



# doing business in the UK

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# Introduction

The United Kingdom remains a key location for companies with international aspirations. And there remain compelling reasons for establishing a commercial base here.

**These include:**

- a new and distinct market for your goods or services
- a skilled workforce
- proximity to continental Europe and ready access to the European market
- access to UK know-how and technology
- excellent employee relations
- a government keen to attract inward investment

To take full advantage of what the UK has to offer you will need to understand the commercial environment in which you will operate.

Our guide gives you an overview of UK corporate and commercial law to help your decision-making.

**The guide covers seven key areas:**

- business structure – choice of corporate entity
- key features of private limited companies – disclosure, liability, finance and role of advisors
- location – property issues
- trading activities – contract, trading and compliance issues
- management and staffing – human resource issues
- taxation – the UK corporate tax regime
- a schedule of the most important UK intellectual property rights



# Choice of corporate entity

There are two common alternatives for overseas businesses to consider if doing business in the UK:

- operating as a foreign-owned branch office
- operating through a UK wholly-owned subsidiary company, or a company in which the overseas party has a controlling interest

## **Branch office**

In the early stages of expansion into the UK, an overseas company may choose to use the branch office route. This involves certain particulars of the foreign company and annual accounts being registered with the Registrar of Companies. It is likely, however, that a branch will not be a particularly attractive long-term solution for the following reasons:

- if the foreign parent company is incorporated in a country covered by EC Insolvency Regulations, all its assets could be within the reach of UK creditors if claims are made against the branch office
- if claims are made against a UK owned subsidiary, any liability will generally be restricted to the assets of the subsidiary
- in some sectors it will be attractive to customers or clients dealing with the company to deal with a UK corporation rather than an overseas branch office
- if the overseas company intends to maintain a medium or long-term foothold in the UK it is likely that the formation of a UK company will be administratively more convenient than seeking to operate the branch office regime
- establishing the income of a branch for tax purposes can be administratively difficult as its legal identity is not separate from that of its parent company

In view of these issues, this guide assumes that the establishment of a UK wholly-owned subsidiary is the preferable route.

## **Limited liability company**

It is quite likely that an overseas investor will at some point wish to form, acquire or participate in a UK limited liability company.

The main benefit of a company limited by shares is that the liability of the shareholders is limited to the amount unpaid on their shares in the company. It follows that if the shares are fully paid, shareholders will not normally be liable to contribute further amounts in the event of the company becoming insolvent, although of course the initial investment would be lost.

On incorporation, all companies must be registered as either private or public. This guide deals only with private companies, since a public limited company is most commonly used where it is intended to offer securities to the public.

# Disclosure requirements

## Disclosure, liability and finance

UK companies are obliged to file information with Companies House, the UK executive agency responsible for maintaining the public records of all UK companies. A company's constitution is set out in its articles of association which is a public document. Information regarding the ownership of shares, particulars of directors and company secretaries and other similar details also has to be filed as public records.

Companies are also obliged to file accounts on a regular basis and its directors are liable to imprisonment and/or a fine for failure to do so. Small companies below a certain threshold are entitled to file abbreviated accounts and are not subject to the same auditing obligations. Some businesses still consider disclosure an unattractive feature of UK company law, and look to other forms of trading, such as a partnership.

## Corporate ownership and control

A UK company is a legal body which is distinct from its members and directors. Group companies work in the same way: a subsidiary is a separate legal person from its parent. The directors are responsible for the day-to-day management of the company's affairs and may be salaried executives or have non-executive status. The directors are appointed by and are accountable to the shareholders.

Decisions relating to the corporate structure such as share issues and constitutional matters are the responsibility of the shareholders. Although decisions (including the appointment of directors) can be made by a majority of the shareholders, a few critical decisions require the support of 75% of the shareholders. It is possible to form private companies with only one shareholder and this is often convenient for wholly-owned subsidiaries.

A company may choose to have only one director, but that director must be a natural person i.e. an individual. A private company may have a company secretary, but is not required to. If there is only one director, it is usually convenient for the company secretary to be a different person from the sole director.

## Directors' liability

Although a company is treated as a distinct legal entity, UK law imposes personal liability on the directors of a company in a number of ways. Areas where such liability can arise include:


- breaches of the rules outlawing trading whilst insolvent
- breaches of statutory and fiduciary duties
- breaches of environmental or product safety legislation
- breaches of health and safety legislation

Individual directors are generally advised to take out insurance against liabilities, but legal advice should be taken on the extent of cover afforded by such policies.

## Finance

There are two main types of finance available to a private company:

- Equity finance – whereby shareholders invest funds in return for shares. This may be individuals or institutional investors who become members by subscribing to the company or trading with existing shareholders. When issuing shares in return for finance, a company has various options as to the rights attached to those shares.
- Debt finance – this is often preferable to companies for tax reasons. A company's assets may be used as security for borrowings to fund the business. Typically, a bank will take a fixed charge (a mortgage) over the company's premises, and a debenture (combining fixed and floating



charges) over the remainder of its assets, such as the trading stock of the company. In addition, a guarantee by the parent company may be required.

### **Role of auditors**

Qualified auditors have to report to the shareholders of a company on whether, in their opinion, its accounts show a true and fair view of the company's position at the end of a financial year. This annual audit is designed to protect shareholders from financial misreporting. Before investing in an existing business it is vital to ensure full legal and accounting due diligence work is undertaken to establish the current financial position of the business and to ensure that warranties are obtained from the vendors before any investment is made.

### **Role of lawyers**

A number of important issues arise when deciding on the role of lawyers within the new organisation, and we look below at some of the most important ones.

### **In-house lawyers**

The application of legal professional privilege varies significantly by jurisdiction, in particular in relation to whether communications between a company and its in-house legal advisers are protected. The UK legal profession is divided between Scotland, and England and Wales.

This guide focuses on the rules relating to lawyers in England and Wales, which does currently recognise legal professional privilege for in-house lawyers, though there are regular legal challenges and impending changes to the nature of the UK legal profession which may affect the position in the near future.

Also, certain activities, called 'reserved legal activities', can only be carried out by lawyers admitted to the local profession, so in the UK this would be solicitors, barristers and certain other specified professionals. Examples of reserved work would include the conduct of litigation and notarial activities.

### **Legal privilege**

There are different types of 'privilege', but the most relevant types would be 'legal professional privilege' (LPP), which encompasses 'legal advice privilege' and 'litigation privilege'. It is important to understand the way these work so as not to prejudice your entitlement to later claim legal privilege in relation to documents which you may wish to avoid having to disclose.

### **Legal advice privilege**


This protects confidential communications (and evidence of those communications) between a lawyer and a client, provided the communications are for the purpose of seeking and receiving legal advice. It does not protect communications with third parties.

The 'client' is restrictive in this context – it does not extend to everyone in the organisation, or even the whole department or division seeking the legal advice. It is only those individuals who are specifically tasked with seeking and obtaining legal advice from their lawyers. Communications falling outside this remit are generally not privileged.

Legal advice privilege is not confined to advice on the law – it also covers advice about what should 'prudently and sensibly be done in the relevant legal context'. This will encompass commercial or strategic advice, provided it relates to a client's legal rights, liabilities, obligations and remedies.

However, it will not apply to advice or to documents created as a result of a strategic or commercial nature that is not provided in a 'relevant legal context'.

### **Litigation privilege**



This protects confidential communications (and evidence of those communications) between a lawyer and client and/or between a client and third party, provided the communications are created for the dominant purpose of obtaining legal advice, evidence or information in preparation for actual litigation, or litigation that is reasonably in prospect (i.e. more than a mere possibility).

Internal grievances, disciplinary proceedings, fact-finding enquiries and investigations are excluded. Also, it will not be enough to create a document for an entirely separate purpose and later seek to rely on litigation privilege.

Generally, LPP applies to advice given by external lawyers and in-house lawyers, provided that:

- they act in their capacity as lawyer and not in an executive or compliance capacity
- they are qualified to practice under the Solicitors Regulatory Authority or Bar Council rules
- in the case of solicitors, they hold a current Practising Certificate

However, one notable exception is the advice given by in-house lawyers to their employers in respect of EU Commission competition investigations which will not be covered by LPP.

In order to ensure that the legitimate claims to privilege are protected, you must think carefully about what documentation you create and what use is made of it. It is sensible to mark relevant documents *Legally privileged: Strictly private and confidential. Not for circulation.*

Consider carefully at the outset the way that your organisation manages its documents, develop clear document retention, destruction and creation policies. Do not overlook electronic documents and data – from 1 October 2010 the court rules (in England and Wales) have been amended to strengthen the disclosure obligations in relation to electronically stored information – there is an express obligation to preserve and potentially disclose this when litigation is contemplated or pending. Organisations need to be aware of where and how their electronic documents and data are stored, as document preservation teams and litigation hold notices are becoming increasingly common.



# Property issues

## Ownership

In England and Wales there are two types of property ownership:

- freehold title (outright ownership)
- leasehold title (ownership for a limited period of time, subject to the terms of the lease which is granted by the owner of the freehold title or the owner of a superior leasehold title). There are two stages to the 'purchase' process: exchange and completion.

## Exchange

Property contracts are negotiated on a 'subject to contract' basis, enabling the parties to withdraw from the transaction up until the time of formal exchange. Prior to exchange the buyer carries out an investigation into the ownership and characteristics of the property. This investigation includes making enquiries of the seller and third party agencies such as the local authority, investigating the seller's title to the property to establish what rights, covenants etc affect the title, and a site inspection/survey.

The seller/landlord will normally require the buyer/tenant to take the property as he finds it and will exclude all liability for its repair and condition. The buyer/tenant should therefore consider commissioning a full structural survey and a ground/environmental report prior to exchange.

Once the buyer/tenant is ready, the contract is formally exchanged and a deposit is paid. Typically, the deposit is 10% of the purchase price, though this figure is negotiable. Once the contract is exchanged it is binding on both parties. The buyer is likely to be responsible for insuring the property from exchange.

## Completion

Completion is far more of a formality than the exchange process. On completion, the balance of the purchase price becomes payable. The period between exchange and completion is subject to negotiation and can happen at the same time as exchange.

## Leasehold


The length of the lease or 'the term' is a matter for negotiation and there is no minimum or maximum. Leases for a term of seven years or longer must be registered at the Land Registry. The length of the term will directly affect the value of the landlord's interest in the property. The landlord will usually want the longest possible term in order to maximise its investment. The tenant needs to weigh the benefit of the security offered by a longer term against the flexibility provided by a short term. Short term leases – five years or fewer – are now far more common than they used to be.

Effectively, there are two types of occupational lease:

- full repairing and insuring lease, with the tenant is responsible for the building as if it were his own
- internal only repairing, where the tenant is normally only responsible for decoration, including fixtures and fittings, and may be indirectly responsible for contributing towards the repair of the structure and other parts of the building, the insurance and other management costs, by way of a service charge

When a buyer purchases an existing lease from the current tenant it is known as an 'assignment'.

It is not normally possible to negotiate the terms of the lease on an assignment, as it is already in existence.



The landlord's consent to the assignment will normally be required, and this is granted by way of formal deed. References will normally be required before consent is given, and in many cases, security in the form of guarantees will be required by the landlord.

On the grant of a new lease the tenant can usually negotiate the actual terms of the lease. Any alterations the tenant wishes to carry out will normally require the landlord's approval. This is usually granted by way of formal licence following the provision of drawings and specifications. In the case of an assignment, the tenant will usually be responsible for the landlord's costs for dealing with the licence. On the grant of a new lease, the landlord would usually be responsible for its own costs but this is subject to negotiation.

If the landlord or tenant is a foreign company, a legal opinion may be required as to the validity of the company and its ability to enter into the lease. Such opinions are usually expensive to obtain.

### **Requirements for surety**

Often, if the tenant is a new UK limited company, the landlord will require a guarantee from a third party. Therefore, the foreign parent company may need to act as surety for its subsidiary's liabilities and obligations under the lease.

Alternatively, the landlord may be prepared to accept other forms of security. Often these include a bank guarantee or the provision of a rent deposit. The deposit is usually refundable to the tenant either at the end of the lease or when the landlord is satisfied that the tenant has reached certain financial criteria, such as having made profits for three consecutive years equal to or in excess of three times passing rent.

### **Planning law and environmental law**

Local authorities have the responsibility for the maintenance, development and enforcement of planning law, subject to the direction of central government. Any negotiations to purchase or lease a property must include a full review of the planning permissions for the property. Environmental legislation has increased, especially since April 2000. The law now provides for the remediation of contamination in respect of land, water and air.

A local authority has powers in certain circumstances to serve a notice on an owner of contaminated land, specifying the steps it requires the owner to take to remedy the contamination. Therefore any property purchased or leased must be surveyed to establish its history and to identify whether there could be any environmental concerns. In addition, any environmental licences or permits required for activities on the property must be transferred or obtained.

### **Stamp Duty Land Tax (SDLT)**

Subject to reliefs and exemptions, SDLT is payable on most land transactions. On the sale of freehold land it is payable by the buyer at a rate of 0-4% depending on the value of the consideration. On the grant of a leasehold, SDLT is payable by the tenant at 1% of the net present value of the rent payable over the term of the lease, for rent in excess of £150,000.

### **Scotland**

Subject to reliefs and exemptions, SDLT is payable on most land transactions. On the sale of freehold land it is payable by the buyer at a rate of 0-4% depending on the value of the consideration. On the grant of a lease SDLT is payable by the tenant at 1% of the net present value of the rent payable over the term of the lease, although there is a nil rate band of £150,000 for commercial leases. We can recommend and work with a Scottish law firm where required.



# Contract, trading and compliance issues

## **Freedom of contract**

Companies dealing with other businesses in the UK are broadly free to agree the terms of their trading contracts (for example, relating to the purchase and supply of goods and services) as they think fit.

The rule known as privity of contract is important in defining liability where there is a chain of relationships between different parties. Under this rule a party is liable for breach of contract only to the party with whom it has made an agreement. Other third parties may have rights of action if they suffer loss or damage, but these rights will usually arise outside the law of contract.

For example, these rights of action may arise in respect of negligently caused death or injury, or property damage. However, the Contracts (Rights of Third Parties) Act 1999 created a statutory exception to the privity of contract rule in relation to contracts entered into from May 2000. Third parties may now enforce rights that are given to them in contracts to which they are not a party. Although the parties may, and often do, choose to exclude third party rights.

## **Freedom of contract: Restrictions and exceptions**

The ability of UK contracting parties to agree terms freely is not unlimited. For example, businesses contracting on their own standard terms and conditions of trading cannot exclude or restrict their liability for negligently caused loss or damage to property unless those restrictions are reasonable. The same applies to limitations on liability for economic or consequential losses.

There is an absolute ban on attempts to exclude or restrict liability for death or personal injury caused by negligence. Therefore, within these limitations, it is important for businesses to consider seriously their standard form contract documentation. Insurance should also be considered as an additional means of self-protection.

Under UK law, damages awards for breach of contract reflect losses which are both reasonably foreseeable as being the consequences of the breach and which are actually suffered by the parties. They do not include an exemplary or penal damages element.

## **Controls over trading activity**

There are several controls over trading activity in the UK. These include:

### **Product liability**

Manufacturers have a statutory obligation owed directly to consumers to ensure that their products are safe. Both civil and criminal sanctions can be imposed for breach of these obligations. It should be noted that consumers have greater rights than businesses in this regard.

### **Competition law**

There are detailed UK and EU laws preventing the restriction or distortion of competition and free trade within the EU. These provisions cover matters such as agreements on prices, production, markets, and sources of supply, development and investment. There are provisions to prevent the abuse of a dominant position within a market. In addition there is legislation to control mergers within the EU. This is a developing area of the law on which specialist legal advice should always be sought. The sanctions for breach of this legislation can include both civil and in extreme cases criminal law liabilities.

### **Intellectual Property Rights**

The UK has detailed rules dealing with the full range of intellectual property rights including patents, trade marks, copyright, design rights and confidential information. Overseas companies considering trading in the UK should make searches to establish the extent to which they will be able to use freely intended names or trade marks in the UK marketplace. Registration of rights should be undertaken at the earliest possible opportunity. See the Schedule of UK Intellectual Property Rights later in this guide.



## **Unfair Commercial Practices**

In May 2008, regulations implementing the EU directive on Unfair Commercial Practices were introduced. These regulations introduced a general ban on unfair commercial practices relating to consumers, and outlawed misleading acts and omissions and aggressive commercial practices. The sanctions for breach of the regulations include both civil and, in some cases, criminal penalties.

## **Sales and marketing agreements**

Agency agreements are regulated by the Commercial Agents (Council Directive) Regulations 1993. These protect agents by providing, among other things, a minimum notice period for indefinite term agency contracts; rules on the validity of post-termination restrictions; and either indemnity or compensation for agents on termination. Distribution and franchise agreements are subject to both UK and EU competition law.

## **Environmental compliance**

As already mentioned, environmental protection is a fundamental cornerstone of UK law. Any overseas investor considering either investing in property or purchasing a UK business should evaluate carefully the environmental record of the business as well as the property concerned, in view of the significant powers of the relevant authorities to control activity which infringes environmental legislation, and to impose financial sanctions on those responsible.

## **Data protection**

The collection and use of personal and certain other data is strictly governed in the UK under the Data Protection Act 1998. Provisions under the Act put significant obligations on any person or company collecting or processing data. These provisions are designed to address, among other concerns, security of data and the purposes for which the data is used. Sanctions for breach of the data protection provisions include both financial penalties and criminal sanctions. Parliamentary discussions have considered the introduction of custodial sentences for offenders who deliberately or recklessly misuse personal information, and the Information Commissioner continues to press for their introduction.

## **Provision of Services Regulations**

These regulations, which came into force in December 2009, apply to the majority of private sector businesses providing services in the UK. They impose obligations in relation to making certain information available to customers, complaints handling, and abiding by the principles of non-discrimination in the provision of services.

## **Bribery**

UK anti-corruption legislation is set to be revamped by the Bribery Act, which received Royal Assent in April 2010, and which is expected to come into force in April 2011. It will introduce four criminal offences, including the 'Corporate Offence' of failure by relevant commercial organisations to prevent bribery by those working on behalf of the organisation. A maximum of 10 years' imprisonment is allowed for all offences, while corporate failure could involve an unlimited fine. In addition, senior managers may be personally liable if bribery committed by companies was done with their consent or collusion.

## **Online trading**

There are a number of compliance requirements likely to apply to business conducted online. For example, the Consumer Protection (Distance Selling) Regulations 2000 impose a number of obligations relating to the provision of certain contractual information to consumers, and they also include the benefit of a cooling-off period during which the consumer can cancel their order and receive a refund. The E-Commerce (EC) Directive Regulations 2002 also impose information requirements in respect of certain commercial activities carried out on-line (for example, advertising and selling goods online).



# Human resource issues

In the UK, employees' legal rights and protections are defined by a combination of their contract of employment and statutory rules and regulations.

The law imposes certain minimum requirements; for example, the national minimum wage, which an employer must observe, although it is free to improve it. It is unlawful for an employer to attempt to provide less than the prescribed minimum.

Where there is no legal minimum requirement, the parties are free to agree their own terms.

Not everyone who works for you will necessarily be an employee.

The law recognises further categories of individuals: workers who have some but not all of the legal protections applicable to employees; and the self-employed, who have very few employment rights.

## The employment contract

All employees are entitled to receive a written statement of their terms and conditions of employment from their employer within the first two months of employment. Most employers comply with this obligation by including the necessary terms in the employee's contract of employment.

This statement must contain some key terms such as a description of the name of the employer, employee's job, the rate of the employee's pay, and any details relating to sickness pay, hours of work, details of disciplinary and grievance procedures, holiday entitlement, notice periods, place of employment and any pension provision.

Any other terms and provisions controlling the relationship with the employee should also be contained in the employee's contract of employment. It is not a requirement to reduce the employment contract to writing, but this is obviously advisable.


It is also advisable to have non-contractual policies, procedures and rules governing the relationship between the employer and employees. These are usually contained in a separate staff handbook and include procedures on matters such as absence reporting, expenses policy, company car entitlements, equal opportunities, health and safety, and any other matters particularly relevant to the employer's business.

There are some other restrictions on the terms which can be included in an employee's contract of employment. For example, an employer may wish to limit the ability of an employee to work for a competitor in a specified place or for a specified period of time after termination of employment. Such a clause is known as a post-termination 'restrictive covenant'. There are public policy restrictions on such covenants in the UK and they will only be enforceable if the employer can show that they are reasonable and necessary to protect their legitimate business interests. In addition, should the employer breach the employee's contract of employment, such covenants will fall away and not be enforceable.

## Statutory rights

Employees have certain employment rights and protections, which are set out in legislation including:

- limits on the number of hours worked per week
- entitlement to a minimum amount of notice on termination
- entitlement to a minimum number of paid holidays per year
- entitlement to rest periods
- entitlement to a minimum rate of hourly pay
- entitlement to maternity leave and pay

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- entitlement to paternity and adoption leave and pay
  - entitlement to parental leave, time off for family emergencies and to request flexible working;
  - protection from discrimination, harassment and victimisation on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation
  - protection from unfair dismissal
  - entitlement to a statutory redundancy payment

Some, but not all, of these legal rights are subject to qualifying periods of employment.

### **Termination of employment**

On termination of employment by an employer, an employee may have a claim for wrongful dismissal if the employer has terminated the employee's employment in breach of the contract of employment, i.e. by not giving or paying in lieu of the amount of notice provided for under the contract. In addition, an employee may also be entitled to claim unfair dismissal if they have not been dismissed for a fair reason or a fair procedure has not been followed. If the employee is dismissed because they are facing redundancy they may also be entitled to a redundancy payment.

### **Employee data**

The Data Protection Act 1998 governs the way employers collect, store and process personal information concerning their employees. Issues around the processing of employee data are increasingly in the media spotlight. The Information Commissioner can take action against organisations that fail to meet their data protection obligations, for example, if there is a breach of security regarding data and this can result in negative publicity as well as, ultimately, criminal penalties.

Employers must comply with eight 'principles' when processing personal data and must register with the Information Commissioner if they process personal data. On payment of a fee, employees have a right of access to information about them held by their employer.

### **Discrimination and equal pay**

Employees, workers and self-employed contractors are protected against discrimination, harassment and victimisation on the grounds of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Note that both older and younger people are protected against age discrimination.

Discrimination can take place at any stage of the employment process – in advertising and recruiting, in the terms of employment offered, promotion, training, and discipline and dismissal. Where an individual successfully brings a claim for discrimination the employer can be ordered to pay unlimited compensation. In extreme cases, the individual who carried out the act of discrimination may also be personally liable.

An employer may be vicariously liable for the discriminatory acts of its employees in the course of their employment as well as harassment against its own employees by third parties if it does not take all reasonably practicable steps to prevent discrimination. A well publicised and properly implemented equal opportunities policy can help mitigate such liability.

In respect of disabled employees, an employer has a special duty to make reasonable adjustments for them.

Women are entitled to be paid the same as men doing the same work (and vice versa). Employers should ensure that there is an equal, fair and transparent pay structure in place.



## Business transfers

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) protect employees where the business in which they work is transferred from one owner to another.

Employees employed in a business immediately before a transfer automatically transfer to a purchaser of the business on the same terms and conditions upon which they were previously employed (and these cannot be changed after the transfer except in very limited circumstances).

It is not possible for parties to contract out of their obligations under these regulations. Purchasers of a business therefore need to be aware of TUPE, as they will have an effect on the financial attractiveness of a business acquisition.

TUPE does not apply where the shares of a business are being sold, as the employees' employer remains the same.

## Migrant workers

The UK has strict requirements in relation to the employment of workers who are immigrants from outside of the European Economic Area and Switzerland, and operates a points-based immigration system. Employers who wish to employ such workers need to become licensed sponsors.

Penalties for employing workers who are in the UK illegally are substantial – up to £10,000 per worker – and it is a criminal offence to employ someone knowing that they do not have the legal right to work in the UK.

An employer can provide itself with a defence against a civil penalty if it carries out checks on certain documents before employing the worker and keep copies of these on file. It is advisable for employers to build such checks into a recruitment procedure which is applied to all applicants, not just foreign workers. Where a worker has only limited leave to remain in the UK the employer is responsible for ongoing checks on their immigration status.

## Self-employed contractors

UK law makes a distinction between employees who are employed under a contract of employment and subject to the control of an employer, and other individuals, such as consultants, who provide services to a company on a self-employed basis.

Whether a particular individual is employed or self-employed can be a complex question and ultimately is a matter for the employment tribunal: the label applied by the parties to the relationship is often of little relevance.

It can be difficult to determine this distinction. However, it is an important distinction due to differences in the tax treatment of these groups of people and their rights under employment legislation.

## Pensions

Currently, an employer does not have to contribute to a pension for an employee, employers who employ five or more people must simply provide access to a stakeholder scheme. Many larger employers do operate occupational pension schemes to which they contribute, and pension contributions made by an employer are increasingly recognised as a valuable benefit for employees.

From 2012 the Government plans to introduce a new low-cost pension scheme, to be known as NEST, aimed at jobholders who don't have access to a good quality, work based pension scheme – in the main, medium to low earners. All qualifying employers will be required to contribute a minimum of 3% (on a band of earnings) to an employee's workplace pension scheme. This will supplement the 4% contribution from the employee and around 1% from the Government in the form of tax relief. There will be a system of automatic enrolment, but employees will be able to opt out if they wish.



# Taxation

The following is a broad overview of the tax issues relevant to establishing business operations in the UK.

## **UK corporation tax**

A UK resident company is liable to UK corporation tax on its worldwide profits, including capital gains.

A non-UK resident company is liable to UK corporation tax on the profits of a trade carried on by it through a permanent establishment in the UK, and on capital gains realised on the disposal of capital assets used or held by it for the purposes of that UK permanent establishment.

Profits that are attributable to the permanent establishment are those that it would have made if it was a distinct and separate UK enterprise, engaged in the same or similar activities under the same or similar conditions, dealing wholly independently with the rest of the non-resident company of which it is a part. In applying the legislation, the permanent establishment is to be treated as having equity and loan capital in the proportions relevant for an independent company operating in the UK.

A non-UK resident company which carries on a trade in the UK other than through a permanent establishment is liable to UK income tax rather than corporation tax on the profits attributable to that trade.

## **Rates of tax**

The current rate of corporation tax is 28%, although this will be reduced to 27% from 1 April 2011 and then by an additional 1% per year, until the rate reaches 24%. A reduced rate of 21% ('the smaller companies' rate') applies if the profits of a company do not exceed £300,000. The smaller companies' rate will be reduced to 20% from 1 April 2011. A marginal rate applies in respect of profits between £300,001 and £1,500,000.

If a particular company has associated companies (including non-UK resident companies) the relevant thresholds of £300,001 and £1,500,000 are divided by the number of its associated companies. The smaller companies' rate does not generally apply to the profits of a UK permanent establishment, but a permanent establishment may be entitled to have its profits taxed at the smaller companies' rate if it can claim the benefit of a non-discrimination clause in a relevant double taxation treaty with the UK.

A system of quarterly accounting for corporation tax has been introduced for larger companies (i.e. companies with profits of at least £1.5m).

## **Exemptions and reliefs**

There are a number of tax incentives to doing business in the UK. Most notably, where certain criteria are satisfied, substantial shareholding relief provides a corporation tax exemption on the sale of an interest of 10% or more in a trading company. There are also significant reliefs available for qualifying spending on research and development, and for investment in unquoted trading companies.

## **Inter-company trading/transfer pricing**

It is generally not possible to reduce the amount of UK taxable profits by means of adopting artificial pricing methods. Under both UK tax law and the UK's double tax treaties, the UK Revenue is able to ignore actual prices and charge tax as if arms length prices had been paid. This would catch, for example, excessively high interest and management charges, and royalties that are paid to the non-UK resident parent of a UK subsidiary with a view to reducing the profits subject to UK tax.

Payments of interest, royalties etc. by a UK permanent establishment to its overseas head office are not deductible for UK tax purposes.

# Schedule of UK intellectual property rights

## Schedule of intellectual property rights with effect in the UK

IPR	Duration	Main Legislation	What is protected?	Where is it protected?	Who owns it?
<b>UK Patent</b>	20 years (subject to payment of renewal fees)	Patents Act 1977 (as amended)	An invention that: <ul style="list-style-type: none"> <li>- is new</li> <li>- involves an inventive step</li> <li>- is capable of industrial application</li> <li>- is not caught by any statutory exclusion</li> </ul>	UK	Inventor or employer if the invention is made by an employee in the normal course of their employment
<b>Community Registered Design Right</b>	25 years (subject to payment of renewal fees)	Council Regulation (EC) 6/2002 on Community Designs	The visible appearance of the whole or part of a product resulting from features of, in particular: <ul style="list-style-type: none"> <li>- lines</li> <li>- contours</li> <li>- colours</li> <li>- shape</li> <li>- texture and materials</li> <li>- ornamentation</li> </ul> <p>The design must be original and of individual character. The design cannot have been made available to the public.</p>	EU	Either: <ul style="list-style-type: none"> <li>- the designer</li> <li>- the Commissioner, if the design has been commissioned</li> <li>- the employer of the design, if the design was created by an employee during the course of employment</li> </ul>
<b>UK Registered Design Right</b>	25 years (subject to payment of renewal fees)	Registered Designs Act 1949 (as amended) and; Community Designs Regulations 2005	See Community Registered Design Right	UK	See Community Registered Design Right
<b>Community Unregistered Design Right</b>	3 years from the point the design is first disclosed or made available to the public within the EU.	Council Regulation (EC) 6/2002 on Community Designs	See Community Registered Design Right	EU	See Community Registered Design Right
<b>UK Unregistered Design Rights</b>	The shorter of: <ul style="list-style-type: none"> <li>- 15 years from the end of the year of creation/ recording</li> <li>- 10 years from the end of the year of first sale/hire</li> </ul>	Copyright Designs and Patents Act 1988 (as amended)	Any aspect of shape or configuration of the whole or part of an article. <p>The design must also:</p> <ul style="list-style-type: none"> <li>- be original;</li> <li>- be the result of independent effort (i.e. not copied); and</li> <li>- not be commonplace in the design field in question</li> </ul>	UK	See Community Registered Design Right
<b>Community Registered Trade Marks</b>	Unlimited (subject to payment of renewal fees)	Council Regulations (EC) 40/1994 on Community Trade Marks	Any mark which: <ul style="list-style-type: none"> <li>- is capable of graphical representation (including words, logos, colours, sounds and smells)</li> <li>- is distinctive</li> <li>- is capable distinguish the mark of one undertaking from that of another</li> <li>- does not consist exclusively of a sign or indication which may designate the kind, quality, quantity or other characteristics of the goods or services to which the mark is applied</li> <li>- does not conflict with any pre-existing third party marks</li> </ul>	EU	Applicant
<b>UK Registered Trade Marks</b>	Unlimited (subject to payment of renewal fees)	Trade Marks Act 1994 (as amended)	See Community Registered Trade Mark	UK	Applicant

<b>UK Unregistered Trade Mark</b>	Unlimited, provided the goodwill exists in the mark.	Common law tort of passing off	A mark which: <ul style="list-style-type: none"> <li>- has discernible goodwill in a particular aspect of its goods and services</li> <li>- has been misrepresented in such a way so that customers are, or are likely to be, confused as to the trade origin of the goods or services</li> <li>- has caused the owner damage as a result</li> </ul>	UK	Owner of the goodwill in the unregistered mark.
<b>Copyright</b>	Typically 70 years from the end of the calendar year in which the creator dies.  In some circumstances, for instance where copyright subsists in broadcast, sound recordings, typographical works and computer generated works, the duration is shorter.	Copyright Designs and Patents Act 1988 (as amended)	Literary, dramatic, musical and artistic works which are <ul style="list-style-type: none"> <li>- be original</li> <li>- be recorded</li> </ul> Also protects sound recordings, films, television broadcasts and typographical arrangements	UK, although will be protected overseas in countries which are signatories to the copyright convention	Typically, the author or the employer if the work is created during the course of employment.  In some circumstances, for instance where copyright subsists in broadcast, sound recordings, typographical works and computer generated works, the owner will be different
<b>EU Database Right</b>	The shorter of: <ul style="list-style-type: none"> <li>- 15 years from the end of the year in which the database was created</li> <li>- 15 years from the end of the year in which the database was published</li> </ul>	Copyright and Rights in Databases Regulations 1997	A collection of independent data which is arranged systematically and is individually accessible by electronic or other means.  There must be "a substantial investment" in obtaining, verifying or presenting the contents of the database, and the collection must be original.	EU	The maker of the database, i.e. the person who obtains, verifies or presents the contents of the database and assumes the investment risk achieved in those objectives.  The maker of the database must be based in the EEA
<b>Confidential Information</b>	Unlimited, provided the information remains confidential.	Common law duty of confidentiality	Information which: <ul style="list-style-type: none"> <li>- has the necessary quality of confidence</li> <li>- was imparted in circumstances importing an obligation of confidence on the recipient</li> <li>- was used without authorisation</li> </ul>	UK	The creator of the confidential information



# Did you know?

## **Unfair competition**

The UK rules concerning acts of unfair competition are considerably more relaxed in contrast to certain European states such as Germany, France and Italy. Broadly, the UK system allows everything other than that which is expressly prohibited, while the German, French and Italian systems prohibit everything except that which is expressly allowed. The result is that areas such as advertising, sales promotions and free prize giveaways are less regulated in the UK, giving companies more freedom to do as they please than in other continental jurisdictions.

## **Trade dress**

Under US law, trade dress can be protected provided it is inherently distinctive or has acquired a secondary meaning and is non-functional in nature. These strict criteria often act as a barrier to trade dress protection for US companies. In contrast, UK law protects trade dress under the common law action of passing-off (see above) and will protect the visual appearance of a product (even if functional in nature) provided it has attracted sufficient goodwill.