuously.
- All business documents and correspondence must also display the name of the overseas company.
- If the overseas company is within the European Economic Area (EEA) its registered number and country of incorporation need to be disclosed in business letters, order forms and websites used in carrying on business in the UK. If the overseas company is outside the EEA then additional information must be disclosed in such letters, forms and websites: identity of any home country registry with which it is registered, location of its head office if any, the legal form of the company, whether the liability of its members is limited, whether it is a limited company, the paid up share capital (optional), and if applicable whether it is being wound up.
- If the names of any directors are to be disclosed, then the names of all the directors must be disclosed.
- If someone requests it, the name of a person authorised to accept service on the overseas company's behalf must be disclosed within 5 working days of the request.
- Failure to comply with disclosure requirements may render business contracts unenforceable and exposes the company and every officer in default liable to a fine.

A Form OS DS01 must be filed with Companies House if the overseas company closes a UK Establishment. There is no mandatory period within which this form must be filed, but the sooner the better because the overseas company's filing requirements (and associated consequences of default) only cease upon the Form OS DS01 being filed.

The UK Establishment does not have separate legal identity and so contracts with customers and others will be made by the overseas company. Whilst the overseas company itself will have unlimited liability subject to any lawful contractual limitations and exclusions, the owners of the overseas company will continue to enjoy the extent of limited liability they are allowed by the laws of the territory in which the overseas company is incorporated. Contracts and deeds may also be signed by anyone authorised by the laws of the company's home country.

A foreign national may be engaged in the UK Establishment, provided he or she has the right to work in the UK.

There is no minimum share capital required to establish the UK Establishment.

**c. Private Company Limited by Shares**

A company limited by shares is the most common type of incorporated business form in the UK. Such companies are identified by the word “Limited” or “Ltd” at the end of their names; and, are owned by their

shareholders but managed by their directors. The rules of the company are set out in its constitution, although its shareholders often have a shareholders' agreement that contains provisions which are often intended to apply in priority to the company's constitution.

Since the company is of a private nature, it is a criminal offence to offer its shares to the public. Each share has a nominal value (typically £1) and the shares are issued either at their nominal value or at a nominal plus premium value. The company may also have different classes of shares with different rights attached to them regarding voting, dividends, capital and redemption. The company must have a minimum of one non-redeemable share but there is no longer an automatic maximum limit unless one is included in the articles or a binding shareholders' agreement.

One of the basic principles of UK company law is that the share capital of a company (including any premium paid over a nominal value) is regarded as permanent capital. However in certain circumstances there is an out of court and a court procedure available to return capital to shareholders before a company is wound up.

The company has separate legal personality distinct from its shareholders and directors and so the company itself can enter into contracts, sue and be sued.

Setting up a private company limited by shares is a relatively simple process. There are on-line formation agents that can be used to incorporate the company by the applicant completing the agent's on-line questionnaire. For a self-incorporation all that is required is:

- a one page "memorandum" (evidencing the stated subscribers' intention to form a company and become its initial shareholders);
- the proposed articles of association (containing the rules governing the management and shares of the company, and which operates as a contract between the shareholders themselves and between the shareholders and the company);
- an application in Form IN01 (containing details of the proposed registered name, address, officers, statement of capital and initial shareholding);
- a statement of compliance confirming that the statutory requirements of registration have been complied with; and
- a filing fee of £20.

Typically a company (of any kind) is incorporated up to 10 days after an application is made, unless a same day incorporation is required for which there is a higher fee from Companies House.

The phrase "limited by shares" here means that if the company is wound up and is unable to pay its debts, the liability of its shareholders to make a contribution to the debts will be limited to the unpaid element of the nominal value of the shares. However, if for example the shareholders give personal guarantees or the "corporate veil" is lifted as a result of the shareholders having set up the corporate structure to defraud creditors then the shareholders' liability may exceed the unpaid element of the nominal value of the shares.

The company must have at least one natural person as its director that is over 16 years old. There is no legal requirement that any one or more directors must be British. There is also no longer a mandatory requirement for the company to have a company secretary.

The day to day running of the business is carried out by the company's sole director or by the decisions reached by a simple majority of the company's board of directors, subject to any special resolutions passed by the company's shareholders holding at least 75% of the voting rights between them and subject to the terms of any shareholders' agreement in force and binding on the company. Minutes of the meetings of directors must be maintained, although the directors are permitted to reach decisions by signing written resolutions.

All directors have personal liability for breaches of duties (such as breaching the duty of acting independently or the duty of acting with reasonable skill and care), fraudulent or wrongful trading under the Insolvency Act 1986 or non-compliance with technical requirements under the Companies Act 2006 for filing accounts etc. In any event, acts of the shareholders in their capacity as members of the company, whether or not decided at a general meeting of the members, are regarded as acts of the company itself.

Once incorporated a set of "statutory books" or "company books" must be maintained containing at the very least a register of members, register of directors, register of company secretaries, register of directors' residential addresses, register of charges and minutes of the meetings of directors/written resolutions of directors.

There are ongoing filing requirements in respect of changes to registered details, annual returns and annual accounts. Most filings are free, however, for example, the cost of filing an annual return on-line is £15 and the cost of filing a charge is £13.

There is no minimum paid up share capital requirement. However, a minimum of one non-redeemable share needs to be issued at par value with the shareholder either fully paying that nominal value when receiving the share, or paying at a later date if the company/administrator/liquidator calls upon the shareholder to pay it in the future.

A company may only pay its member(s) dividends from distributable profits, once liabilities and expenses have been taken into account.

### d. Public Company Limited by Shares

Public companies limited by shares can be recognised by the words "public limited company" or "PLC" after the end of their names. They have the same principle features, requirements and procedures as a private company limited by shares except that there are few differences in terms of requirements.

However, whilst the additional requirements may not persuade a foreign company to set up a PLC, third parties such as suppliers, bankers, investors, creditors etc. may have more confidence in the PLC due to the additional requirements such as those listed below:

- A PLC, unlike a private company, may offer its shares to the public on compliance with extensive rules under the Financial Services and Markets Act 2000 and the FSA Handbook of the Financial Services Authority.
- A PLC must have an issued share capital of at least £50,000 of which at least 25% must be fully paid up. The PLC must comply with this requirement in order to obtain a trading certificate after filing a Form SH50 with Companies House. The trading certificate is required for the PLC to do business and/or to borrow, and a failure to obtain the trading certificate before doing business and/or borrowing is a criminal offence.
- A PLC is prohibited from accepting an undertaking to do work or perform services as consideration for allotment of shares.
- The original subscriber(s) to the memorandum of the PLC must pay for their shares in cash.
- Where a PLC allots shares as fully or partly paid in exchange for non-cash consideration, any undertaking which forms part of that consideration (e.g. to transfer assets to the PLC) must be performed within 5 years of the allotment and an expert's valuation and report on the consideration given will usually be required.
- An expert's valuation is a mandatory pre-requisite for a PLC to issue shares for consideration other than cash.
- A general meeting of the shareholders must be convened within 28 days of the date when any member becomes aware of the net assets of the PLC being reduced to 50% or less of its called up share capital, to consider what measures, if any, to take.
- In addition to the requirement of making dividends from distributable profits, a PLC can only make dividends if its net assets do not fall below the aggregate of its called up share capital and undistributable reserves.
- Unlike a private company limited by shares, a PLC cannot buy back its shares from capital.
- A PLC cannot give financial assistance (for example, as a cash loan or a guarantee or indemnity or grant of security over its assets) for the purchase of its own shares or the shares of its holding company or to discharge a liability incurred for that purpose.
- A PLC does not have the benefit of a private company of filing short form abbreviated accounts by virtue of being a small or medium sized company.
- A minimum of two directors, rather than one as in the case of a private company, is required – with at least one being a natural person over 16 years old.

**e. Company Limited by Guarantee**

A company limited by guarantee is in many respects the same as a private company limited by shares with the same principle features, requirements and procedures, although not as common.

Those with a stake in the company are known as members rather than shareholders, since there is no share capital. A company limited by guarantee can only now be incorporated as a private company.

The members do not have to make any payment under the law to be a member, however, they undertake/guarantee to pay a minimum amount towards the debts and liabilities of the company if it is unable to do so on it being wound up. Typically a member's undertaking/guarantee may be limited to £1. The amount of the undertaking/guarantee is not an asset of the company but a contingent liability.

Unlike a company limited by shares, membership in a company limited by guarantee is non-transferable. Membership usually ceases, under the company's constitutional documents, on the member leaving the company, dying (if a natural person) or there is a forced expulsion due to a lack of qualifying criteria.

If the company has objects that are essentially charitable and prevents distribution of profits/capital to members, then it can apply to Companies House to have "limited" or "ltd" not to form part of its name. However, such a "not for profit" company will not be suitable for most foreign companies wishing to enter into any one or more markets in the UK for profit purposes.

**f. Community Interest Company**

A community interest company (or CIC) is a limited company designed for use by entrepreneurs that want to use some if not most of the profits and assets for the public good without the business form being registered as a charity and becoming subject to charity law regulation.

A CIC must be structured as a private company limited by guarantee, a private company limited by shares or a public company limited by shares. However additional requirements that apply to a CIC are as follows:

- A CIC must satisfy the community interest test, in that it must demonstrate that "a reasonable person might consider that its activities are being carried on for the benefit of the community or a section of the community".
- A CIC is subject to an "asset lock" and "dividend cap". This means that: (1) a CIC may can only transfer assets at a full market value or to another asset-locked body (such as another CIC or charity); (2) dividends must be declared by the shareholders and not by directors alone; (3) if the articles of the CIC allow for dividends to be paid to non-asset locked bodies then the dividend is subject to a cap (the maximum dividend per share issued on or after 06 April 2010 being 20% of the paid up value of the share, and the maximum aggregate cap for dividends on all shares being 35% of distributable profits); (4) for agreements made after 06 April 2010, where the interest rate is linked to the CIC's performance, interest on loans is capped at 10% of the average amount of the CIC's debt or sum outstanding on the loan during the 12 month period before the interest becomes due; and (4) on dissolution any surplus assets must be transferred to another asset locked body (such as another CIC or charity).

- A CIC must file an annual CIC report under Form CIC34 including details of what the CIC has done to benefit the community, details of how its stakeholders have been involved, information about the remuneration of directors, details about asset lock related issues and information on the transfer of assets. The report must be filed with the annual accounts with a filing fee of £15.

- A CIC is subject to the regulation by the Office of the Regulator of Community Interest Companies. The main tasks of this regulator are to encourage the formation of CICs, develop the CIC brand, provide guidance and assistance on matters relating to CICs and consider complaints and take enforcement action.

- A CIC can only cease by dissolution or conversion to a charity.

A CIC is formed in the same way as limited company, however an additional form CIC36 is required and the formation fee is £35 and not £20.

A CIC has separate legal identity and its members will have liability limited to the nominal value of the shares held in the CIC (if the CIC is a company limited by shares) or limited by the guarantee given by the member (if the CIC is a company limited by guarantee).

**g. Limited Liability Partnership**

A limited liability partnership (or LLP) is a form of business structure with a separate legal personality (and therefore limited liability for its partners) but which has the management organisation of an unincorporated partnership. The trade off for limited liability is the public reporting requirements of a company.

Key characteristics:

- LLPs must be formed by at least two members for the purpose of carrying on business with a view to profit.

- LLPs are managed by the members and every member is an agent of the LLP (and so the LLP is bound by the actions of the members unless the third party involved knows that the member(s) in question have no authority to act from the LLP).

- At least two of the members must be specified as "designated members," unless the incorporation document specifies all the members to be designated members. In addition to the rights and duties of ordinary members, designated members are responsible for: (1) signing and filing accounts of the LLP at Companies House; (2) notifying Companies House of changes in the membership, registered office and name of the LLP; (3) filing an annual return known as Form LL AR01; and (4) appointing an auditor (if one is needed).

- The rules about governing the LLP and relationship between the members and between the LLP and the members are contained in an LLP Agreement which remains a private document, which is not filed at any public registry. In the absence of an LLP Agreement there are rights and duties that are prescribed by law, which are similar to those found in general partnership law, such as: (1) the

members are entitled to share equally in the profits and capital; (2) every member is entitled to take part in the management of the LLP; and (3) decisions can be made by a simple majority (except for the introduction of a new member or a change in the nature of the LLP business which require unanimity).

- As with a company, changes in the registered details, annual returns and annual accounts need to be filed at Companies House.

An LLP is formed by filing a Form LL IN01 with a fee of £20 with Companies House. Registration takes approximately 5 to 10 days. For same day registration the Companies House fee is £50

There is no minimum equity requirement to form an LLP.

**h. How each business form is treated for tax purposes**

The following discussion is a brief overview of the UK tax laws affecting UK and foreign companies, as well as Limited Liability Partnerships. The law is complex and changes often. Tax matters should be reviewed with qualified professionals.

i. Company:

UK corporation tax is charged on the profit of a company resident in the UK by reference to the total profit arising in each accounting period. A company resident in the UK is liable to UK corporation tax on its worldwide profits, including its chargeable gains. A company which is incorporated in the UK is regarded as resident in the UK for UK tax purposes. A company incorporated outside the UK is a resident in the UK if its central management and control is exercised in the UK.

Profits chargeable to UK corporation tax include income from all types of land and buildings in the UK, profits from a trade, net interest receivable on loans taken out for non-trading purposes, income from overseas, and net income receivable from intangible fixed assets. Capital allowances, i.e., depreciation, and other allowances apply on certain assets.

Dividends received from UK resident companies are not subject to corporation tax in the hands of a corporate shareholder and should not form part of the profits chargeable to corporation tax. Dividends paid by UK companies are not deductible in arriving at the profits chargeable to corporation tax.

If a company has one or more associated companies at any time in its accounting period, then the upper (£1,500,000) and lower (£300,000) profit limits are divided by the number of associated companies plus 1. A company is associated with another company if it either controls the other of if both are under the control of the same person or persons. Whether such a company is UK resident or not is irrelevant. Control is deemed to be given by holding over 50% of the share capital or the voting power, or being entitled to over 50% of the distributable income or of the net assets in a winding up.

The corporate tax rates are set out in section 3.2.

A company's net chargeable gains for an accounting period are included within the computation of profits chargeable to corporation tax. A company pays corporation tax on its net chargeable gains. Companies are allowed to deduct an allowance for inflation (indexation allowance) from their gains. This indexation allowance does not apply to individuals.

The following persons are chargeable to corporation tax:

- UK resident companies and unincorporated associations are chargeable on their worldwide profits;
- Non-resident companies/associations are liable for company tax on any UK income if they are trading in the UK through a permanent establishment; and
- A company has a permanent establishment if it has a fixed place of business through which the business of an enterprise is wholly or partly carried on.

The overseas income may have suffered overseas tax in which case the income now being subject to UK corporation tax will be suffering a tax charge twice-overseas and also in the UK. Double taxation relief is available in the UK. See section 5.

ii. Limited Liability Partnership:

A limited liability partnership is a flow through entity for UK tax purposes, i.e., the partners are subject to tax on their share of net income. If a partner is a UK company the tax rules described above for companies would apply. If a partner is an individual he/she would be subject to UK tax as an individual. Generally, a UK resident person is liable for UK income tax on his/her UK and foreign income whereas non-residents are liable for UK income tax only on income arising in the UK. A UK resident who is not domiciled in the UK, may claim to be liable for UK tax on foreign income on a remittance basis, i.e., only to the extent such income is brought to the UK, subject to paying a tax charge. A personal allowance is deducted from net income to arrive at taxable income.

A deduction is available for certain payments from total income to arrive at net income. Deductible payments include gifts of shares and land to charity, interest payments, patent royalties, and certain losses. There are also tax credits such as the EIS tax credit described in section 3.2.

In the March, 2011 Budget for the fiscal year beginning 6 April, 2012, the personal allowance will be increased to £8,105 for those individuals under 65, and is expected to rise to £10,000 by the end of the five year Parliament.

Individual tax rates are currently 20% on income up to £37,400, 40% on income above that to £150,000, and 50% thereafter. The personal allowance which is currently at £6,475 (it will be £7,475 in 2011-2012) is phased out between income from £100,000 to approximately £115,000.

## 5. List of Tax Treaties

There are more than 2500 double taxation treaties worldwide and the UK has the largest network of treaties, covering over 100 countries. Double taxation treaties are agreements between two countries which are designed to:

- protect against the risk of double taxation where the same income is taxable in two different countries;
- provide certainty of treatment for cross-border trade; and
- prevent tax discrimination against UK business interests abroad.

The taxing authority in the UK, HMRC, has published on line a Digest of Double Taxation Agreements which can be found at:

www.hmrc.gov.uk/si/double.htm

There are also a few double taxation treaties that have been signed but are not in force. They can be found on line at:

www.hmrc.gov.uk/international/signed.htm

The UK also has Tax Information Exchange Agreements with a number of countries. These agreements are bilateral agreements in which countries agree to cooperate in tax matters through the exchange of information.

The UK has also entered into a few Double Contribution Conventions which promote the free movement of labour.

COMPENDIUM OF PRINCIPLES OF LAW REGARDING THE ESTABLISHMENT AND OPERATION OF A BUSINESS IN THE UNITED STATES

## 1. Overview of the legal frame work of the United States

The United States has a federal system of government. As a result, foreign corporations doing business in the United States must comply with state and federal laws. In the United States, at both the state and federal levels, the legal framework is embodied by three branches of government: legislative, judicial, and executive.

The role of the legislative branch is to make laws. The United States Constitution grants specific law making powers to the United States Congress. All powers not granted to the federal government are reserved for the states. As a result, statutes in the United States are created by both Congress and state legislatures. As a practical matter, laws governing corporations and other business entities in the United States are all made at the state level. Additionally, state law provides much of the law that affects the way a business conducts its operations, such as contract law or product liability law. However, federal laws also affect businesses operating in the United States in many different areas. Environmental, employment, immigration, and securities laws are a just few examples of areas of federal law that can affect businesses operating in the United States.

The role of the judicial branch is to interpret the law. Courts in the United States exist at both the state and federal levels. Federal courts have power to decide cases as they relate to federal law. In limited instances, federal courts are also able to hear cases involving state law, specifically when a case is between two parties that are not domiciled within the same state. However, in the majority instances, matters of state law are decided by state courts. Because the United States is a common law system, state court also play a role in making state law. Where statutes do not govern a particular area, the law is developed through court decisions.

The role of the executive branch is to enforce the laws. Agencies and administrative bodies exist at both the state and federal levels to enforce laws in particular areas. These agencies and administrative bodies are given regulatory and enforcement power by the legislative branch. A foreign corporation operating in the United States should be familiar with the state and federal agencies and regulations that affect the industry in which it operates.

## 2. Ways in which a foreign company can enter the United States

### a. Establishing a separate legal entity

One of the most common ways for a foreign corporation to enter the United States is by establishing a separate legal entity as a United States based subsidiary. In the United States, business entities are established pursuant to state law, which requires a filing with the applicable agency in the state in which the entity is to be organized. Corporations and limited liability companies are the forms of entity most often used in the United States for this purpose. Section 4 below discusses some of the different types of business entities that are available in the United States and the processes required to form an entity in the United States.

### b. Establishing a branch office

A foreign corporation can also enter the United States by establishing a branch office. Establishing a branch office in the United States will typically require that the foreign corporation be qualified by the applicable state agency that the branch office is located in. Qualification to do business as a foreign corporation is generally a simple process which includes filing an application and paying a filing fee. The qualification process ensures that the name used by the foreign corporation is not confusingly similar or identical to a name already in use by a corporation or other entity already doing business within that state. The qualification process also verifies that the foreign corporation has been properly organized under the laws of another jurisdiction.

### c. Use of sales representatives or distributors

Another way for a foreign corporation to enter the United States is by having sales representatives located in the United States. A sales representative is an employee or agent of the foreign corporation who solicits sales in a particular geographic area. Orders for products or services are placed directly with the foreign corporation. As a result, the foreign corporation is not typically subject to a registration requirement at the state level.

Similar to employing sales representatives, a foreign corporation can use distributors to enter the United States. In this type of arrangement, the distributor buys product from a foreign corporation and then sells the product at a mark-up to third parties. Since the products are being sold directly by the distributor, in these relationships, the foreign corporation does not typically bear the economic risk of the transaction. As with the sale representative, there is no registration requirement for a corporation using distributors to do business within the United States.

### d. Franchising

Franchising is another way in which a foreign corporation can enter the United States. Like a distributor arrangement, franchising involves the foreign corporation contracting with another party that will in turn sell products directly to the purchaser. However, a franchising relationship involves a more integrated relationship than does a relationship with a distributor. In addition to an agreement to supply product, franchising typically involves the licensing of intellectual property. In a franchising relationship, the foreign corporation remains more involved in the business operations of its franchisee than it would with a distributor selling its products. Franchising is subject to regulation at the federal level by the Federal Trade Commission (FTC). Most states have also adopted statutes and regulations relating to franchising.

## 3. Regulation of foreign investments

Foreign investors are able to invest in the United States in the same manner that United States investors would be able to invest, with relatively few exceptions. In addition to receiving generally favorable treatment in the United States, foreign corporations often receive incentives and tax credits from state governments for making investments within a particular state.

Some industries that are subject to additional regulation with respect to foreign investment include: defense, radio and television broadcasting, air cargo, shipping, insurance, and banking. Additionally, proposed foreign investments that implicate concerns of national security are subject to scrutiny under the *Exon-Florio Amendment* and can be blocked under the authority of the President of the United States.

## 4. Forms of doing Business in the United States

### a. Corporations

A U.S. corporation is formed in accordance with state laws by filing Articles of Incorporation or a Certificate of Incorporation with the applicable state agency. Filing also requires payment of a filing fee to the applicable state agency, which varies by state. In most states, filing fees range between $50 and $300 dollars. The filing process typically takes only a short period of time, and most, if not all states, provide for expedited filing with the payment of an additional fee so that formation can be finalized within one or two days.

A U.S. corporation is a legal entity that exists separately from its owners (known as shareholders or stockholders) and if corporate formalities are adequately followed, the shareholders are generally not liable for the debts and obligations of the corporation.

State corporate laws are generally well developed and provide a framework for forming and operating a corporation. These laws generally require that the shareholders of the corporation appoint a board of directors to govern the corporation, and officers to run the day to day activities of the corporation. The corporation has traditionally been the primary entity choice for most business organizations, and is particularly well-suited for larger companies with many shareholders.

Laws governing the incorporation of a company must be strictly followed and may vary from state to state. Accordingly, it is important to consult an attorney prior to incorporating a company in the United States.

### b. Limited Liability Companies

A limited liability company (LLC) is formed in accordance with state laws by filing Articles of Organization with the applicable state agency. The filing process and filing fees are generally similar to what is required to form a corporation. As are shareholders of a corporation, the owners (known as members) of a limited liability company are shielded from personal liability for most liabilities incurred by the LLC. The LLC can be managed by its members (similar to a partnership, described below) or by elected managers (similar to a corporation). The members usually share profits and losses and distributions in proportion to their capital contributions, although the members can agree to a different allocation in a written Operating Agreement. Most state laws governing limited liability companies can be preempted by a written Operating Agreement among the company's members.

The limited liability company is a relatively new type of business entity; however, it has grown quickly in popularity. Born out of antiquated tax laws, the limited liability company remains popular for many businesses with fewer owners due to the greater flexibility in company governance, profit and loss allocations and tax treatment permitted by state laws and federal tax laws.

### c. Sole Proprietor or General Partnership

The sole proprietorship and the general partnership are the most basic forms to transact business in the United States. Neither type of organization requires any formal filing to organize. The owner(s) of both types of organizations have unlimited personal liability for the debts and obligations of the business. Accordingly, proprietorships and general partnerships generally have modest capital needs that can be met from the resources of their owner(s). Both sole proprietorships and general partnerships are managed and controlled directly by their owner(s).

The sole proprietorship has a single owner and a general partnership is automatically created when two or more persons (known as partners) associate to carry on a business as co-owners. While there are generally no state laws that apply only to sole proprietorships, general partnerships are typically governed by some form of a uniform partnership act as adopted by the particular state in which the business is established. The partners may enter into a partnership agreement to govern their business relationship, pre-empting many state laws that are applicable only if there is no agreement between the partners. A general partnership dissolves upon death, bankruptcy, or withdrawal of any partner.

### d. Other Business Entities

There are a number of other types of entities in which a business can operate, although most are used infrequently or only for specialized professions, such as physicians, or lawyers. Other business entities, which vary under the laws of different states, include limited partnerships, limited liability partnerships, and business trusts.

While choice of business entity is important, the choice is usually driven first and foremost by tax law considerations. Once the most beneficial tax structure is determined, the types of business entities that permit the elected tax structure should be considered.

## 5. Tax Treaties Currently Entered into by the United States

The United States is a party to tax treaties with many foreign countries. Appendix A, includes a table provided by the Internal Revenue Service of those countries with which lists the tax treaties the United States has currently entered into.

# Appendix A – List of Tax Treaties

(**Source**: Internal Revenue Service, Publication 901, Revised April 2010, pp 54-55)

| Country | Official Text Symbol[1] | General Effective Date | Citation | Applicable Treasury Explanations or Treasury Decision (T.D.) |
|---|---|---|---|---|
| Australia | TIAS 10773 | Dec. 1, 1983 | 1986-2 C.B. 220 | 1986-2 C.B. 246 |
| Protocol | TIAS | Jan. 1, 2004 | | |
| Austria | TIAS | Jan. 1, 1999 | | |
| Bangladesh | TIAS | Jan. 1, 2007 | | |
| Barbados | TIAS 11090 | Jan. 1, 1984 | 1991-2 C.B. 436 | 1991-2 C.B. 466 |
| Protocol | TIAS | Jan. 1, 2005 | | |
| Belgium | TIAS | Jan. 1, 2008 | | |
| Bulgaria | TIAS | Jan. 1, 2009 | | |
| Canada[2] | TIAS 11087 | Jan. 1, 1985 | 1986-2 C.B. 258 | 1987-2 C.B. 298 |
| Protocol | TIAS | Jan. 1, 2009 | | |
| China, People's Republic of | TIAS 12065 | Jan. 1, 1987 | 1988-1 C.B. 414 | 1988-1 C.B. 447 |
| Commonwealth of Independent States[3] | TIAS 8225 | Jan. 1, 1976 | 1976-2 C.B. 463 | 1976-2 C.B. 475 |
| Cyprus | TIAS 10965 | Jan. 1, 1986 | 1989-2 C.B. 280 | 1989-2 C.B. 314 |
| Czech Republic | TIAS | Jan. 1, 1993 | | |
| Denmark | TIAS | Jan. 1, 2001 | | |
| Protocol | TIAS | Jan. 1, 2008 | | |
| Egypt | TIAS 10149 | Jan. 1, 1982 | 1982-1 C.B. 219 | 1982-1 C.B. 243 |
| Estonia | TIAS | Jan. 1, 2000 | | |
| Finland | TIAS 12101 | Jan. 1, 1991 | | |
| Protocol | TIAS | Jan. 1, 2008 | | |
| France | TIAS | Jan. 1, 1996 | | |
| Protocol | TIAS | Jan. 1, 2010 | | |
| Germany | TIAS | Jan. 1, 1990 | | |
| Protocol | TIAS | Jan. 1, 2008 | | |
| Greece | TIAS 2902 | Jan. 1, 1953 | 1958-2 C.B. 1054 | T.D. 6109, 1954-2 C.B. 638 |
| Hungary | TIAS 9560 | Jan. 1, 1980 | 1980-1 C.B. 333 | 1980-1 C.B. 354 |
| Iceland | TIAS 8151 | Jan. 1, 2009 | | |
| India | TIAS | Jan. 1, 1991 | | |
| Indonesia | TIAS 11593 | Jan. 1, 1990 | | |
| Ireland | TIAS | Jan. 1, 1998 | | |
| Israel | TIAS | Jan. 1, 1995 | | |
| Italy | TIAS | Jan. 1, 2010 | | |
| Jamaica | TIAS 10207 | Jan. 1, 1982 | 1982-1 C.B. 257 | 1982-1 C.B. 291 |
| Japan | TIAS | Jan. 1, 2005 | | |
| Kazakhstan | TIAS | Jan. 1, 1996 | | |
| Korea, South | TIAS 9506 | Jan. 1, 1980 | 1979-2 C.B. 435 | 1979-2 C.B. 458 |
| Latvia | TIAS | Jan. 1, 2000 | | |
| Lithuania | TIAS | Jan. 1, 2000 | | |
| Luxembourg | TIAS | Jan. 1, 2001 | | |
| Mexico | TIAS | Jan. 1,1994 | | |
| Protocol | TIAS | Jan. 1, 2004 | | |
| Morocco | TIAS 10195 | Jan. 1, 1981 | 1982-2 C.B. 405 | 1982-2 C.B. 427 |
| Netherlands | TIAS | Jan. 1, 1994 | | |
| Protocol | TIAS | Jan. 1, 2005 | | |
| New Zealand | TIAS 10772 | Nov. 2, 1983 | 1990-2 C.B. 274 | 1990-2 C.B. 303 |
| Norway | TIAS 7474 | Jan. 1, 1971 | 1973-1 C.B. 669 | 1973-1 C.B. 693 |
| Protocol | TIAS 10205 | Jan. 1, 1982 | 1982-2 C.B. 440 | 1982-2 C.B. 454 |
| Pakistan | TIAS 4232 | Jan. 1, 1959 | 1960-2 C.B. 646 | T.D. 6431, 1960-1 C.B. 755 |
| Philippines | TIAS 10417 | Jan. 1, 1983 | 1984-2 C.B. 384 | 1984-2 C.B. 412 |
| Poland | TIAS 8486 | Jan. 1, 1974 | 1977-1 C.B. 416 | 1977-1 C.B. 427 |
| Portugal | TIAS | Jan. 1, 1996 | | |
| Romania | TIAS 8228 | Jan. 1, 1974 | 1976-2 C.B. 492 | 1976-2 C.B. 504 |
| Russia | TIAS | Jan. 1, 1994 | | |
| Slovak Republic | TIAS | Jan. 1, 1993 | | |
| Slovenia | TIAS | Jan. 1, 2002 | | |
| South Africa | TIAS | Jan. 1, 1998 | | |
| Spain | TIAS | Jan. 1, 1991 | | |
| Sri Lanka | TIAS | Jan. 1, 2004 | | |
| Sweden | TIAS | Jan. 1, 1996 | | |
| Protocol | TIAS | Jan. 1, 2007 | | |
| Switzerland | TIAS | Jan. 1, 1998 | | |
| Thailand | TIAS | Jan. 1, 1998 | | |
| Trinidad and Tobago | TIAS 7047 | Jan. 1, 1970 | 1971-2 C.B. 479 | |
| Tunisia | TIAS | Jan. 1, 1990 | | |
| Turkey | TIAS | Jan. 1, 1998 | | |
| Ukraine | TIAS | Jan. 1, 2001 | | |
| United Kingdom | TIAS | Jan. 1, 2004 | | |
| Venezuela | TIAS | Jan. 1, 2000 | | |

[1] (TIAS) — Treaties and Other International Act Series.
[2] Information on the treaty can be found in Publication 597, *Information on the United States-Canada Income Tax Treaty.*
[3] The U.S.-U.S.S.R. income tax treaty applies to the countries of Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.