

CLIENT GUIDE

Doing business in the UK

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Introduction

The United Kingdom remains a key location for companies with international aspirations.

Compelling reasons for establishing a commercial base here include:

- a new and distinct market for your goods or services
- a skilled workforce
- access to UK know-how and technology
- excellent employee relations
- familiarity of the English language
- proximity to continental Europe
- 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 a general overview of some of the key considerations when deciding whether to establish a business presence in the UK.

The guide covers seven key areas:

- business structure – options available
- key features of private limited companies – reporting requirements, directors' liability, finance and role of auditors
- location – property issues
- management and staffing – human resource issues
- intellectual property rights
- trading activities – trading contracts and compliance issues
- taxation – the UK corporate tax regime.

The UK comprises four nations: England, Wales, Scotland and Northern Ireland. England and Wales are a single legal jurisdiction and Scotland and Northern Ireland each have their own separate legal jurisdictions. This guide applies to England and Wales only, except where otherwise stated, and references to the UK should be understood accordingly. Shoosmiths has an office in Edinburgh and an office in Belfast should legal advice in Scotland or Northern Ireland be required.

The Channel Islands (Jersey and Guernsey mainly) and the Isle of Man are not part of the UK and have separate legal systems.

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Choice of business structure

There are a number of alternatives open to an overseas business which wishes to do business in the UK. These include:

- opening a UK establishment
- incorporating a UK company
- acquiring an existing UK company
- entering into a joint venture or partnership arrangement
- putting in place an agency, distributorship or franchise arrangement.

As well as legal, tax and regulatory considerations, there are a number of commercial factors to consider when deciding which of these alternatives is the most appropriate, such as, product origin, available funding/ resources, size and permanency of the UK operation and the level of risk to be incurred.

Many overseas entities wishing to do business in the UK set up an establishment or branch or incorporate company as a subsidiary. Further details on each of these are set out below and a comparison of the two business structures can be found in the Appendix.

UK establishment

An overseas company may choose to open a UK establishment (such as a branch or place of business where it trades). There is a requirement for an overseas company to register any establishment it has in the UK. This means that certain particulars of the overseas company and details of the UK establishment have to be registered with the Registrar of Companies together with a fee. If any of the original information filed changes, an amended return must be filed.

The main point to note about operating a branch is that it is not a separate legal entity. This means that the overseas company is directly responsible for the operations, liabilities and obligations of the UK establishment.

It is important to note that UK establishments are subject to certain trading disclosures and will usually be required to file annual accounts with the Registrar of Companies. The UK establishment may also be subject to UK tax.

Subsidiary company

A company is a separate legal entity, distinct from its shareholders and directors. This makes it an attractive proposition for an overseas company looking to establish a business in the UK. Separate legal entity status enables the company to enter into contracts directly and generally offers the parent company protection from the subsidiary's liabilities (although recent case law has set out certain exceptions to this).

On incorporation, all companies must be registered as either private or public. Private companies can be limited by shares, limited by guarantee or be unlimited. This guide deals only with private companies limited by shares.

The main benefit of a company limited by shares is that the liability of the shareholders is limited to the amount, if any, unpaid on the shares held by them 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.



Incorporating a private company limited by shares is a straightforward process which can usually be completed within one business day. To do so, certain forms need to be completed and filed with the Registrar of Companies along with a fee.

The details currently required to set up a company include:

- a suitable name for the company. There are some restrictions on the choice of name and a company cannot use a name that is already registered at Companies House
- details of the proposed director(s) including full name, date of birth, nationality, address and occupation. A private company can have just one director (who is a 'natural person' over 16 years of age). A director does not have to be a UK national but must consent to act as a director
- the official address of the company, called a 'registered office'. If the company is set up in England, the registered office must also be in England. For companies registered in Wales, Scotland or Northern Ireland, the registered office address must be in Wales, Scotland or Northern Ireland (as appropriate). A company is required to have a registered office at all times
- the names and addresses of the company's initial shareholders and details of any 'person with significant control'. Shareholders can be individuals or other legal entities, such as another limited company
- articles of association (which govern the company's administration). A company can choose a simple set of articles of association (called 'Model Articles') or it can create its own articles of association. Many companies start off with the Model Articles and change them later on.

A UK company must keep certain registers and records as well as being subject to stringent filing and reporting requirements. Whilst a private company is no longer required to have a 'company secretary', an overseas parent company may want to consider appointing one for a UK subsidiary company, as the company secretary can then ensure these registers are kept up to date and all statutory filing requirements are complied with.

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 requirements for appointment of directors will usually be set out in the company's articles of association.

Private company limited by shares – Key features

Reporting requirements

Companies incorporated in the UK are obliged to file information with Companies House, the official registry of companies. A company's incorporation and constitutional documents have to be filed, along with particulars of directors and company secretary, information regarding ownership of shares and 'persons with significant control' over the company, copies of security granted by the company and certain shareholder resolutions.

Every year a company must file a confirmation statement confirming various details including who the shareholders and directors are, as well as audited accounts. Accounts must be filed in respect of each financial year (audited, if applicable).

All information filed at Companies House is available to the public, with some limited exceptions.

The company must update Companies House whenever certain details change, for example if a new director is appointed or an existing director resigns or if new shares are issued.

Failure to file documents at Companies House on time can result in penalties on the company and the directors.

Share capital

Private companies limited by shares generally have no minimum or maximum share capital requirements.

The rights attaching to shares are usually set out in the company's articles of association.

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 circumstances. Areas where such liability can arise include:

- breaches of the rules outlawing trading whilst insolvent
- breaches of statutory and fiduciary duties

but this is not an exhaustive list and liability can arise in other circumstances, for example, as a result of 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.

Directors should also be aware that personal criminal liability can attach to them for a range of breaches and offences committed by the company.

Role of auditors

Unless a company is exempt from audit, a company's auditor has to prepare a report to the shareholders of the company on the company's annual accounts including whether those accounts give a true and fair view of the state of affairs of the company as at the end of a financial year. This annual audit is designed to protect shareholders from financial misreporting.



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 it is possible for completion to take place 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 more than seven years 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, where 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, but will 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 an assignment will normally be required, and this is granted by way of formal licence. References and financial information will normally be required before consent is given, and in many cases, security in the form of guarantees or rent deposits will be required by the landlord.

On the grant of a new lease the tenant can usually negotiate the specific terms of the lease. Any alterations to the property that 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 proper formation of the company and its ability to enter into the lease. Such opinions are obtained from lawyers in the foreign company's country of incorporation and 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. These may 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 the current rent.

Planning law and environmental law

Local authorities have the responsibility for the development, maintenance 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 law provides for the remediation of contamination in respect of land, water and air.

A local authority has power 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 commercial freehold land it is payable by the buyer at rates of between 2% or 5% depending on the value of the consideration. On the grant of a lease SDLT is payable by the tenant at 1% or 2% of the 'net present value' of the total rent payable over the term of the lease. There is a nil rate band of £150,000 for freehold and leasehold commercial transactions.

Scotland and Northern Ireland

There is a separate legal system of property ownership and transactions in Scotland, as well as a different property tax, known as Land and Buildings Transaction Tax (LBTT). Advice can be obtained from our real estate team in Scotland.

Northern Irish property ownership and transactions are similar, but not identical, to those undertaken in England and Wales. SDLT is payable on Northern Irish property transactions. Advice can be obtained from our real estate team in Northern Ireland.



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 contract

All employees and workers are entitled to receive a written statement of specific terms and conditions of employment/engagement from their employer on or before the date their employment or engagement commences. Most employers comply with this obligation by including the necessary terms in the employee's contract of employment or worker's engagement letter.

This statement must contain some key terms such as the name of the employer, the individual's job title, the rate of pay, and any details relating to sick pay, hours of work, probationary periods, details of disciplinary and grievance procedures, holiday entitlement, fixed term periods, notice periods, place of work, training requirements, other benefits and any pension provision.

Any other terms and provisions regulating the relationship with the employee should also be contained in the employee's contract of employment or with the worker in their engagement letter. It is not a legal requirement to reduce these other terms and provisions to writing, but this is obviously advisable to avoid disputes later on.

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 or on the employer's intranet site and include procedures and policies on matters such as absence reporting, expenses, 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 amongst others:

- 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 sick pay
- entitlement to family leave and pay (including for maternity, paternity and adoption)
- entitlement to parental leave and shared parental leave
- time off for family emergencies
- entitlement 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 detriment and dismissal on grounds of making a protected disclosure (whistleblowing)
- protection for part time employees and fixed term workers
- protection from unfair dismissal
- entitlement to a statutory redundancy payment
- protection in the event of a transfer of a business or service provision charge

Some, but not all, of these legal rights are subject to qualifying periods of employment. and other eligibility criteria. Some of these statutory rights are also available to workers.



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, ie. by not giving (or paying in lieu) of the amount of notice provided for under the contract. 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 of redundancy they may also be entitled to a statutory redundancy payment. Where 20 or more employees may be dismissed at one establishment within a 90 day period, the employer will also have obligations to inform and consult on a collective basis.

Employee data

The Data Protection Act 2018, together with the General Data Protection Regulation (UK GDPR), govern 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 which 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 and financial penalties.

Employers must comply with the data protection 'principles' set out in the UK GDPR when processing personal data and, in most cases, must pay a data protection fee unless they are exempt. Employees have a right of access to information about them held by their employer which must be responded to within strict time limits. There are also obligations on employers to report data breaches to both the Information Commissioner and the employee whose data is breached, in certain circumstances, again within strict time limits.

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. 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 that 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 to help them overcome the disadvantage caused by their disability in the workplace.

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

Organisations with 250 or more employees are required to publish prescribed information relating to their gender pay gap i.e. the difference in average pay between men and women in the organisation.

Business transfers

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) (TUPE) protect employees where the business in which they work is transferred from one owner to another and place obligations on an employer to inform and consult on a collective basis.

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 TUPE. 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 also applies where there is a service provision change. Broadly, this occurs where services are outsourced to a contractor, bought back in-house or transferred from one contractor to another.

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 migrants from outside the UK and operates a points-based immigration system. Employers who wish to employ such workers (including EU nationals who were not resident in the UK prior to the 31 December 2020) need to become licensed sponsors.

Penalties for employing workers who are in the UK illegally are substantial – up to £20,000 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. Whilst the UK government has stated that ID checks for EU nationals can remain the same for those who join a business between the 1 January 2021 and 30 June 2021 it should be noted that if you are aware that the EU national has not previously resided in the UK prior to the 31 December 2020 then you will need to take extra steps to potentially sponsor them. Whilst the current guidance is sketchy you should seek advice on a case by case basis.

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 keeps 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, for employment law purposes, 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. There is the added complication that an individual's status for employment law purposes and for tax purposes may not be the same.

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

Insurance

You should seek insurance advice in relation to employers' liability insurance, which is a legal requirement for employers in the UK. Employers in the UK are responsible for the health and safety of their employees while they are at work. The Employers' Liability (Compulsory Insurance) Act 1969 ensures that employers have at least a minimum level of insurance cover in place against certain claims that employees might seek to bring in connection with their employment.

Pensions

All employers in the UK must automatically enrol their eligible workers in a pension scheme.

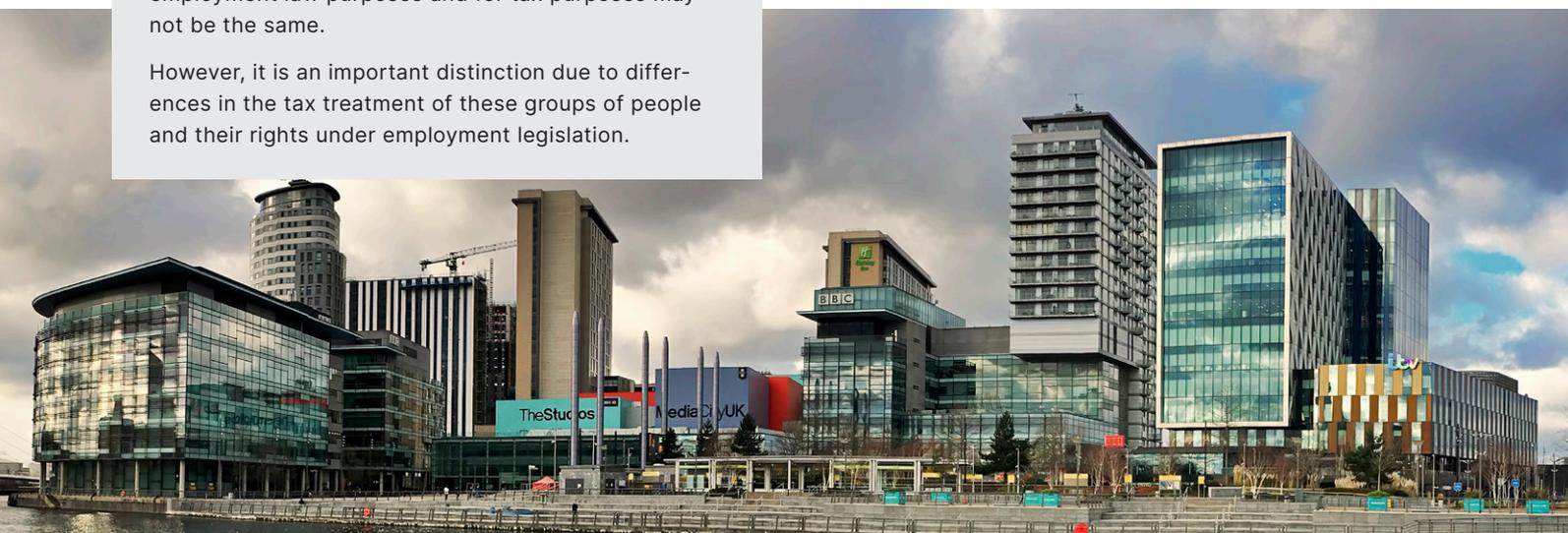
Eligible jobholders must be enrolled into a qualifying automatic enrolment scheme, unless they are already active members of a qualifying scheme. Newly established employers must comply with their auto-enrolment duty from the date their jobholders become eligible.

To be eligible for auto-enrolment, a worker must qualify as a jobholder. Jobholders include permanent and temporary employees and agency workers. The worker must also be between age 22 and state pension age and earn at least £10,000 a year (in the 2020/21 tax year).

Eligible jobholders have the right to opt out, but if they do not then the employer will be obliged to pay minimum contributions of 3% of a jobholder's earnings that fall within the qualifying earnings band each year, with combined contributions due (from employers and jobholders) of 8% of band earnings. In most cases, therefore, jobholders will be expected to pay the balance of 5% contributions, though it is possible for the employer to pay the entire 8% if it chooses.

Every year, the Department for Work and Pensions (DWP) reviews the earnings thresholds for automatic enrolment. The earnings thresholds for the current tax year can be found on the Pensions Regulator's website:

<https://www.thepensionsregulator.gov.uk/en/employers/new-employers/im-an-employer-who-has-to-provide-a-pension/declare-your-compliance/ongoing-duties-for-employers-/earnings-thresholds>





Intellectual property rights

The UK has detailed rules dealing with the full range of intellectual property rights. The main types of intellectual property rights in the UK are summarised below:

Copyright

Copyright is perhaps the most diverse intellectual property right, protecting works from books to computer software and from symphonies to broadcast transmissions. It protects original works against copying, sharing copies, selling copies, renting copies, lending copies, performing, showing in public and making adaptations of the work.

Copyright in the UK arises automatically, there is no need to register to benefit from this right and it usually lasts 70 years from the death of the author.

Through its membership of the Berne Convention (and other international arrangements of reciprocity) the UK Courts will enforce the vast majority of foreign copyrights, provided that they meet the criteria for protection in the jurisdiction in which they were created. A foreign national may approach the UK Courts and assert their copyright, which subsists as a result of their own foreign law, and seek to assert rights associated with their copyright in the UK.

Trade marks

Trade marks, logos, brands, trading names – call them what you will, but most businesses will have one or more of them. They are how we distinguish one person's goods or services from another and depending on how well we do that, it can result in that trade mark being worth millions. Trade marks can protect words, names, images, sounds, slogans and logos.

Trade marks can be registered in the UK. Once registered a trade mark can be renewed indefinitely (subject to renewal fees). We provide a fixed-fee service to apply to register your trade mark and deal with the process through to acceptance.

Trade marks can also be unregistered under the law of passing off. Passing off is a 'common law' right, that arises automatically to protect the whole 'get up' of an item. To claim passing off there must be: goodwill; misrepresentation leading to confusion; and damage (usually lost profits or reputation). The right to pursue another for passing off lasts indefinitely.

Patents

Patents protect new inventions and are normally something that can be made or used in industry. Compared to other intellectual property rights patents are expensive to obtain and take a long time to be granted but are still very valuable rights. The initial discussion is normally about whether your idea is patentable or not. If not, it may still be protected as a trade secret. However, if it is patentable the first thing to do is ensure the idea has not got out into the public domain. The reason being that if the idea is already known to the public it is not new and therefore cannot be patented.

Patents must be registered and can last up to 20 years (subject to payment of renewal fees).

UK designs

It is possible to protect designs through registration in the UK.

Registered Designs protect the overall visual appearance of a product or part of a product. Registration with the Intellectual Property Office is required and can last 25 years (subject to payment of renewal fees).

Designs may also benefit from automatic (unregistered) protection in the UK.

In the UK, designers may benefit from automatic protection for the internal or external shape of an original design. If applicable, this right arises automatically; there is no need to register. The right lasts the shorter of 15 years from the end of the year of creation/ recording or 10 years from the end of the year of first sale/hire. However, this right is limited to designers who are resident in the UK (or one of certain “qualifying countries” including, amongst others, Hong Kong, New Zealand and the Channel Islands), or businesses formed under the laws of the UK or a qualifying country.

A further design right automatically applies to all aspects of a design of an article (not just shape – colours, textiles, decoration, etc) for three years from the first disclosure within the UK. Those wishing to do business in the UK should be aware that if the design was first disclosed in the EU, the design right will not apply in the UK, and businesses will instead benefit from protection in the EU under a similar EU design right for the 3 year period.

Protection of database rights

Rights in databases are not widely known but are incredibly valuable. Companies with customer lists, tables of historic information or marketing mailing lists have databases which can be protected through copyright (see our earlier section on Copyright).

Databases are not just lists of names and addresses. They can include spreadsheet data, technical specifications, research and databanks. You will want to keep some of your databases secret (e.g. your own customer lists). However, there are an increasing number of situations where you may wish to make some of your databases available to third parties through web sites or in published directories either for free or under a ‘paid for’ subscription.

Where a third party fails to abide by your restrictions for the use of your database and starts using it for its own commercial advantage, we can advise you how to enforce your rights in your database.

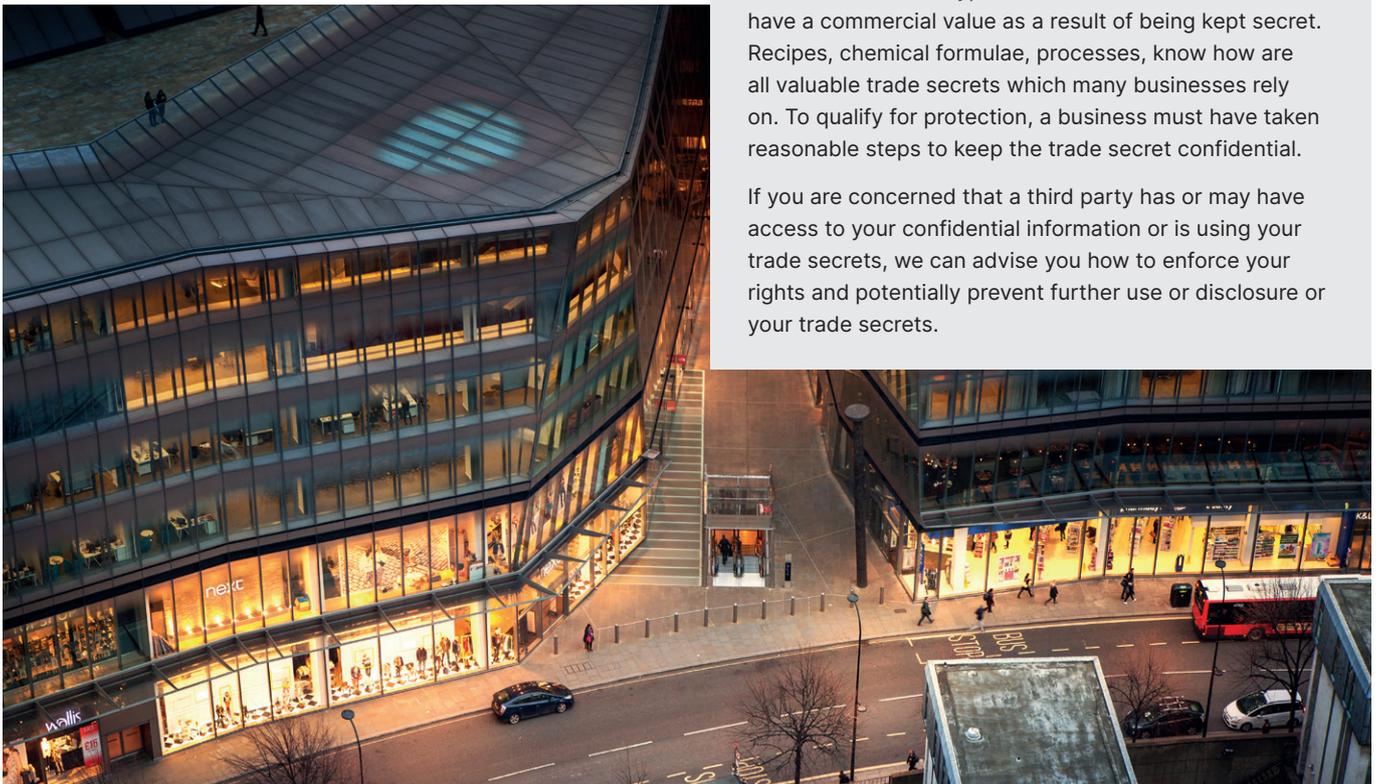
Confidential information and trade secrets

It can be possible to protect information that is disclosed in circumstances in which an obligation of confidence arises. Such information is known as confidential information. To be protected, the information must satisfy the following conditions:

- 1 it must be confidential in nature, for example it cannot apply to information already in the public domain;
- 2 it must have been disclosed in circumstances in which an obligation of confidence arises. This can be implied or expressly stated in a contract;
- 3 its unauthorised use would be to the detriment of the person disclosing it.

Trade secrets are a type of confidential information which have a commercial value as a result of being kept secret. Recipes, chemical formulae, processes, know how are all valuable trade secrets which many businesses rely on. To qualify for protection, a business must have taken reasonable steps to keep the trade secret confidential.

If you are concerned that a third party has or may have access to your confidential information or is using your trade secrets, we can advise you how to enforce your rights and potentially prevent further use or disclosure of your trade secrets.



Trading contracts and compliance issues

Trading contracts

Clearly, any UK operation will need to put in place trading contracts with its customers, suppliers and other third parties.

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. However consumers are afforded certain protections by law and it is important to ensure any trading contracts/terms with consumers comply with the legal requirements. The requirements extend to all advertising and marketing and sales promotions as well as rights and remedies for defective goods and services. Much of the law to do with consumers is derived from EU legislation (much of which has now been incorporated into the laws of the UK).

Typical protections include:

- **Unfair contract terms** – there are controls on the terms which can be imposed when dealing with consumers to reflect the difference in bargaining power between the two parties. In general, terms must be clear, fair and not misleading. The ability of a business to exclude or limit its liability is also severely restricted in contracts with consumers.
- **Provision of services** – there are regulations which apply specifically to 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.
- **Unfair commercial practices** – there is a general ban on unfair commercial practices relating to consumers and misleading acts and omissions, and aggressive commercial practices are outlawed.
- **Product liability** – manufacturers and importers have a statutory obligation to ensure that their products are safe, with increased rights for consumers. The impact of Brexit means that UK distributors who import products from the EU are now considered ‘importers’ of products into the UK and will be held liable for any unsafe products that they supply in the UK. There are also key changes to product labelling. Beyond general product safety, market specific regulations apply to labelling and safety for pharmaceuticals, toys, food, medical devices, electrical goods, etc. with the new UKCA marking regime applying to goods being placed on the GB market which previously required a CE mark.

It should be noted that there are some over-arching limitations on the ability of UK contracting parties to agree their terms freely. There is an absolute ban on attempts to exclude or restrict liability for death or personal injury caused by negligence, and certain exclusions or limitations of liability must be reasonable to be enforceable, for example, any provision excluding or restricting liability for negligently caused loss or damage to property.

Therefore, to ensure terms are enforceable, it is important for businesses to review their standard form contract documentation before doing business in the UK.

Regulated and licensable activities

In the UK some industry sectors are more heavily regulated than others, including: banking and financial services, professional advisory services, life sciences and pharmaceuticals, gambling, energy and utilities, media, broadcasting and telecommunications, defence, waste disposal and food and drink production. Some trading activities require a licence, such as the sale of alcohol, provision of late night refreshment and gambling activities. Requirements for licences can differ substantially between each local authority. Businesses operating without a licence can face large fines. Consequently, before operating a business in the UK it is important to check that the business has all the requisite licences.



Controls over trading activity

There are a number of general controls over trading activity in the UK which also require consideration. These include:

Sales and marketing agreements

Agency agreements are regulated by the Commercial Agents (Council Directive) Regulations 1993. These protect commercial agents by providing, among other things, minimum notice periods for terminating indefinite term agency contracts; rules on the validity of post-termination restrictions; and either indemnity or compensation for agents on termination. In the short term it is unlikely that the 1993 Regulations will be amended or repealed. Distribution and franchise agreements are subject to UK competition law. There is no equivalent protection for distributors and franchisers to that afforded to commercial agents.

Data protection

The collection and use of personal and certain other data is strictly governed in the UK under, for example, UK GDPR (based on the EU GDPR) and the Data Protection Act 2018. Provisions under these laws put significant obligations on any person or company collecting or processing personal data. These provisions are designed to address, among other concerns, security of personal data and the purposes for which such data is used. Sanctions for breach of data protection law includes considerable financial penalties (the higher maximum amount being £17.5 million or 4% of total annual worldwide turnover in the preceding financial year, whichever is the higher). In due course, it is likely that the EU GDPR and the UK GDPR will diverge.

Online trading

There are a number of compliance requirements which apply to business conducted online and advertising and selling goods online. These obligations include, amongst others, an obligation to provide pre-contractual information to consumers when entering into contracts online and a cooling-off period during which, in most cases, the consumer can cancel their order and receive a refund.



Advertising

As well as the consumer protection laws mentioned above, there are certain advertising codes enforced by the Advertising Standards Authority. These codes set out general advertising rules, including a requirement that all adverts are legal, decent, honest and truthful. There are more detailed rules relating to advertising in particular industries.

Health, safety and environmental compliance

Health, safety and environmental protection is a fundamental cornerstone of UK law. Any overseas investor considering either investing in property or establishing a UK business should evaluate carefully the health, safety and environmental record of the property or business concerned. Regulators have significant powers to control activities and impose significant financial penalties (unlimited in most cases) on those in breach of legal requirements. Importantly, in some instances, directors or employees can face personal prosecution for breach of health, safety and environmental legislation.

Competition or antitrust law

There are detailed UK competition laws that apply to business activities in the UK. The relevant UK laws adopt a similar approach to the competition laws in many other jurisdictions around the world (and, in particular, largely mirror the equivalent EU rules), by prohibiting anti-competitive agreements and the abuse of a dominant market position. How the rules apply in practice has been developed through a significant amount of published guidance and decisional practice by the competition authorities, as well as through judgments of the courts. As well as prohibiting anti-competitive agreements between competitors (eg cartels), the laws also apply to other aspects of trading arrangements (including, for example, contractual restrictions in supply agreements). Additional rules apply to businesses that have strong (dominant) market positions.

Competition law is a constantly developing area on which specialist legal advice should always be sought. The sanctions for breach of competition law are severe and can include both civil and criminal law liabilities. Civil fines can be up to 10% of group worldwide turnover. Follow-on damages claims (as well as standalone actions) are increasingly prevalent in the English courts.

In addition, the UK competition authority has the power to review certain corporate transactions (eg mergers and acquisition) on competition grounds under the merger control rules. It is worth noting that, following Brexit, the UK competition authority can now review transactions that require clearance by the European Commission in Brussels (previously, if a deal was subject to review by the European Commission it generally fell outside the scope of UK merger control). There are also rules that require certain 'public' contracts to be competitively tendered (referred to as the 'public procurement rules') and that limit public bodies' ability to offer funding (and other advantages) to businesses ('State aid').



Bribery

UK has anti-corruption legislation in force. There are 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.

Practical considerations

There will be any number of practical matters which have to be addressed when doing business in the UK but a few key ones are specifically worth mentioning:

Insurance

You should seek insurance advice. It is compulsory to have certain insurance protections before doing business in the UK, including employers' liability insurance and third-party motor insurance.

It would also be prudent to consider additional insurance cover in areas where it is regarded as common and best practice to have insurance cover in place to help protect your business. This includes policies relating to areas like public liability, product liability, professional indemnity, buildings and other property-related cover, business interruption, credit risks, directors' and officers' liability and evolving areas like cyber and data insurance.

Bank accounts

If a UK bank account or other bank finance is required, the bank will have to comply with the UK's strict anti-money laundering legislation before the account can be opened. You will be asked to produce certain documents to verify the UK entity's existence, such as the company's certificate of incorporation and articles of association, as well as personal identity documentation for the directors, for example their passports and documents to verify their address (a similar procedure has to be followed when instructing third party professional advisers, such as lawyers and accountants). The bank will also have to comply with FATCA regulations in relation to disclosure of information if there is a US connection. For a company account, the board of directors will need to approve the bank mandate and designate authorised signatories on the account. There are no exchange control restrictions in the UK that would restrict cash leaving the UK but there might be issues with getting cash from the country of origin of the group into the UK (some countries do have exchange control restrictions in place).

Stationery and website

Whether operating as a limited company or a branch, there are statutory requirements in relation to trading disclosures. The name of the business, together with other prescribed information has to be disclosed on business correspondence (including letterhead, business cards, order forms, invoices, delivery notes and email footers) and on any website.

Taxation

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

UK corporation tax

Broadly, UK companies are liable to corporation tax on their worldwide profits although certain exemptions may apply whereby profits arising outside the UK are subject to tax in that other country.

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 were 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. However, from 6 April 2020, non-UK resident companies in receipt of income from UK property are subject to UK corporation tax on that income, rather than UK income tax.

Rates of tax

A company usually pays corporation tax by reference to taxable profits arising in an accounting period (that is, broadly the period for which it makes up accounts). The current main rate of corporation tax is 19%. It was previously intended that this would be reduced to 17% from 1 April 2020. However, following an announcement in the Spring 2020 Budget, the rate will remain at 19% for the financial years starting 1 April 2020 and 1 April 2021.

Corporation tax is generally payable by a company 9 months and 1 day following the end of an accounting period. However, for larger companies (ie companies with profits of at least £1.5m), corporation tax is due in quarterly instalments.

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 arm's length prices had been paid. This would catch, for example, excessively high interest and management charges, and royalties that are paid to the non-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.

Stamp duty

Stamp duty is a tax on documents and is charged on the transfer of stock and marketable securities at a rate of 0.5% of the chargeable consideration. Transfers with consideration of £1,000 or less and which do not form part of a larger transaction or series of transactions are exempt from stamp duty. There are also various other exemptions including intra-group transfers, transfers on divorce or death and transfers from share incentive plans.

Value added tax

Value Added Tax (VAT) is a form of consumption or indirect tax. It is charged on the supply of goods and services made in the UK where the taxable supply is made by a taxable person in the course of business.

A UK-established person must register for VAT where its taxable supplies for the preceding year exceed the threshold for compulsory registration (currently £85,000 per year) or it is likely that its taxable supplies in the next month alone will exceed that threshold. A person may voluntarily register if it makes taxable supplies and/or carries on a business and intends to make taxable supplies (even if its taxable turnover is below the threshold for compulsory registration). Two or more bodies corporate can be registered as a single taxable person for VAT purposes (ie a VAT group).

The general rule is that all supplies of goods and services are subject to VAT at the standard rate unless they are exempt or subject to VAT at a lower rate. There are three rates of VAT: the standard rate (applies to most goods and services – currently 20%); the reduced rate (applies to some goods and services such as home energy and children's car seats – currently 5%); and the zero rate (such as most foods and children's clothing – 0%).

There are some goods and services on which VAT is not charged – known as exempt supplies. These include (among others) postage stamps, a number of financial products and land and buildings (where no option to tax has been made). Other supplies are outside the scope of VAT, such as certain supplies made between landlords and tenants.

In light of the above, where a person sells assets to another person, VAT will usually be payable on the purchase price. However, where the assets of a business are transferred as a going concern and certain conditions are met, this will be treated as neither a supply of goods nor a supply of services for VAT purposes.

About Shoosmiths

Shoosmiths is a national law firm in 13 locations across the UK and acts for a wide range of clients from start-ups to global organisations. We have helped many international businesses set up and grow in the UK and then expand into Europe.

Similarly, we have helped provide many UK businesses with legal services across most jurisdictions in the world. We do this through our unique network of personal relationships with professional services firms around the world to ensure our clients get the best and most appropriate advice from people who know the local culture, are specialists in their field, treat clients the same way that we do and are able to communicate at all levels in whatever language is suitable.

We can locate the right legal experts for you, manage the project if you wish and ensure that the work is carried out efficiently and within your budget.

Our network is complemented by our longstanding membership of the World Services Group (WSG), a multi-disciplinary professional services organisation, which brings together leading advisers in over 145 countries.

We are involved in European wide practice groups formed with lawyers from our WSG firms covering Banking, Corporate, Data Protection/Privacy, Employment, Family, Intellectual Property, Litigation, M&A, Private Equity, Private Client, Real Estate, Tax and Technology. These groups have a wealth of knowledge of European issues affecting these legal areas and frequently work together on pan-European projects.

As a client of Shoosmiths, you will find us quick to relate to your commercial goals, and adept at advising you on the most direct way of achieving them. Our lawyers tailor their approach to each client's business, delivering high quality legal advice backed by clear and open communication, cost transparency and business sense.

Your contacts

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Appendix – comparison of a UK branch and subsidiary

	UK establishment (or branch)	Subsidiary company
Status	<p>A branch is not a separate legal entity.</p> <p>A branch usually has some form of physical presence in the UK, such as business premises.</p>	<p>A subsidiary company is a separate legal entity.</p> <p>A subsidiary can be established by incorporating a new company or acquiring an existing company.</p>
Formation	<p>Relatively easy and inexpensive to establish, although the application form is fairly long and detailed.</p> <p>Particulars of the overseas company have to be registered with the Registrar of Companies in the UK, together with information about the UK establishment.</p>	<p>There is a standard process to incorporate a private company, which can usually be completed within one business day.</p> <p>Certain forms have to be completed and registered with the Registrar of Companies in the UK and a fee is payable.</p>
Legal considerations	<p>It gives no protection to the overseas company from the UK operation's trading losses/ other liabilities.</p> <p>The overseas company will make decisions and enter into contracts on behalf of the UK operation.</p>	<p>A subsidiary company will have limited liability, offering the overseas parent company some protection against trading losses/ other liabilities of the UK entity.</p> <p>As it is a separate legal entity the subsidiary can enter into contracts/ transactions directly.</p>
Commercial considerations	<p>In some sectors it is more attractive to customers/ clients to deal with a UK company rather than an overseas branch office.</p> <p>It may be harder to secure finance without the stability of a separate UK entity.</p>	<p>Companies often prefer to do business with a UK company.</p> <p>Operating a UK company may be administratively more convenient.</p> <p>If claims are made against a UK owned subsidiary, any liability is usually restricted to the assets of the subsidiary.</p> <p>It may be easier to secure grants and loans/ other finance.</p>
Accounts	<p>A branch (with a permanent establishment in the UK) has to deliver to the Registrar of Companies copies of all the accounting documents that the overseas company is required to disclose by its local law (and, if no such requirement, in a form that complies with UK company law or International Accounting Standards).</p> <p>These accounts will be available for public inspection.</p>	<p>A UK company has to prepare and file annual accounts.</p> <p>The accounts filed with the Registrar of Companies are available for public inspection, but will relate only to the UK subsidiary, not the overseas parent company.</p>
Transparency	<p>Branches do not currently have to comply with transparency rules.</p>	<p>UK companies have to comply with transparency rules by keeping and publishing a register of 'people with significant' control which shows who controls the company (and not just the shareholders).</p>

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