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Issue:
March 2021

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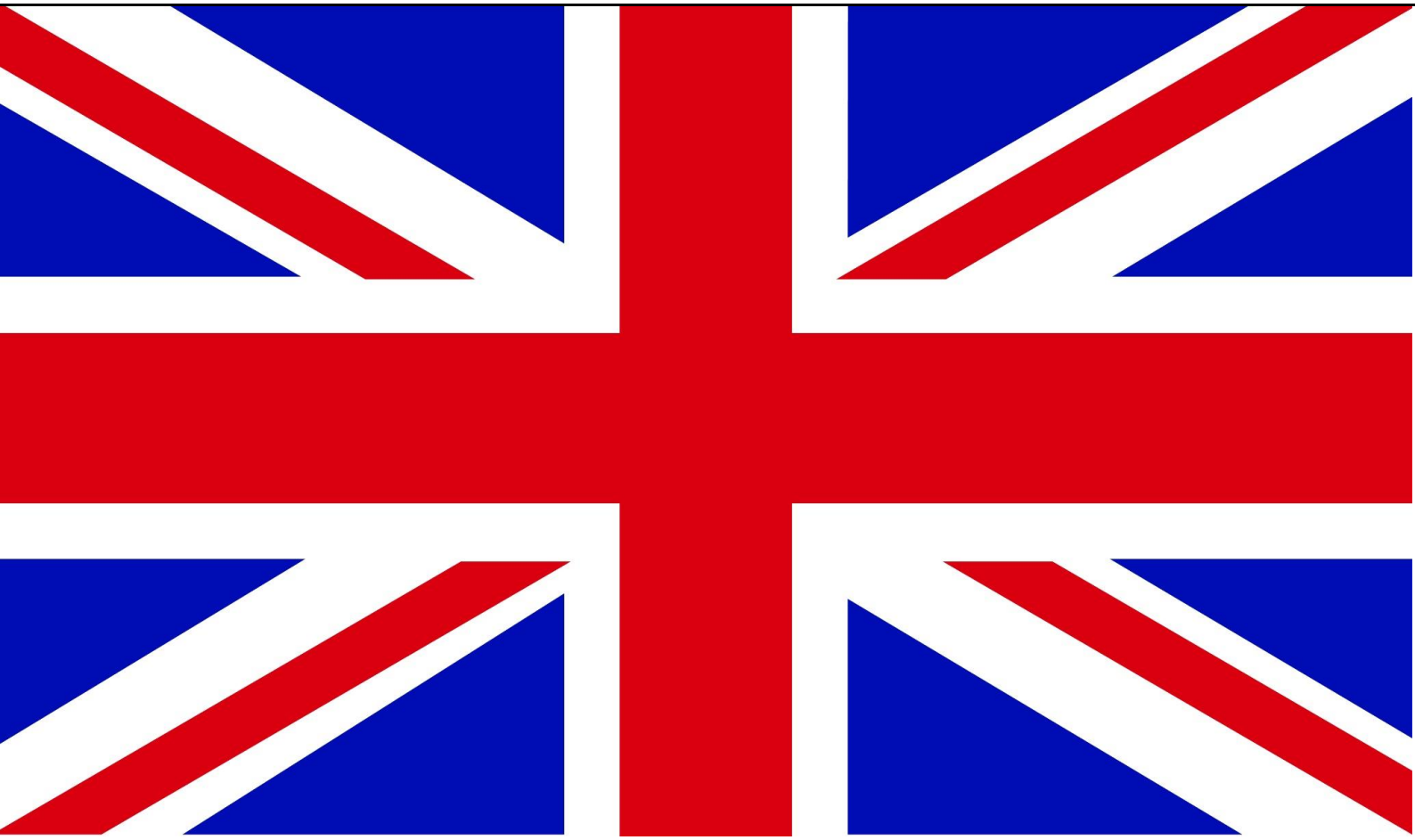

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Birmingham Solicitors' Group: Kiran Munawar joins Committee for 2020/2021

Kiran is a Corporate Solicitor for Rödl and Partner Legal Limited. Kiran is new to the committee this year and takes the role of Junior Lawyers' Division Representative. She is responsible for being involved with the national JLD Committee to represent the BSG and its members.

Contact for further information

Kiran Munawar
Solicitor
T +44 121 227 8963
kiran.munawar@roedl.com

Brexit

The Vaccine War: AstraZeneca vs the EU – A Fact-Check

In light of the recent controversy between AstraZeneca and the EU Commission relating to the supply of the Covid-19 vaccine, we have undertaken a fact-check of some of the key statements made by the parties concerned. Whilst acknowledging that the contract is governed by Belgian law, we have applied market standard legal principles that are generally applicable in circumstances such as these.

On 27 August 2020, the European Commission and AstraZeneca PLC signed an Advance Purchase Agreement for the production, purchase and supply of 300 million doses of the Covid-19 vaccine ("the Vaccine"), with an option for a further 100 million doses, to be distributed to the EU population ("the Contract"). This was at a time when a vaccine had not been established or approved but rather was in development. In January 2021, AstraZeneca informed the EU that it would only receive about a quarter of the 100 million vaccines they were expecting to receive by March, a shortfall of about 75 million jabs[1], triggering the following statements:

- Pascal Soriot (CEO, AstraZeneca): "The UK agreement was reached in June, three months before the European one... As you could imagine, the UK government said the supply coming out of the UK supply chain would go for the UK first. Basically, that's how it is."[2]

- Stella Kyriakides (Health Commissioner, EU): "We reject the logic of first come first served. That may work at the neighbourhood butchers but not in contracts and not in our advanced purchase agreements."[3]

Fact-check: Mr Soriot's claim is incorrect. AstraZeneca contracted separately with both the EU and the UK to supply a certain volume of the vaccine. According to the EU, AstraZeneca has failed to meet its obligations to supply the required number of vaccines to the EU under the Contract. AstraZeneca have pointed to production problems at their plants, but continue to supply to the UK. Therefore, the dispute between the two parties is one relating to supply under the Contract and totally independent of AstraZeneca's contract with the UK.

The absence of a term in the Contract that requires AstraZeneca to supply the UK first, and indeed nothing linking the UK supply with the EU Contract shows clearly that the agreement with the UK is irrelevant to the EU Contract. Mr Soriot is precluded from justifying the lack of Vaccine supply to the EU by claiming a "first come, first served" in favour of the UK, a view supported by the President of the Law Society of England & Wales.[4]

That being said, Ms Stella's statement is also incorrect in the context of contracts generally. A contract can have a first come first served obligation among the beneficiaries of the contract, but this would require an express clause in all relevant contracts to that effect. In the case of AstraZeneca, no such clause exists. The time-related component of the delivery of the Vaccine is not relevant; the two contracts exist independently and in parallel.

- Pascal Soriot (CEO, AstraZeneca): "We didn't commit with the EU, by the way. It's not a commitment we have to Europe: it's a best effort."[5]

Fact-check on "no commitment": This statement is incorrect. On 29 January 2021, the EU and AstraZeneca mutually agreed to publish the Contract in the public domain. The Contract has all the vital elements needed to be considered a contract under the law i.e., an offer, the acceptance of that offer, consideration (which has been redacted from the published copy), the competency and intention to enter into a contract. The effect of this is that legal obligations have been created on both sides and thus, commitments.

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[1] www.bbc.co.uk/news/world-europe-55852698
[2] https://www.theguardian.com/world/2021/jan/26/head-of-astrazeneca-confirms-uk-has-prior-claim-on-vaccine
[3] https://www.politico.eu/article/health-commissioner-astrazeneca-logic-might-work-at-butcher-but-not-in-contracts/
[4] https://www.theguardian.com/business/2021/jan/28/astrazeneca-may-have-to-renegotiate-covid-vaccine-contracts-warn-experts?CMP=share_btn_wa
[5] https://www.cnbc.com/2021/01/27/astrazeneca-ceo-pascal-soriot-interview-on-supplies-to-the-eu.html

Fact-check on "best effort": Mr Soriot's statement is at least partially incorrect. The Contract does indeed oblige AstraZeneca to make "best reasonable efforts" to supply the EU. However, this phrase has an established meaning in the legal community and so is not as simple as a literal interpretation under everyday English language in the way Mr Soriot suggests.

Parties to a commercial contract often choose to qualify contractual obligations by agreeing to attempt to achieve them, rather than absolutely agreeing to do so. This may be because the obligation is contingent on a third-party performing an action or subject to an aim still to be achieved in the future, and this may be out of the contracting party's control. In this case, it was in all likelihood the development of a vaccine that qualified AstraZeneca's ability to commit absolutely. However, the vaccine now exists and this together with the contractual commitment to supply the vaccine does in our view support the EU's argument for being supplied with it as per the Contract. It would be fair to say that it is not the fault of the EU that AstraZeneca has issues at its production plants and no such limitations or exclusions to AstraZeneca's liability on this basis appear in the Contract.

Under English law "reasonable efforts" and "best efforts" are commonly used. "Reasonable efforts" clauses require the obligor to achieve a balance between its obligation to the oblige and its own commercial objectives. On the other hand, "best efforts" clauses require the obligor to incur significant costs and act against its own commercial interests, albeit not ruinously.

It is worth noting that the parties here have expressly defined "Best Reasonable Efforts" in the Contract itself to help create a level of clarity on a complex point and to avoid any ambiguity of the scope of their respective obligations.

The definition of "Best Reasonable Efforts" in the Contract reads as follows:

"...in the case of AstraZeneca, the activities and degree of effort that a company of similar size with a similarly-sized infrastructure and similar resources as AstraZeneca would undertake or use in the development and manufacture of a Vaccine at the relevant stage of development or commercialization having regard to the urgent need for a Vaccine to end a global pandemic which is resulting in serious public health issues, restrictions on personal freedoms and economic impact, across the world but taking into account efficacy and safety..."

The definition is then used in the Contract in the following context:

"AstraZeneca has committed to use its Best Reasonable Efforts (as defined below) to build capacity to manufacture 300 million Doses of the Vaccine, at no profit and no loss to AstraZeneca, at the total cost currently estimated to be Euros for distribution within the EU (the "Initial Europe Doses"), with an option for the Commission...to order an additional 100 million Doses (the "Optional Doses")."

The use of the term 'Best Reasonable Efforts' is not a common one and something of a hybrid. It can be argued that the language 'having regard to the urgent need for a Vaccine to end a global pandemic...resulting in serious public health issues, restrictions on personal freedoms and economic impact, across the world but taking into account efficacy and safety' imposes a high standard on AstraZeneca to perform under the Contract as the circumstances surrounding it are unusual, serious and urgent.

The definition additionally requires consideration of the size and resources of AstraZeneca. AstraZeneca plc is a British-Swedish global and science-led pharmaceutical and biopharmaceutical company with a portfolio of products for major disease areas including cancer. AstraZeneca may easily be considered a 'Goliath' of the pharmaceutical world[6] and therefore fully capable of meeting the obligations it has committed itself to under the Contract.

– Michael Gove (Minister for the Cabinet Office, UK): He was "confident" of the UK's vaccine supply and said its programme would continue as planned.[7]

Fact-check: The validity of this statement remains to be seen, and remains doubtful in light of the following representation by AstraZeneca in its contract with the EU: '[AstraZeneca] is not under any obligation, contractual or otherwise, to any Person or third party in respect of the Initial Europe Doses or that conflicts with or is inconsistent in any material respect with the terms of this Agreement or that would impede the complete fulfilment of its obligations under this Agreement'.

This provision – an assurance to the EU, in effect – expressly excludes AstraZeneca from prioritizing the UK supply. In doing so, as expressly admitted to by the CEO (Pascal Soriot: 'first come, first served') AstraZeneca risks a material breach

[6] https://www.astrazeneca.com/investor-relations/annual-reports/annual-report-2019.html
[7] https://www.bbc.co.uk/news/uk-55873288

of the Contract. Consequently, AstraZeneca may feel obliged to shift its priorities between its customers.

Ultimately it may be for the courts to decide under Belgian law if AstraZeneca has met its 'Best Reasonable Efforts' obligation. It is evident that the dispute will lead to some form of dispute resolution or renegotiation as the 'urgent' circumstances of the pandemic require it.

The matter ultimately highlights the importance of careful drafting in commercial contracts in order to avoid disputes such as this.

Contact for further information

Jan Eberhardt
Partner
T +44 121 227 8963
jan.eberhardt@roedl.com

→ Brexit

The EU Settlement Scheme – Absences from the UK during the Continuous Qualifying Period

Following the end of the Brexit transition period on 31 December 2020, whilst EU citizens who successfully apply to the EU Settlement Scheme by 30 June 2021 will be able to continue living and working in the UK[8] after 30 June 2021, any lengthy absences from the UK during the preceding five years "continuous residence" period, even when holding pre-settled status, could put their future settled status in jeopardy.

Continuous qualifying period

It is established knowledge that EU citizens and their family members will qualify for settled status after completing "a continuous qualifying period" of five years' residence in the UK. Those living in the UK for less than five years qualify for pre-settled status instead and can apply to change this to settled status once they have five years' continuous residence.

A "continuous qualifying period" is defined in Annex 1 of the Appendix EU of the Immigration Rules as a period of residence that began before 11pm (GMT) on 31 December 2020 and which has not been broken by one of the following:

1. Absence(s) from the UK exceeding a total of six months in any 12-month period (subject to some exceptions discussed below);
2. A prison sentence; or
3. A deportation, exclusion or removal decision or order.

The exceptions referred to in the first point above are:

- one period of absence abroad of up to 12 months for an important reason (for example, childbirth, serious illness, study, vocational training or an overseas work posting);
- compulsory military service abroad of any length;
- time spent abroad as a Crown servant, or as the family member of a Crown servant; or
- time spent abroad in the armed forces, or as the family member of someone in the armed forces

Absences

Key points to note regarding absences are, firstly, that the wording is plural: "absence(s)", meaning that the six-month cap is not limited to a single period outside the UK but can also comprise the total length of a multiple shorter trips.

The rules also refer to absence(s) during "any 12-month period", meaning that this is not restricted to a calendar year, rather it is any rolling 12-month period. Further, it should be noted that these are examples only and the list is not exhaustive. There have been indications from the Home Office that longer absences related to the coronavirus pandemic may also be permitted to fall within this exception.

Exceeding the six-month absence

Absence(s) of more than six months that do not fall within one of the exceptions will break a person's "continuous qualifying period". If, following the absence(s), the individual retuned to the UK before 11pm on 31 December 2020, this would have reset their "settled status clock" and they would have started the five year period again from the date they returned to the UK. They will have to re-apply for pre-settled status by 30 June 2021 and, as such, their right to upgrade to settled status later will be preserved.

However, if someone with pre-settled status exceeded the permitted absence and returned or returns to the UK after 11pm on 31 December 2020, they will be unable to restart the five year continuous qualifying period at all, due to how the continuous qualifying period is defined in the Immigration Rules (i.e. that it began before 11pm on 31 December 2020). If such individuals intend to stay in the UK after their pre-settled status expires and they cannot rely on one of the exceptions set out above, they will need to look at applying for a visa under the UK's new points-based immigration system instead.

It should be noted that pre-settled status is only lost through two years of absence from the UK rather than six months, so this issue only affects those who intend to stay in the UK

[8] All references to "the UK" also include the Channel Islands and the Isle of Man.

indefinitely and to apply for settled status after the expiration of their pre-settled status.

As such, lengthy absence(s) during the continuous qualifying period may not prohibit an individual staying in the UK indefinitely, but the reasons for such absences and the dates of the same need to be carefully analysed so that the risks are fully appreciated and to determine the best way forward.

Contact for further information

Kiran Munawar
Solicitor
T +44 121 227 8963
kiran.munawar@roedl.com

→ Brexit

Brexit and employing non-UK citizens – What you need to know

The current situation: EU citizens and the EU Settlement Scheme

The rights and status of EU, EEA and Swiss citizens[1] living and working in the UK will remain the same until 30 June 2021. (Non-EU citizens are currently subject to the existing points based system which is due to change with effect from 1 January 2021 – see below).

EU citizens who successfully apply to the EU Settlement Scheme by 30 June 2021 will able to continue living and working in the UK after 30 June 2021. Depending on how long they have been living in the UK when they apply to the scheme, they will be given either:

- settled status
- pre-settled status

Settled Status

Settled status will usually be granted if the individual:

- started living in the UK by 31 December 2020
- lived in the UK for a continuous five-year period (known as 'continuous residence')

Five years' continuous residence means that for five years in a row they have been in the UK, the Channel Islands or the Isle of Man[2] for at least six months in any 12 month period. The exceptions are:

- one period of absence abroad of up to 12 months for an important reason (for example, childbirth, serious illness, study, vocational training or an overseas work posting)
- compulsory military service abroad of any length
- time spent abroad as a Crown servant, or as the family member of a Crown servant
- time spent abroad in the armed forces, or as the family member of someone in the armed forces

An individual can stay in the UK as long as they like if they get settled status. However:

- An individual can spend up to five years in a row outside the UK without losing their settled status, but,
- If the individual is a Swiss citizen, they may only spend up to four years in a row outside the UK without losing their settled status.

Pre-Settled Status

If an individual does not have five years' continuous residence when they apply, they will usually get pre-settled status. They must have started living in the UK by 31 December 2020. The individual can then apply to change this to settled status once they have five years' continuous residence. They must do this before their pre-settled status expires.

If the individual reaches five years' continuous residence at some point by 31 December 2020, they can choose to wait to apply to the settlement scheme once they have reached five years' continuous residence. This means that if the application is successful, they will get settled status without having to apply for pre-settled status first.

The individual can stay in the UK for a further five years from the date they get pre-settled status. If an individual has pre-settled status, they can spend up to two years in a row outside the UK without losing their status but they will need to maintain continuous residence if they want to qualify for settled status.

The Application Process

Individuals will need proof of:

- identity (either a valid passport or national identity card. Other evidence can be used in certain situations. A digital photo of the face must also be provided);
- residence in the UK. A National Insurance number can be provided to allow an automated check of a residence based on tax and certain benefit records. If this check is successful, no further documents will be required as proof. Further documents will only be needed if the individual has been here for five years in a row but there is not enough data to confirm this.

Documents can be provided either by:

- Scanning the document and uploading the photo using the 'EU Exit: ID Document Check' app using an Android phone, or an iPhone 7 or above; or
- Sending the document in the post and uploading the photo using the online application.

1 January 2021 onwards: Sponsorship Licences and the new Points Based System

The UK's post-Brexit immigration system is due to come into effect on 1 January 2021 and will apply to EU citizens who were not living in the UK on or before 31 December 2020, as well as to non-EU candidates.

UK VISA SPONSORSHIP

If a business (be it a UK limited company as a parent or subsidiary of a German company, a UK branch of a German company or even a foreign legal form with a presence in the UK) wants to recruit workers from outside the UK's resident labour market from 1 January 2021 and is not already a Home Office licensed sponsor, it should apply to become one now.

Sponsoring someone does not guarantee that they will be allowed to enter or stay in the UK; the applicant (employee) will have to apply for a visa for themselves – see below.

SPONSORSHIP LICENCES

There are various different types of sponsorship licenses that can be applied for. the two most common. The two most common are the Skilled Migrant Worker and the Intra-Company Transfer visa routes for applicants.

- Skilled Migrant Worker visa route. In order to sponsor a candidate (EU or non-EU) under this route, businesses will need to have an offer in place for the applicant. The job must meet the suitability requirements, i.e., an appropriate skill level and be compliant with the salary thresholds (see below);
- Tier 2 (Intra-Company Transfer (ICT). This route applies for businesses that want to transfer staff from overseas entities into the UK. The Home Office will need to see sufficient proof that the two entities are linked. This can be done by showing common ownership and/or common control.

BECOMING A LICENSED SPONSOR

Businesses will need to:

1. Check the business is eligible

To get a licence, key personnel of a business or those involved in its day to day running cannot have unspent criminal convictions for immigration offences or certain other crimes, such as fraud or money laundering.

2. Choose the type of skilled worker licence it wants to apply for

This will depend on whether the business wants to sponsor a job applicant for general purposes, or for the purpose of an ICT. It can apply for a licence covering either or both.

3. Decide who will manage sponsorship within the business

The business needs to appoint people to manage the sponsorship process. The main tool they'll use is the sponsorship management system (SMS). The roles are:

- Authorising Officer – a senior and competent person responsible for the actions of staff and representatives who use the SMS
- Key Contact – the business' main point of contact with UK Visas and Immigration (UKVI)
- Level 1 User – responsible for all day-to-day management of your licence using the SMS. These roles can be filled by the same person or different people.

4. Apply online and pay a fee

An online application must be submitted to the Home Office. The application requires the business to fill in the company information, pay a fee that is determined by the size of the company and send key documentation to the Home Office.

POINTS-BASED/SKILLED WORKER SYSTEM

The points based or skilled worker system is the new system under which visas will be awarded to those coming to the UK for work. Individuals must meet a specific set of requirements for which they will score points so businesses wanting to employ them must give them due consideration when creating a role. Visas are then awarded to those who gain enough points.

Under the new system, anyone coming to the UK to work will need to demonstrate that:

- they have a job offer from a Home Office licensed sponsor
- the job offer is at the required skill level – RQF 3 or above (equivalent to A Level in the UK and Abitur in Germany); and
- they speak English to the required standard. This needs to be evidenced by the passing of an English language test, which assesses an individual's reading, writing, speaking and listening abilities, as issued by an approved provider.

In addition to this, the job offer must meet the applicable minimum salary threshold. This is the higher of either:

- the general salary threshold set by Her Majesty's Government on advice of the independent Migration Advisory Committee at £25,600; or

- the specific salary requirement for their occupation, known as the "going rate".

All applicants will be able to trade characteristics, such as their qualifications, against a lower salary to get the required number of points. If the job offer is less than the minimum salary requirement, but no less than £20,480, an applicant may still be eligible if they have:

- a job offer in a specific shortage occupation
- a PhD relevant to the job
- a PhD in a STEM (science, technology, engineering or maths) subject relevant to the job.

There are different salary rules for workers in certain health or education jobs, and for "new entrants" at the start of their careers. A total of 70 points is needed to be able to apply to work in the UK.

How we can help

- Advising on applications to the EU Settlement Scheme and any documentary evidence required
- Determining the type of sponsorship licence a business requires when looking to recruit EU and non-EU candidates from 1 January 2021.
- Drafting the application for a sponsorship licence
- Collating all the supporting documents that will need to be provided as evidence for a licence
- Drafting a covering letter with all the additional information that will need to be provided
- Assisting prospective EU and non-EU candidates with the visa application process

[1] All further references to "EU citizens" throughout this document will also apply to citizens of the EEA and Switzerland.
[2] All further references to "the UK" will also include the Channel Islands and the Isle of Man.

Contact for further information

Charlotte Bateman
Senior Associate
T +44 121 227 8963
charlotte.bateman@roedl.com

UK Budget 2021

Highlights

Covid-19 Roundup

CORONAVIRUS JOB RETENTION SCHEME
On 3 March 2021 in the Budget statement, it was confirmed the furlough scheme would be extended again and is now expected to end on 30 September 2021. The scheme continues in its current form and the employer continues to be required to pay national insurance and pension contributions. Between July and September 2021 the employer will also start to contribute to the cost of their employees furloughed hours, starting at 10 per cent and rising to 20 per cent.

	May	June	July	August	September
Government contribution to wages	80% up to £2,500	80% up to £2,500	70% up to £2,187.50	60% up to £1,875	60% up to £1,875
Employer contribution to wages	No	No	10% up to £312.50	20% up to £625	20% up to £625

Post Covid-19 recovery support

RECOVERY LOANS
A new recovery loan scheme which opens from 6 April until 31 December 2021 is available to businesses of any size to help recover from the effects of the pandemic. The loans may be used for any legitimate business purpose. The government will guarantee 80 per cent of the finance.

- Businesses can borrow between £25,000 and £10m
- Invoice finance and asset finance is also available between £1,000 and £10m

Terms will be up to three years for overdrafts and invoice finance facilities. For term loans and asset finance terms are up to six years.

RESTART GRANTS
Local Authorities will provide one-off grants to businesses required to close for lockdown. Grants of up to £6,000 per premises will be paid to non-essential retail business. Grants of up to £18,000 per premises for hospitality, accommodation, leisure, personal care and gym businesses as these will open later and will be more impacted by restrictions when they do reopen. The Government will also be providing all local authorities in England with an additional £425 million of discretionary business grant funding.

BUSINESS RATES RELIEF
100 per cent business rates relief will continue for eligible retail, leisure and hospitality businesses until 30 June 2021. This will be followed by 66 per cent business rates relief until 31 March 2022 capped at £2 million for businesses that were required to close on 5 January 2021 or £105,000 per business for other eligible properties.

REDUCED VAT RATE EXTENSION
The temporary 5% reduced rate of VAT applicable to certain supplies relating to hospitality, hotel and holiday accommodation and admission to certain attractions due to end on 31 Match 2021 was extended for a further six months and will now apply until 30 September 2021. A new reduced rate of 12.5 per cent will come into force on 1 October 2021 and which will end on 31 March 2022 after which the standard VAT rate will revert to 20 per cent.

NEW PAYMENT SCHEME IN RESPECT OF DEFERRED VAT
Businesses were able to defer VAT liabilities falling due between 20 March 2020 and 30 June 2020 and where VAT was deferred businesses were initially given until 31 March 2021 to pay any liabilities. It was subsequently announced (on 24 September 2020) that businesses would be able to pay the deferred VAT in up to 11 monthly interest-free instalments with all instalments required to be paid by the end of March 2022.

PAYING DEFERRED VAT
Businesses have three available options:

- Pay its deferred VAT liability in full on or before 31 March 2021;
- Sign up online for the VAT deferral new payment scheme between 23 February 2021 and 21 June 2021;
- Agree alternative arrangements with HMRC by 30 June 2021, if further help is needed.

CORPORATE TAX

CORPORATION TAX RATES
In an attempt to rebuild sustainable public finances the Chancellor announced an increase in the rate of corporation tax from 1 April 2023 to 25 per cent on profits over £250,000. Companies with profits of up to £50,000 will continue to pay corporation tax at 19 per cent. Profits between £50,000 and £250,000 will pay tax at 25 per cent and will be able to claim marginal relief.

DIVERTED PROFITS TAX
The diverted profits tax will also increase from 1 April 2023 to 31 per cent.

TEMPORARY EXTENSION TO CARRY BACK LOSSES
The temporary extension for businesses to carry back losses is being extended from twelve months to three years. The extension will apply to trading losses made by companies in accounting periods ending between 1 April 2020 and 21 March 2022 and to trading losses made by unincorporated businesses for tax years 2020/21 and 2021/22.

For companies the carry back to the previous year remains unlimited. After that there is a £2m cap for losses carried back to the two earlier years. The £2m limit applies to each accounting period ending in 1 April 2020 and 31 March 2022. There is a group cap of £2m. Group companies with losses of up to £200,000 are not subject to any group cap limitations.

CAPITAL ALLOWANCES
From 1 April 2021 to 31 March 2023 two new first year allowances are made available to companies. A “super deduction” allowing companies to claim 130 per cent capital allowances on qualifying plant and machinery main pool spend and a 50 per cent “SR allowance” for companies investing in new plant and machinery qualifying for special rate pool plant and machinery. It is worth noting that, special disposal rules will apply to these assets such that upon disposal they will be subject to a balancing charge.

Contact for further information

Rhian Thiarya
Chartered Accountant, Tax Manager
T +44 121 227 8963
rhian.thiarya@roedl.com

Imprint

Publisher:
Rödl & Partner Legal Limited
170 Edmund Street, Birmingham B3 2HB
United Kingdom
T +44 121 227 8963
www.roedl.com/united-kingdom

Responsible for the content:
Jan Eberhardt
jan.eberhardt@roedl.com

Layout:
Angela Hackett
angela.hackett@roedl.com