



## 502 Opening & Operating Foreign Offices & Subsidiaries

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## 502 Opening and Operating Foreign Offices and Subsidiaries

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*“In-house Perspective”*

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## Foreign Office/Subsidiary-Why?

**•Establish and document clear motivation:**

- Why foreign subsidiary/office required?
- Why one jurisdiction (or more) selected over another?
- What functional areas will represent the operation?
  - Research and Development
  - Manufacturing or Distribution
  - Marketing
  - Financial/Legal/other General & Administrative

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## Senior Management By-in

- **Create cross-functional team staffed with key decision-makers**
- **Identify at least one key decision-maker in target jurisdiction as “point person”**
  - Current employee who will establish foreign operations
  - New employee
  - Local consultant/expert

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## Create 3-5 Year Operating Plan

- **Consider initial and evolutionary model**
- **Assess how quickly the model will evolve**
- **Provide for contingency to accommodate dynamic circumstances**

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## Develop Organizational Structure

- What staff will service the initial/projected needs of a particular functional area?
- Will the operation rely on personnel who are:
  - Permanent/temporary
  - Foreign employed (seconded or otherwise)
  - External, third party contractors
  - Other employment relationships

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## Map Needs to Org. Structure

- What resources/positions are:
  - Critical
  - Secondary
  - Tertiary
  - Non-essential?
- When possible, consolidate functions
- Create timeline to implement structure
- Amend to reflect dynamic circumstances

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## Procure Physical Office Space

- Address as early as possible in the planning process
- Allow for growth/expansion
- Significant factors to consider
  - cost structure/budget
  - location
  - configuration/size
  - purchase, build, lease and shared ownership models

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## Procure Physical Office Space

- Engage Resources to assist
  - Internal or external expertise?
  - Local or remote brokering agents?
- Physical space infrastructure
  - Phone
  - Information Technology/application support
  - Security and cleaning crew
  - Other relevant infrastructure service providers

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## Engage Key Third Parties

### •External Service Providers

- Business consultants (tax and similar)
- Local auditors
- LEGAL COUNSEL
- Insurers
- Search consultants (hiring/firing)
- Payroll and other similar financial functions
- Relocation Agents

### •Establish written agreement for all relationships

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## Engage Key Relationships

### •Internal resources

- Functional experts
- Parent/affiliate management

### •Obtain commitment for cross-functional effort

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## Operating Infrastructure

- Broad scope**

- Policies
- Procedures
- Systems

- Ensure**

- parent/affiliate compliance
- consistency with local legal requirements/practice

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## Operating Infrastructure

- Jurisdiction- and region-specific conformance**

- Policy documentation
- Forms
- Inter-company documentation

- Integrate with those of parent/affiliate/subsidiary**

- Supplemental but not supplantive

- Establish parent/affiliate/subsidiary reporting process**

- Periodic
- Consistent and shared commitment

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## Operating Infrastructure

- Avoid**
  - Excessive parent/affiliate dominance
  - Onerous reporting and unnecessary compliance requirements
- Require**
  - Accountability
  - Consistency in ethics, compliance, and similar critical areas
- Seek, where appropriate**
  - Economies of scale across jurisdictions
  - Unified systems, methodology and practices

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## Personnel Resources

- Know the local hiring markets**
  - Jurisdictional/regional nuances
  - Cultural and professional standards
  - Compensation ranges
- Engage appropriate search consultant to assist**
- Complete job descriptions for all positions**
  - Must map to organization structure
- Document appropriate requirements for terminating**
  - Don't wait until faced with an impending termination

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## **Establish Government Contacts**

**•Identify and establish contacts with relevant government offices/officials:**

- Business and personal taxing authorities
- Regional and national regulatory offices
- Commercial record-keeping officials
- Relevant courts, embassies, consulates, etc.
- National, provincial and communal visa and residency/work permit agencies

**•Engage strategic local consultants (legal, tax, business, and the like) to facilitate developing relationships**

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## **Create Legal Infrastructure**

**•Evaluate forms for legal entities**

- Limited partnership, stock company, etc.

**•Establish all relevant companies/ownership structure**

- Parent/affiliate/subsidiary structure
- Consider dividend/distribution/tax strategy

**•Assess, develop and implement corporate governance**

- Identify key personnel
- Evaluate relevance and application of relevant regional/jurisdiction-specific legislation

**-Integrate with broader infrastructure**

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## **Address Affiliate Transactions**

- **Cross-border transfer pricing issues**
  - Goods/products
  - Services (including professional and financial)
  - Intangibles
- **Dividend and income distribution activity**
- **Affiliate guarantees and warranties**

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## **Documentation/Records**

- **Retention requirements**
  - Documentation types
  - Consistency with local requirements AND corporate governance standards
- **Confidentiality/Legal Privilege**
- **Cross-border data privacy**
- **Information systems architecture, process and structure**

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## Miscellaneous Considerations

- **Identify and designate accountable personnel**
  - Preferred single management person
- **Eliminate as much redundancy as possible between parent/affiliate/subsidiaries**
- **Seek assistance from local “experts” early in process**
  - Confirm periodically throughout process of establishing foreign/subsidiary operations
- **Continue to maintain frequent and consistent dialog between parent/affiliate/subsidiaries**

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## Conclusion

- **QUESTIONS/DISCUSSION?**
- **Administrative**
  - Complete program/conference evaluations
  - Remove all personal materials

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### INTRODUCTION

- 1. Belgian perspective**
- 2. Additional considerations for other European countries**
- 3. Welcoming foreign investment**

E.g. in Belgium, in principle, no discrimination between domestic and foreign companies with respect to legal obligations, possible incentives, etc.

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## INTRODUCTION

### 4. Financial incentives

- E.g., investment aid granted by the autonomous regional authorities (Flemish, Walloon and Brussels Regions)
  - Systems differ slightly from one region to another depending on the factors that are taken into account by granting aid: number of jobs created, increased added value per job, the technology content of the project and its attractiveness for the region.
  - In some areas, financial incentives are available with the support of the EU structural funds (2 billion €).



## INTRODUCTION

- Forms:
  - Interest rebate (if financing by way of a loan)
  - and/or
  - Capital premium (if self-financing)
- In principle, maximum incentive aid amounts 21% of the eligible investment
  - Which is in line with the percentages in other European countries



## INTRODUCTION

### 5. Labour and training issues

- Employment incentives by the regional and federal authorities
- Since 2004, structural reductions of social security charges payable by employers in the private sector (even for part-time workers)
- Other incentives
  - E.g.: for employees who have been unemployed for the preceding 12 months, reduction of social security costs to 75% in the first year and to 50% in the second year;
  - E.g.: for employees who have been unemployed for the preceding 24 months, reduction of social security costs to 100% in the first year and to 75% in the second year;
  - E.g.: Incentives to recruit young people

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## INTRODUCTION

### 6. Tax measures

- Possibility of accelerated depreciation, investment deduction, etc;
- Tax credits and personal tax concessions for expatriate personnel

### 7. Useful address :

- Services for foreign investments  
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Rue du Progrès, 50  
1210 Brussels  
[invest.belgium@mineco.fgov.be](mailto:invest.belgium@mineco.fgov.be)

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**LEGAL CORPORATE STRUCTURE (1)**

1. Doing Business in Belgium ⇨ legal presence
  
2. No prior government authorisation required and no restriction on the transfer of capital into or out of Belgium
  
3. Main options for operating a new business:
  - Subsidiary (incorporated under Belgian law)
  - Branch office (of a company incorporated under the laws of the foreign country)



**LEGAL CORPORATE STRUCTURE (2)**

4. Subsidiary (incorporated under Belgian law)
  - Separate legal entity acquiring legal personality as of the filing of the incorporation deed
  
  - Forms of companies (with legal personality)
    - NV – SA *limitation of liability*
    - BVBA – SPRL
    - CVBA – SCRL
    - CVA – SCA
    - GCV – SCS
    - CVOA - SCRI
    - VOF – SNC *no limitation of liability*





### LEGAL CORPORATE STRUCTURE (3)

BVBA / SPRL	NV / SA
Two incorporators (one exception)	Two incorporators
Minimum capital: EUR 18,550 of which at least EUR 6,200 must be paid in (> each share must be paid in up to 20%)	Minimum capital: EUR 61,500 fully paid in (> each share must be paid in up to 25%)
Shares are registered - restricted transferability (approval by at least half of the shareholders representing at least 3/4 of the capital, except if transferred to another shareholder or a direct ascendant or descendant of the shareholder)	Registered or bearer shares - freely transferable (unless special provisions in Corporate Charter)
Shares with or without voting rights may be issued	Different types of shares may be issued as well as "financial instruments" (e.g. shares without voting rights, profit shares, warrants)

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### LEGAL CORPORATE STRUCTURE (4)

BVBA / SPRL	NV / SA
Company is managed by one or more Business Managers (Revocable by the shareholders under the conditions provided in the Corporate Charter)	Board of Directors: minimum three Directors (ad nutum revocable). If the company has, however, only two shareholders, the Board of Directors can be composed of only two directors
No interim-dividends can be attributed	Interim-dividends can be distributed provided that this is foreseen in the Company's Articles of Incorporation
The liability of the Business Managers is the same as that of the Directors of a NV/SA, except that the joint and several liability of the Business Managers does not exist for small companies (i.e. companies which, during the three book years preceding the bankruptcy, (i) have a turnover of less than EUR 620,000, excluding VAT, and (ii) a total balance sheet of maximum EUR 370,000)	

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## LEGAL CORPORATE STRUCTURE (5)

### 5. Branch office (of a company incorporated under the laws of the foreign country)

- no distinct legal personality but extension of the foreign company
- 3 criteria for having a branch in Belgium (Belgian Supreme Court):
  - physical presence
  - legal representative
  - business activities



## HOW TO PROCEED ? (1)

### 1. Is the opening of a branch office or a subsidiary in Belgium still daunting?

- Since 2003, process of administrative simplification and modernization
  - > Examples:
    - Creation of the "Crossroad Bank for Enterprises" (= database with basic information (directorship, VAT registration, Social security registration, registered office, publications, etc.) on companies. Information available by all relevant administrations => less formalities because no need to file information with each administration separately)  
One Enterprise number = VAT number
    - Creation of the "Company counters" (= offices acting as intermediary between the company and the Crossroad Bank for Enterprises)
    - Access to the administrations through Internet



## HOW TO PROCEED ? (2)

### 2. Subsidiary

- Incorporation deed in presence of a Belgian public notary
  - > Articles of Incorporation
  - > Object of the company => administrative authorizations for some activities
  - > Share capital
    - Minimum 61,500 € for a SA/NV (to be fully paid-up)
    - Minimum 18,550 € for a SPRL/BVBA (to be paid-up at least in the amount of 6,200 €)
  - > Appointment of directors (number, duration, permanent representative if legal entities)
  - > Powers of daily management
  - > Appointment of a statutory auditor (if relevant)



## HOW TO PROCEED ? (3)

- 
- Financial plan for a 2-year period
  - > Amount of share capital should be sufficient to allow normal activities of the company during the following two years
  - > Founders' liability in case of bankruptcy within three years of incorporation



#### HOW TO PROCEED ? (4)

##### • Costs

- > Registration duties: 0,5 % on the amount of the subscribed capital (to be abolished as from 2006)
- > Publication in the Annexes of the Belgian State Gazette (202.31 € for 2005)
- > Registration with the "Crossroad Bank for Enterprises" (130 € for 2005)
- > Registration with the VAT (for free)
- > Registration with a Social Insurance Fund
  - Total balance sheet  $\leq$  532,022. 59 € : 347.50 € (for 2005)
  - Total balance sheet  $>$  532,022. 59 € : 852.50 € (for 2005)



#### HOW TO PROCEED ? (5)

### 3. Branch office

- Decision of the Board of Directors of the foreign company to open a branch office + appointment of a legal representative
  - > Legalisation and certification of the signatures of the directors by a foreign public notary
  - > Legalisation of the signature of the foreign public notary by way of an "Apostille" (except for France, Italy, Ireland and Denmark)
  - > If needed, sworn translation of the decision in one of the official languages of Belgium (Dutch, French or German)



## HOW TO PROCEED ? (6)

- Costs
  - > Publication in the Annexes of the Belgian State Gazette (202.31 € for 2005)
  - > Registration with the "Crossroad Bank for Enterprises" (130 € for 2005)
  - > Registration with the VAT (for free)
  - > Registration with a Social Insurance Fund
    - Total balance sheet ≤ 532,022.59 € : 347.50 € (for 2005)
    - Total balance sheet > 532,022.59 € : 852.50 € (for 2005)
  - > Filing of last annual accounts of the foreign company with the National Bank of Belgium (unofficial translation is accepted – costs: maximum 415.82 €)

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## HOW TO PROCEED ? (7)

1. **Setting up a company or a branch office in a foreign country may imply that foreign individuals may be involved**
2. **For individuals who are not EEA nationals and who are not resident in Belgium, they would need :**
  - Residence permit (if they stay more than 3 months)
    - > Before arriving, filing of an application with the relevant Belgian Embassy or Consulate
    - > Upon arrival, registration with the local town hall
  - Professional card (if self-employed)
    - > Before arriving, filing of an application with the relevant Belgian Embassy or Consulate
  - Work permit (if employee)
    - > Employer must file an application with the local regional employment offices

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### HOW TO PROCEED ? (8)

- Certificate of managerial capabilities
  - > Only for "small and medium-sized companies" => not applicable if one the following conditions is met:
    - > 50 employees
    - > 25% shares owned by one or more large companies
    - Yearly turnover > 7,000,000 €
    - Total balance sheet > 5,000,000 €

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### BRANCH versus SUBSIDIARY (1)

#### BRANCH

no separate legal entity

obligations incurred through such branch can be enforced on the assets of the foreign company, even abroad

opening costs:

- no capital contribution
- no registration duties
- costs for the sworn translations
- costs for the publications in the Belgian State Gazette (EUR 202.31)

#### SUBSIDIARY

separate legal entity

shareholders will not be personally affected by the liabilities of the subsidiary beyond the amount of subscribed capital

incorporation costs:

- capital contribution
- registration duties
- notarial fees and costs (approximately EUR 1,500, including publication costs and registration tax of 0.5 % on the minimum share capital)

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**BRANCH versus SUBSIDIARY (2)**

**BRANCH**

costs for the registration with the Crossroads Bank for Enterprises (EUR 130)

**SUBSIDIARY**

costs for the registration with the Crossroads Bank for Enterprises (EUR 130)

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**TAX ISSUES (1)**

**BRANCH**

no registration duty on the amount of the subscribed capital

non-resident corporate income tax on Belgian source income

current tax rate: 33.99%

tax base: net accounting profit, adjusted for tax purposes, allocated to the branch

tax losses: carry forward in Belgium without limitation; check whether deductible at level of the head office

withholding taxes

**SUBSIDIARY**

registration duty of 0.5 % on the amount of the subscribed capital (to be abolished as from 2006)

corporate income tax on the worldwide profit, subject to tax treaty provisions

current tax rate: 33.99%, but lower progressive rates if certain conditions are met

tax base: net accounting profit, subject to adjustments for tax purposes

tax losses: carry forward without limitation, but no tax consolidation or grouping

withholding taxes

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## TAX ISSUES (2)

### 1. Tax incentives

- Tax ruling
  - Possibility to obtain a binding decision from the Tax Authorities about the tax consequences prior to a particular project
    - => legal security regarding the tax treatment of the project
    - => possibility to evaluate the potential net profits of the project
  - Procedure has been reorganized as smooth, fast and efficient.
- Tax regime for expatriates
  - Foreign executives, specialists and researchers residing temporarily in Belgium are eligible for a special tax regime that treats them as non-residents
  - Only taxable on the incomes relating to professional activities performed in Belgium (travel exclusion for days spent on business outside Belgium)

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## TAX ISSUES (3)

- Certain costs and expenses are attributable to the employer and their reimbursement is not taxable on behalf of the employee (excess of expenses the employee incurs due to his relocation to Belgium)
  - Lowers the taxable personal income
  - Minimizes the salary cost of the foreign employee
- Investment deduction
  - Possibility to deduct from the taxable income a percentage of the amounts invested in new fixed assets used for business purposes in Belgium
    - E.g.: R&D, energy saving, « green » investments, investments made by small and medium-sized companies
- No taxation on capital gains on shares

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#### TAX ISSUES (4)

- Dividend Received Deduction (DRD)
  - Belgian version of participation exemption
  - Minimum 10% participation or at least 1,200,000 € acquisition value
  - Financial fixed assets
  - Minimum holding period of 1 year
  - 95% of dividends received deductible from the tax base
- Deduction for risk capital (as from assessments year 2007)
  - Limits the difference between debt and equity financing
  - Annual tax deduction for risk free interest component of return on equity
  - Long term interest rate on government bonds (with maximum of 6,5%) applied to total net equity reduced by a number of items
  - Carry forward over 7 years

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#### SARBANES-OXLEY ACT (1)

##### 1. Only for companies and subsidiaries of companies quoted in the NYSE : SEC rules

- Independence of the statutory auditor
  - > Cooling-off period (1 year) if CEO, CFO or CAO was employed by the auditing company
  - > Non-audit services: list of services forbidden because of threat for independence. For other non-audit services not listed: need for an authorization of the audit committee unless amount < 5 % of the total amount paid to the auditing company
  - > Rotation of the audit responsible partners after 5 years
  - > Information to the audit committee

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## SARBANES-OXLEY ACT (2)

- Companies' obligations
  - > Creation of an audit committee (by and inside the Board of Directors)
    - Members should be independent (no direct or indirect remuneration for accounting, consulting, legal or investment banking services)
    - One member should have financial expertise
    - Control on accountancy and financial reporting systems: appointment of statutory auditor, fees of statutory auditor, control his work
  - > Certification duties for the CEO or CFO
  - > Interdiction of share trading for directors or executive officers
  - > No influence from the management on the control activities of the statutory auditor
  - > Reimbursement of advantages
  - > No loans to the companies' management
  - > Ethic Code

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## LIABILITIES OF DIRECTORS AND PERMANENT REPRESENTATIVES

### *Preliminary comment :*

*This Section refers to the potential liability of the directors/business managers of a Belgian limited liability company towards a company, its shareholders or towards third parties*

*Article 59 of the BCC has rendered these liabilities equally applicable upon the legal representatives of a Foreign corporation's Belgian Branch (unless explicitly stated otherwise)*

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### LIABILITIES (1)

**As a rule, a director is not held personally responsible for contractual arrangements entered into by him on behalf of the company (Article 61 BCC)**

However, in certain cases of fault or error, the director may be held liable, either *vis-à-vis* the company or third party, in particular :

1. the directors and persons in charge of day-to-day management are liable in accordance with general civil law principles, for the performance of their mandate and acts of mismanagement (Article 262/527 BCC)
2. the directors are jointly liable *vis-à-vis* the company and/or third parties, for any damages ensuing from the non-compliance with company or accounting laws or the company's Articles of Incorporation (Article 263/528 BCC)



### LIABILITIES (2)

3. various responsibilities and liability in case of non-compliance at the occasion of specific operations
4. in the event of bankruptcy, the directors, former directors or persons who are in fact managing the company can be held personally liable if it is established that a manifestly serious mistake committed by one of them contributed to the bankruptcy or the involuntary liquidation (Article 265/530 BCC)  
*!! not applicable to branch offices nor to small SPRL/BVBA's (cfr. below)*
5. directors may also incur tort liability *vis-à-vis* third parties in accordance with Articles 1382-1383 Civil Code
6. under certain circumstances, the directors can incur criminal liability



### LIABILITIES (3)

#### Protection measures

- release by the annual shareholders' meeting
- possible to take out insurance for the liability of directors / business managers vis-à-vis the company and third parties
- "hold harmless letters" - typically issued by an affiliate or a shareholder of the company
- delegation of powers (*e.g.* management committee)

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### QUESTIONS

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## Opening and Operating Foreign Offices & Subsidiaries in France

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### INTRODUCTION

**When investing in France, investors must pay attention to :**

1. Short-term (a) or long-term solutions (b)
2. Choice of legal structure (a) and incorporation modalities (b)
3. Tax
4. Incentives by public bodies
5. Labour law
6. Regulatory issues

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### 1. (a) SHORT-TERM SOLUTIONS

- Liaison Office (*bureau de liaison*)
  - No legal existence, no commercial activity
  - Only to establish contacts with prospective clients and implement market research activities
- Commercial Agent (*agent commercial*)
  - Bound by a commercial agency with the company
  - Agents are responsible for negotiating and in some cases signing contracts for sales, purchases and lease on behalf of and in the name of their principal
  - They are paid by commissions on completed transactions and receive damages upon termination of the contract notwithstanding the cause of termination
  - Resorting to a commercial agent does not necessary entail a commercial activity
  - Registration with the Registry of Commerce and Companies
  - Independent: payment of both employer and employees social security tax by the commercial agent
- Employee of the Company or Sales Representative
  - Bound by an employment contract with the company subject to French labour law
  - Hiring a sales representative in France may constitute a commercial activity, subject to tax



### 1. (b) LONG-TERM SOLUTIONS: OPENING OF A BRANCH OR A SUBSIDIARY?

- Whether the structure be a branch or a subsidiary, registration with the competent Registry of Commerce and Companies ("RCS") must be made within 15 days of the commencement of operations.
- In both cases, the entity will be liable to all French taxes, including corporate income tax and VAT. Withholding tax will depend on the tax treaty between France and the country where the foreign company is registered.
- In both cases, the simpler, easiest and cheapest way to register in France is to resort to a lawyer. For the fulfillment of the accounting obligations and the labour law requirements, the best solution is to resort to an accountant.



### 1. (b) LONG-TERM SOLUTIONS: OPENING OF A BRANCH OR A SUBSIDIARY ?

- The branch has no legal personality
  - No need to create a company in France
  - No limitation of the foreign company's liability
  - The foreign company will be the employer in France of the branch's employees
  
- The subsidiary **has** a legal existence in France
  - A French company has to be created
  - Limitation of the foreign company's liability
  - The employer of the subsidiary's employees will be the subsidiary

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### 2.(a) CHOICE OF LEGAL STRUCTURE: OPENING OF A BRANCH

• **List of documents required:**

- 2 original copies of the bylaws of the foreign company;
- 2 originals of the decision of the relevant corporate body of the foreign company to open the branch in France;
- An original of the certificate testifying of the foreign company's existence and a copy of a free translation thereof;
- A copy of the lease of the branch on the premises;
- Documents regarding the legal representative in France (residence and business permits if relevant);
- A power of attorney for legal formalities.

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**2.(a) CHOICE OF LEGAL STRUCTURE: OPENING OF A BRANCH**

• **Information required:**

**a) Foreign company:**

- date on which the company's financial year closes.

**b) French branch:**

- Details of the business carried on by the branch in France;
- Number of staff in the branch in France;
- Tax system applying to the branch in France;
- Date of commencement of business in France.



**2. (a) CHOICE OF LEGAL STRUCTURE: OPENING OF A SUBSIDIARY**

Forms of commercial companies (with legal personality)

- > SARL *limitation of liability*
- > SA/ SAS
- > SCA
- > SCS
- > SNC *no limitation of liability*



The most common legal structure are the SARL (*Société à responsabilité limitée*), the SAS (*Société par actions simplifiée*) and the SA (*Société anonyme*).

A European company may be created by companies incorporated in at least 2 EU countries (EC Regulation n° 22157/2001, dated October 8, 2001):

- > Minimum capital of € 120,000
- > Incorporation in one EU country and publication in the JOCE
- > Registered office in the EU country of incorporation
- > National provisions apply when the EC Regulation does not provide any rules



## 2. (a) CHOICE OF LEGAL STRUCTURE

SARL	SAS	SA
<p>There may be only one shareholder (EURL).</p> <p>Shareholders' liability is limited to their contributions.</p> <p>No minimum capital. Issuance of bonds allowed.</p> <p>No public offering.</p> <p>Shares (<i>parts sociales</i>) are transferable after approval given by the majority of shareholders</p>	<p>There may be only one shareholder (SASU).</p> <p>Shareholders' liability is limited to their contributions.</p> <p>Minimum capital : EUR 37,000. Cash contributions can be made in instalments : half at the time the company is set up and the remainder over 5 years.</p> <p>Public offering and cash contributions not allowed.</p> <p>Rules regarding transfer of shares are freely decided by all shareholders and stated in the SAS's bylaws.</p>	<p>At least 7 shareholders.</p> <p>Shareholders' liability is limited to their contributions.</p> <p>Minimum capital: EUR 37,000. Cash contributions can be made in instalments : half at the time the company is set up and the remainder over 5 years.</p> <p>Public offerings allowed if share capital is greater than EUR 225,000. No industrial contributions allowed.</p> <p>Shares are transferable unless otherwise stated (approval needed).</p>

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## 2. (a) CHOICE OF LEGAL STRUCTURE

SARL	SAS	SA
<p>One or more business managers (<i>gérants</i>), who shall not be corporate entities and do not need to be shareholders.</p> <p>At least one shareholders' meeting a year: annual approval of the accounts by simple majority, changes to bylaws by a 3/4 majority.</p>	<p>Only a chairman (individual or legal entity) is required. The management structure is provided for in the bylaws.</p> <p>Only certain decisions to be exclusively taken by the shareholders' meeting : approval of the accounts, mergers, changes in capital, liquidation. Other rules are stated in the bylaws.</p>	<p>The company is managed whether by the a board of directors (<i>société anonyme à conseil d'administration</i>) or by a management board, under the supervision of a supervisory board (<i>société anonyme à directoire et conseil de surveillance</i>).</p> <p>At least one shareholders' meeting per year : annual approval of the accounts and ordinary decisions by simple majority, changes to bylaws by a 2/3 majority.</p>

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**2.(b) INCORPORATION MODALITIES (SUBSIDIARY)**

Registration of a subsidiary with the Registry of Commerce and Companies takes two weeks when the following documents are delivered :

- > Bylaws
- > Proof of the deposit of the minimum stated capital required
- > Appointment of management officers, director or managing director
  - > Number
  - > Term
  - > Long-term visas
  - > Business permits for directors who are not citizens of a EU, EEZ or OECD country
- > Appointment of a statutory auditor
  - > Compulsory for SAS and SA
  - > Optional in SARL unless a certain turnover is achieved



**2.(b) INCORPORATION MODALITIES (SUBSIDIARY)**

- The Corporate Formalities Center (*Centre de formalités des entreprises* ) will deal with all documents required to set up, change or close down companies and will deliver such documents to the relevant authorities:
  - > Commercial Court Clerk's Office,
  - > Tax administration,
  - > Social security administration (URSSAF).
  - > Administrative formalities cost approximately € 60, plus the cost of publishing a notice in a legal newspaper (approximately € 200).
- Some formalities are not handled by the Center:
  - > Authorization to engage in regulated professions, professional cards (sales representative), licenses or registration with professional associations for lawyers, accountants, architects, physicians, etc...
  - > Formalities to register trade names and brands with France's National Industrial Property Institute ("INPI");
  - > Registering internet domain names ending in ".fr" with the French Internet Names and Cooperation Association ("AFNIC");
  - > Registration of the company with an insurance center;
  - > Registration with an employee retirement plan (shall be done within three months of RCS registration);
  - > Formalities relating to hiring employees to be completed with URSSAF;
  - > Formalities relating to foreign investments (see point 6).



### 3. TAX ISSUES

- French taxes paid by companies: VAT (19.6%), corporate income tax (33.33%)
  
- Tax incentives for investors
  - R&D tax credit of up to € 8 million per company and per year
  - Tax exemptions in urban free zones
  - Employee training : corporate income tax credit proportional to training expenditures
  - Innovative new companies : corporate income tax relief, capital gains tax exemptions

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### 4. INCENTIVES BY PUBLIC BODIES

- **Public bodies** : central government and local communities (*régions, départements, communes*) with the support of the European Regional Development Fund.
  
- **Forms** : Interest rebate (if financing by way of a loan), tax exemptions (urban free zones) or direct subsidies (*Prime d'aménagement du territoire* - PAT)
  - In priority development areas, investment and job creation subsidies covers 11.5% to **23%** of the amount invested in land, plant and equipment for large companies, and 21.5% to **33%** for small and medium-sized enterprises.
  - In other areas, only small and medium-sized enterprises can benefit from investment and job creation assistance. The maximum amount is 7.5% of the investment for medium-sized enterprises (50 to 249 employees) and 15% for small enterprises (less than 50 employees).

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## 5. LABOUR LAW

- Employment contracts in France:
  - > Indefinite-term or fixed-term
  - > Dismissal subject to specific conditions
  
- The 35-hour workweek and overtime possibilities
  - > The 35-hour workweek does not apply to executives and management
  - > The 35-hour workweek does not prohibit overtime (10 hrs max. per day and 48 hrs per week), which is paid at least 10% more than regular time, 25% more in most cases.
  
- Companies may obtain subsidies and exemptions from social security charges by hiring certain categories of workers (young jobseeker or the long-term unemployed).
  
- Other incentives : European social fund, national employment agency (training of employees).

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## 6. REGULATORY ISSUES

- Rules regarding foreign investors in France
  - > File a statistical return with a credit institution for transactions in which non-residents acquire more than 10% of the equity or voting rights in a resident company.
  
  - > Notify the Ministry of the Economy in the event that investments regarding (i) the setting up of new companies or (ii) the acquisition of an equity interest in a French company (involving more than a third of its shares or voting rights) is greater than € 1.5 million.
  
  - > Request prior authorization from the Ministry of the Economy for investments relating to national defense, weapons and explosives or investments likely to affect public order and safety or create serious public health risks.
  
- French rules on classified facilities
  - > Concern for preventing hazards, pollution and other nuisances means that preliminary administrative formalities are required before operating certain types of manufacturing plants called "classified facilities". The classification determines whether classified facilities are subject to prior authorization or notification, depending on the scale of the hazard or nuisance that they cause.

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## The Netherlands

Some formalities for incorporating Dutch companies and registering branches in the Netherlands

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### **INCORPORATING A DUTCH COMPANY WITH LIMITED LIABILITY – REQUIREMENTS**

- Notarial deed of incorporation
- Declaration of no-objection from Ministry of Justice
- Non-resident incorporators are required to submit a letter of good standing and a letter of intent
- Minimum issued and paid up capital of EUR 18,000
- Contribution on shares can be made in cash or in kind
- If in cash: Bank statement confirming shares are paid up
- If in kind: description and valuation of assets to be contributed

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### **MOST COMMON ENTITY**

- **The most common entity is the *Besloten Vennootschap* ("BV")**
- **A business may also be undertaken by the *Naamloze Vennootschap* ("NV")**
- **Most important differences:**
  - **Limitation for transfer of shares is obligatory for a BV, but optional for an NV**
  - **Minimum share capital for a BV is EUR 18.000. For an NV: EUR 45.000**



### **DUTCH BRANCH OFFICE – REQUIREMENTS**

- **Proof of registration in country of origin**
- **(Translation of) articles of association**
- **Legalised copies of passport directors**
- **Legalised copy of proof of private addresses of the directors**
- **In some cases, a lease agreement for office space needs to be provided**



### **ADVANTAGES OF INCORPORATING A DUTCH COMPANY**

- **Liability is limited to the Dutch activities**
- **Predominantly, local companies prefer to enter into business with a local entity**
- **Cumbersome formalities, such as legalisations and apostilles can be avoided**
- **Power of representation is clear for all parties**
- **Speed in business is assured**

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### **TAX CLIMATE THE NETHERLANDS – NEW LEGISLATION**

- Tax reforms are expected effective as of 1 January 2007
- Main points:
  - **Reduction of general corporate income tax to 26.9%**
  - **Abolishment of capital duty**
  - **Improvement of participation exemption**
  - **Introduction of cross-border fiscal unity with EU subsidiaries**
  - **Limitation on tax depreciation real estate**
  - **Limitation on tax loss carry back and forward**
  - **Abolishment of deduction of liquidation losses and (temporary) devaluation losses on participations that qualify for the participation exemption**

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## Germany

Formalities and Requirements for incorporating German companies and registering branches in Germany

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### German Limited Liability Company (“GmbH”) – General Information

The following overview refers to a German Limited Liability Company as this is the most common (in particular as subsidiary for foreign companies) in Germany

- **Minimum share capital: € 25,000 (from 1 January 2006 the minimum share capital will be reduced to € 10,000);**
- **Strong influence of the shareholders on the company;**
- **Decision-making within the company is not formalistic;**
- **Much flexibility re. the organisation of the legal structure of the GmbH and the legal relationships between the GmbH and its shareholders;**
- **No access to the capital market;**
- **Obligation to compile annual statements of accounts;**
- **Bookkeeping and Financial Statements**

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### Implementation of a German GmbH – Key Aspects

- **General proceeding instead of founding a new company as a matter of practicability: purchase of a shelf company the share capital of which amounts to € 25,000**
- **Purchase of the company by way of notarised share purchase and transfer agreement;**
- **Amendment of the articles of association of the shelf company according to the requirements of the client (name change, change of business seat, section regarding „Commercial Purpose of the Company“ etc.)**
- **Appointment of new managing directors**
- **Time frame for the proceeding for the acquisition and the appointment of managing directors: approx. 2 – 3 weeks; time frame until the amendments of the articles of association will be registered with the commercial register: varies/another couple of weeks.**
- **Total costs (including the share capital, notary's fees and lawyer's fees) for the implementation of a German subsidiary in form of a GmbH: max. € 30,000; from 1 January 2006: max. € 15,000.**

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### German Branch Office of a Foreign Company – Key Requirements

- **Running of business**
- **Filing with the Commercial Register including the following:**
  - **Certified (in general notarised and by way of apostille) excerpt from the (commercial) register of the foreign company (hereinafter referred to as “Company”) as well as a certified translation;**
  - **Certified (in general notarised and by way of apostille) copy of the current articles of association of the company as well as a certified translation;**
  - **Certified (in general notarised and by way of apostille) copy of the shareholders' resolutions regarding the appointment of the directors of the company as well as a certified translation;**
  - **Verification of the authorisation of representation of all directors/secretaries of the company;**
- **A German branch of a foreign company is subject to German bookkeeping provisions.**

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- The branch normally has a separate bank account
- The branch can enter into legal relations under its firm name created according to German law
- Since the German branch is not a separate legal entity but only a part of the foreign company, no separate articles of association are required.

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### Notification requirements vis-À-vis various authorities

Various authorities have to be informed that business activities have been started:

- Tax office (*Finanzamt*)
- Municipal authority for general business matters (*Gewerbe- und Ordnungsamt*)
- Municipal tax authority (*Stadt- or Gemeindesteueramt*)
- Employment office (*Arbeitsamt*)
- Local social security office (*Allgemeine Ortskrankenkasse*)
- Chamber of commerce (*Industrie- und Handelskammer*): in general the commercial registry files a copy of the articles of association with the chamber of commerce
- Employer's liability insurance association (*Berufsgenossenschaft*)
- Federal office of finance (*Bundesamt für Finanzen*): regarding the granting of the sales tax identification number.

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**DRAFT**

## **England & Wales**

Formalities and rationale for incorporating English companies, and registering branches in England & Wales

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### **OVERVIEW**

1. Introduction
2. Company Limited by shares
  - Overview
  - Structure and operation
  - Formalities of operation
  - Tax
3. Branch
  - Overview
  - Structure and operation
  - Formalities of operation
  - Tax
4. Comparison: Subsidiary v Branch
5. UK Employment Considerations
6. Conclusion

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## INTRODUCTION

- There are a wide range of different vehicles that may be used by a foreign entity to gain a presence in England and Wales:
  - company limited by shares
  - company limited by guarantee
    - private limited company
    - public limited company
  - Branch
  - Partnership
  - Limited liability partnership
  - Agency, distribution and franchising agreements
  - Registered place of business
  - Societas Europea
  
- The following slides concentrate on the two most popular vehicles used by foreign entities wishing to gain a presence in England and Wales:
  - Company limited by shares
  - Branch



## COMPANY LIMITED BY SHARES

### OVERVIEW

- (i) Private limited company
  - commonly used by a foreign entity wishing to setup a presence in England and Wales
  - generally no restrictions on foreign ownership or control
  
- (ii) Public limited company
  - used rarely by a foreign entity wishing to set up a presence in England and Wales
  - relatively high set up costs
  - relatively high continuing administrative requirements
  - minimum capital requirements of £50,000

It is normally the private limited company that is the corporate vehicle chosen by a foreign entity wanting to establish a presence in England and Wales. In light of this, we will not examine the public limited company further.



## PRIVATE COMPANY LIMITED BY SHARES

### STRUCTURE AND OPERATION

- No minimum requirement as to the amount of authorised share capital
- At least one director and one secretary – can be either a natural person or a corporate body, and does not need to be British or domiciled in England and Wales
- The shareholders of the company can be either natural persons or corporate bodies, and do not need to be British or domiciled in England and Wales
- Registered office must be in England and Wales
- Every company, other than dormant companies and certain categories of small company who are exempt from auditing their accounts, must appoint an auditor

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## PRIVATE COMPANY LIMITED BY SHARES

### FORMALITIES OF OPERATION

- Annual general meeting held every year (unless the shareholders dispense with the requirements by passing an elective resolution)
- Directors = duty of skill and care towards the company
- Annual accounts filed at Companies House
  - the exact requirements of filing depends on the size of the company, being more onerous the larger the company
- Annual return filed at Companies House – contains details of the directors and secretary, the shareholders and their respective holdings
- Wide range of documents need to be filed at Companies House
- Statutory books

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**PRIVATE COMPANY LIMITED BY SHARES**

**TAX**

(i) Corporation Tax

- Companies incorporated in England and Wales treated as a UK tax resident
- Charged corporation tax on the whole of their worldwide profits (subject to double tax relief for foreign taxes)
- Corporation tax bands:

Profits	Rate of tax
First £10,000	0%
Next £40,000	Effectively 23.75%
Next £250,000	19%
Next £1,200,000	Effectively 32.75%
Over £1,500,000	30%

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**PRIVATE COMPANY LIMITED BY SHARES**

**TAX**

(i) Corporation Tax

- Provision for carrying forward/back trading losses against future trading income
- Provision for offsetting trading losses against profits, and capital losses against capital gains
- UK tax authorities will not levy UK tax on the trading activities of the newly formed English company on any other entity in a corporate group which is not conducting business in the UK simply because they are a shareholder in the newly formed English company
- Only tax that may apply to such non-UK entities is withholding tax on or interest on loans paid to non-UK entities by the UK

(ii) Value Added Tax (VAT)

- Where the value of a company's taxable supplies are in excess of £60,000 in any one year period, it must register with Customs and Excise
- VAT is currently charged at a rate of 17.5% on the supply of goods and services by a taxable person in the course of business in the UK

(iii) National Insurance Contributions

- Employers = contribute 12.8% on employees earnings

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## BRANCH

### OVERVIEW

- The premises of an overseas company will constitute a branch if they are organised so as to conduct business on behalf of the overseas company – a person will be able to deal direct with the branch in the UK instead of with the company overseas in its home state

### STRUCTURE AND OPERATION

- An overseas company with a branch in England and Wales must register the fact within one month of the branch being opened
- Following must delivered to Companies House:
  - Particulars of the overseas company
  - Certified copy of the constitutional documents of the company in English
  - Where the company is required by the law of its home county to publicly disclose accounts, copies of its latest accounts
  - A number of documents filed at Companies House in relation to the overseas company must be translated into English



## BRANCH

### FORMALITIES OF OPERATION

- The overseas company must keep all particulars and documents filed in respect of branches at Companies House
- Various requirements for filing the overseas company's accounts with Companies House
- There are various public disclosure requirements that must be complied with, including displaying details of the overseas company at every branch and on company stationery
- Details of charges on property in the UK must be provided to Companies House



**BRANCH**

TAX

- A non-UK resident entity which conducts business in England and Wales through a branch will be subject to UK corporation tax only on the income profits and gains that is attributable to that branch
- The applicable tax rates will be the same as those in respect of a company limited by shares
- The overseas entity itself becomes a UK taxpayer
- Most of the UK's double taxation treaties exempt branch offices from being regarded as a permanent establishment if it merely carries on preparatory or auxiliary functions
- National Insurance Contributions still have to be paid in respect of the branch staff working in England and Wales



**COMPARISON: SUBSIDIARY V BRANCH**

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SUBSIDIARY	BRANCH
Members have limited liability	Whether members granted limited liability dependant on the type of overseas entity
Easy to raise equity and debt finance	Difficulties in raising equity and debt finance
Relatively high costs of establishment and operation	Relatively low costs of establishment and operation
Quite extensive disclosure requirements	Limited disclosure requirements
Possible taxation advantages in certain situations	Possible taxation advantages in certain situations
Commonly engages UK employees	Unusual to engage UK employees
Relatively simple to establish a bank account	Difficulties in establishing a bank account
Customers and suppliers familiar with conducting business with a British company	Customers and suppliers may be wary of conducting business with a non-UK entity



## UK EMPLOYMENT CONSIDERATIONS

- Employees prefer to be employed by a English based entity
  
- Non-UK staff seconded or temporarily transferred to the English office may gain the benefit of English employment law. This is irrespective of whether there is a branch or subsidiary in England and Wales
  
- Work permits and visas
  - Needed by non-EEA nationals
  
- Working time
  - 48 hour working week
  - Opt out
    - 48 hour working week may be disapplied by agreement in writing between the employer and the worker
    - The employer must keep a record of all employees who have agreed to disapply the 48 hour limit

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## UK EMPLOYMENT CONSIDERATIONS

- Health and Safety
  - Written statement of general policy
  - Compliance with any industry specific health and safety requirements
  
- Maternity and parental rights
  - Maternity leave and parental leave
  - Differing entitlements according to the length of employment the employee has had with the company
  
- Discrimination
  - unlawful for employers to discriminate against their employees on the grounds of their sex, race or disability
  - claims for discrimination are not contingent on length of service, and there is no statutory cap on compensation awards for damages
  
- Termination of employment
  - Minimum notice period requirements
  - Unfair dismissal /wrongful dismissal /redundancy

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## CONCLUSION

- Many influences in choosing what form an English presence should take
  - Legal
  - Commercial
  - Financial
  
- When setting up a presence in England and Wales thought should be given to how the entity may evolve in the future

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