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Corporate Law

## Setting Up a Business in the UK – The Legal Stuff



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## Introduction

The UK is open for business! Despite the challenges created in recent years by Brexit, the UK remains a popular destination for overseas business thanks to its strong support of enterprise and its favourable legal and financial regulations.

This guide highlights some of the commercial and legal issues involved in setting up a business. The guide is intended for general information and as an overview only. It is essential to take professional legal and accountancy advice prior to setting up a business or undertaking any investment in the UK.

For more detailed advice on the matters contained in this guide, please contact the Corporate and Commercial Team at Mackrell.

All references to the UK is to England and Wales. The Channel Islands (in particular, Jersey and Guernsey) and the Isle of Man are not part of the UK and have separate legal systems.

## Business structures

A business can be run through various corporate structures, each providing its own commercial and legal advantages.

A large proportion of overseas investors who have established themselves in the UK do so by incorporating a private company limited by shares as a subsidiary of their existing overseas company.

In this type of company, members' liability is generally limited to the amount unpaid on the shares they hold. The subsidiary will be registered at Companies House, operating under UK company law.

Other types of companies include:

- **Private Company Limited by Guarantee:** Members' liability is limited to the amount they have agreed to contribute to the company's assets in the event it is wound up. Sports clubs, societies, social enterprises and charities often use this structure.
- **Private Unlimited Company:** Members' liability is not limited. These companies benefit from reduced disclosure requirements since they do not have an obligation to file accounts with Companies House.
- **Public Company Limited by Shares (PLC):** Shares in these companies can be offered to the general public however not all public companies are listed. Shareholders' liability is limited to the amount unpaid on the shares they hold. There is a minimum share capital requirement of £50,000.

The structure that is the most appropriate for you will depend on your individual circumstances and we can help you decide which is the most suitable structure for you and your business.

## Incorporating a company

To incorporate a company in the UK, certain documents must be filed at Companies House. Companies House is the UK's registrar of companies and is the governing body that oversees the incorporation, running and dissolution of companies.

The main constitutional documents for a UK company are its articles of association and memorandum of association. These are the internal rules that govern the company. Statute sets out certain rules which apply to companies, however it is possible to amend or vary most of these rules in the company's articles of association.

The team at Mackrell can provide advice on whether incorporation is right for your business, which structure is the most appropriate and can also complete the incorporation process for your chosen company.

## Other business structures

**UK Establishment:** As an alternative to setting up a subsidiary in the UK, overseas companies can also set up a UK establishment. This is generally defined as a branch or any place of business that is not such a branch. The overseas company will need to register the UK establishment with Companies House.

**Partnership:** Two or more persons (which includes individuals and companies) individuals can set up a business in the UK as a partnership, broadly defined as two or more persons carrying on business with a view to a profit. This is a flexible business structure, with few formalities and no registration requirements, although a partnership is not a separate legal entity. Between them, partners are jointly and severally liable for the debts of the partnership and generally have unlimited liability

**Limited Liability Partnership (LLP):** This is a hybrid of the company and partnership business structures and is a separate legal entity. An LLP offers the benefit of limited liability for its members, while allowing a degree of flexibility in organising the internal structure and tax arrangements of the business. Two or more individuals or companies can incorporate as an LLP through registration at Companies House.

**European Company:** Also known as a Societas Europaea, this is a public company that can be registered anywhere within the European Economic Area. It must have a minimum subscribed share capital equivalent to €120,000 and if it is registered in the UK, at least £50,000 must be denominated in sterling or €57,100 must be in euros. Shareholders' liability is limited in a similar way to that of a PLC.

As of 1 January 2021, Societas Europaea were no longer be able to be registered in the UK and those already registered will need to be converted into alternative corporate structures.

## Immigration issues

After Brexit, the Government replaced the old immigration system with a new points-based system. This system features immigration categories, which include routes for skilled workers with job offers, highly skilled individuals without job offers and international students and graduates.

The system applies to all people hoping to work in the UK, whether they are EU citizens or other foreign nationals. Applications for skilled worker visas are judged based on a points system, which is like existing systems that operate in countries like Australia.

Under the skilled worker route, points are awarded for various factors, such as having a job offer at the appropriate skill level in an eligible occupation, knowledge of English and a salary threshold, which will typically be at least £26,200.

Where the applicant's salary is below £26,200 but above £20,960, they may be able to rely on an exception in order to make an application.

The cost of applying is between £719 to £1,500 and applicants will have to show they have sufficient means to support themselves.

Employers looking to recruit under the system need to obtain a sponsor licence to be able to employ individuals from outside the UK.

Applications can be made for the Global Talent and Innovator Founder visas which are designed to attract people with exceptional talent and expertise, particularly in the fields of arts and culture, engineering, science and technology.

Student visas are also open to students who have been offered a place on a course, can speak read, write, and understand English, and have enough money to support themselves and pay for their course.

A Graduate visa is also available to international students who have completed a degree in the UK.

Irish citizens do not need to apply to the scheme or apply for a visa to come to the UK, as the UK and Ireland are both a part of the Common Travel Area.

Depending on your circumstances, and the circumstances of your family, there may be other applicable visa categories for those who want to invest in the UK or set up a UK business. Examples include spousal/partner visas for those married to/in a long-term relationship with a British Citizen, or UK Ancestry visas for those who have at least one grandparent who was born in the UK.

We can advise you on the most appropriate application for you and guide you through the application process.

## Employment issues

There are a wide range of employment law issues you need to be aware of when recruiting employees for your business in the UK. There are seven key considerations to bear in mind.

### 1. Employees' right to work in the UK:

It is illegal for an employer to employ someone who is not allowed to work in the UK. As an employer, you must check potential employees' documents prior to their employment to ensure they have the right to work in the UK. An employer may have to pay a penalty for failing to check employee documents, or if it knowingly employs an illegal worker.

### 2. Employers' liability insurance:

Employers are responsible for the health and safety of their employees while they are at work. Liability insurance must be taken out as soon as you become an employer. An employer must be insured for at least £5 million.

### 3. Contract of employment:

Employers must give employees a copy of the terms and conditions of their employment. If you are employing someone for more than one month, you must give them a written statement of employment on or before the date employment commences.

### 4. Registering HM Revenue & Customs (HMRC):

HMRC is the UK tax department. Your employees must pay tax on the wages you pay them, so you must register as an employer with HMRC. This can be done up to four weeks before the first payday.

### 5. Paying staff:

The UK sets a National Minimum Wage (NMW). NMW rates are updated in April each year.

## 6. Informing staff:

As an employer you must provide staff with a statement of pay, detailing deductions such as tax and national insurance and where the employee is paid on an hourly rate basis, the number of hours worked for that period.

## 7. Pensions:

Employers must auto-enrol all eligible employees into a workplace pension and make mandatory employer contributions into a qualifying workplace pension scheme.

Other employment issues you need to be aware of include:

- Working hours and the Working Time Regulations.
- Statutory annual leave.
- Statutory sick pay.
- Maternity and paternity leave.
- Right to request flexible working.
- Dismissing staff and redundancies.
- Health and safety.
- Employee handbook.

Our expert employment team is able to explain the issues which are relevant to your business and will guide you through the process of preparing the necessary documentation.

## Health and safety

UK health and safety laws generally apply to all businesses, regardless of their size. As an employer, you have a duty of care to your employees to safeguard, as far as possible, their health, safety and welfare. You must take necessary steps to protect you, your employees and members of the public from risks of workplace dangers and to provide a safe working environment.

You must provide clear instructions, information and adequate training for your employees including, contractors and self-employed people.

When considering how much training may be necessary, a proportionate approach should be taken so for example, if an employee has a technical role, they should be given lengthy technical training. In addition to training, you must ensure everyone has the right level of information on:

- The hazards and risks they may face, if any;
- The measures in place to deal with those hazards and risks, if necessary; and
- How to follow any emergency procedures.

If you have five or more employees your business must have a written statement of its general Health and Safety Policy. We can assist you in

drafting a suitable policy for your business taking into account your health and safety requirements.

## Business premises

The UK property market offers a wide range of flexible commercial property options, from leased and serviced offices to premises to buy. There are no restrictions on overseas companies either buying or renting property in the UK.

Premises can be sourced through commercial property agents or through many councils (known as local authorities), which have business premises available for lease.

Renting premises often makes good financial sense for a new inward investor but entering into a lease can be a major commitment and you need to proceed with caution.

The 'term' of the lease (the length of time you will occupy the property) will be a matter of negotiation; there is usually no minimum or maximum term unless the landlord so prescribes. If the term of the lease is for more than seven years, the lease must be registered at the Land Registry. The obligation to register the lease with the Land Registry will generally fall on the tenant.

The standard terms contained within a lease will cover a number of key issues including:

Responsibilities for maintenance, repairs, health and safety, options to extend the lease or terminate it early through a break clause and how rental income will increase over time. Accordingly, any potential tenant should consider carefully the terms of a lease to which they are committing themselves.

Before agreeing to certain terms to let a property, a landlord will want to assess a potential tenant's financial stability and profitability by reference to accounts and references. In the case of a newly incorporated business in the UK, accounts and references are likely to be unavailable so a landlord is likely to require a guarantee from a third party.

A guarantee may be provided by a foreign parent company, or alternatively, any individual with an interest in that newly incorporated business willing to act as a guarantor. Alternatively, a landlord may be prepared to accept a bank guarantee or the provision of a rent deposit deed.

If it is proposed to take a transfer (assignment) of an existing lease, the current tenant will need to obtain the landlord's consent (licence to assign) and the provision of full information as to the financial standing of the incoming tenant will be required.

Businesses looking to set up in the UK will also need to comply with the relevant legislation and are often given protection by Acts such as the Landlord and Tenant Act 1954, which protects businesses by giving tenants a statutory right to renew their tenancies at the end of the term if they are occupied for business purposes. Subject to certain conditions, some leases will benefit from such rights, others will not as the rights may have been formally 'excluded'.

Subject to any applicable reliefs and exemptions, Stamp Duty Land Tax is payable on most land transactions, that is, the acquisition of a 'chargeable interest', which includes freehold and leasehold interests in land located in the UK. On the sale of commercial freehold property it is payable by the buyer at a rate of zero to four per cent depending on the value of the consideration.

On the grant of a commercial lease, SDLT is charged to the tenant on the 'net present value' of the total rent (VAT inclusive rent if the rent bears VAT) over the term of the lease at the following rates:

Property or lease premium or transfer value	Rate
Up to £150,000	0%
£150,001 to £250,000	2%
Above £250,001	5%

When calculating the amount of SDLT payable, the slice system applies so rather than SDLT being charged at a single percentage depending upon the NPV, the first £150,000 is charged at zero per cent and the excess one per cent etc.

Our expert property team can provide you with introductions to agents and provide advice on any heads of terms and lease provisions to be agreed and any other supplementary documentation.

## Tax issues

There are a number of taxes that an overseas business in the UK may be required to pay. The UK tax regime is particularly favourable to businesses worldwide but the regime is complex, with different rates, reliefs, exemptions and allowances for each type of tax and on the domicile and residence of the owners of the company.

It is essential to talk to an expert experienced in advising inward investment businesses to ensure that you are operating compliantly and as tax-efficiently as possible.

The following is a brief overview of key taxes but more detailed information is available on HMRC'S website at [www.hmrc.gov.uk](http://www.hmrc.gov.uk)

**Corporation Tax:** This is paid by companies on the profits of their businesses both on income and gains. The full rate of corporation tax varies depending on the profitability of the business being taxed at a rate up to 25 per cent.

**There are a number of reliefs, allowances and exemptions available for companies to utilise to reduce their corporation tax liability. Value added tax (VAT):** VAT is levied at the point of sale of most goods or services. It is paid by most types of companies and individuals and it may be possible for a company to pass the tax charge on to customers. Once your business reaches a certain level of annual turnover you must register for VAT with HMRC.

There are three different rates of VAT (a standard rate of 20 per cent, a reduced rate of five per cent and a zero rate).

**Income Tax:** Income tax is paid by individuals and trusts on their income and various allowances and exemptions may apply. Individuals are entitled to an annual personal allowance. An individual's personal allowance is £12,570 (for 2023/24). If you employ other people in your business, you will be required to collect income tax and national insurance contributions from your employees through the Pay As You Earn system (PAYE).

**National Insurance Contributions:** Most people who work have to pay National Insurance Contributions (NIC), a form of tax that depends on their level of earnings. The amount of NIC that you will have to pay will depend on, among other factors, your age, if you are employed or self employed and the type of work you do.

**Capital Gains Tax (CGT):** CGT is a tax paid by individuals on gains of a capital nature. When you dispose e.g. sell or give away certain assets that have increased in value, the gain, real or notional, may be taxable. The rate of CGT paid depends on the individual's overall income. Each individual is exempt from CGT on the first £6,000 for gains in the period 6 April 2023 to 5 April 2024. After this date the exemption falls to just £3,000 for the 2024/25 tax year. There are a number of reliefs available to individuals when paying CGT.

**Stamp Duty:** This is paid when buying property or shares. Stamp Duty Land Tax is paid on property or land purchases. For further information, see 'Business Premises'. Stamp Duty is also paid on the purchase of shares in a limited company at a rate of 0.5 per cent and rounded up to the nearest £5.

## Intellectual property issues

If your company is involved in producing new and innovative designs, products or technologies, or if it uses a descriptive logo, design or process, you will want to protect your right to exploit these in the UK.

The UK offers various ways to protect your company's intellectual property rights domestically, within the EU and worldwide.

- **Trade marks:** In order for a trade mark to be capable of registration, it must be a distinctive word, logo, picture or graphical representation that is distinctive for the goods and/or services you provide. Trade marks can be registered either within the UK or throughout the EU as a European Trade Mark which provides protection throughout the 28 member states of the EU. Trade marks registered with the UK Intellectual Property Office (UKIPO), or with the EU Intellectual Property Office (EUIPO) are valid for 10 years and can be renewed indefinitely.
- **Copyright:** Protects material, such as art, music, literature, sound recordings, broadcasts and films. Copyright is an automatic right and there is no need to apply for registration to obtain protection.
- **Designs:** There are two types of design rights:
  - Design right: Automatic protection for the internal/external shape or configuration of an original design (i.e. a 3D shape). Protection is limited to the UK, other EU member states and other qualifying countries for a period of either 10 years after the first marketing of articles that use the design or 15 years after the creation of the design was first recorded in a design document.
  - Registered designs: Exclusive rights in a design, in the UK for up to 25 years. You can stop people using your design for commercial means. It can protect a two-dimensional design or surface patterning, logos or software icons.

It is possible to apply for a Registered Community Design and to protect the design across the EU, however, this may change as the UK's relationship with the EU is formalised.

- **Patents:** Protects the novel technical and functional aspects of products and processes. Registration of a patent in the UK affords the owner 20 years protection from the date of filing, subject to the payment of renewal fees. It is possible to apply for a European patent with the European Patent Office.

Our experienced Intellectual Property team can analyse what intellectual property rights your business has and how they should be protected.

## The Bribery Act 2010

The Bribery Act was implemented in 2010 to update and reinforce existing offences related to bribery into one legislative tool. The Bribery Act has extra-territorial reach and can be used for the prosecution of an individual or company with a

close connection to the UK, even if the offence was committed abroad.

A significant feature of the Act is Section 7 which criminalises the failure of a corporate body to prevent bribery and corruption. It therefore places a responsibility on corporate bodies to implement and enforce policies targeted at preventing corruption in the workplace.

Our Crime and Regulatory Team at Mackrell can help you create your anti-bribery policy and advise you on its implementation.

## Risk management and corruption

The Bribery Act places a responsibility on corporate bodies to put in place and actively implement 'adequate procedures' in order to prevent corruption in the workplace.

An absence of these procedures can, if prosecuted, lead to very severe penalties for the organisation and its employees.

When considering what 'adequate procedures' are and how they can be implemented in practice, business owners should carefully consider the following issues that can arise during the ordinary course of business:

- Does your business operate overseas with countries that are considered to be at 'high risk' for corruption?
- What sort of due diligence do you carry out on your clients?
- Have you ensured your hospitality expenditure is reasonable and proportionate?
- How do you communicate to your staff their duty to prevent, detect and report any suspicion or knowledge of bribery?

The Government has issued guidance to help commercial organisations put into place anti-corruption procedures but of course, the test of 'adequacy' depends very much on the particular characteristics of each organisation.

At Mackrell, we can help ensure that you have the correct anti-corruption policies in place to ensure your organisation is compliant.

## The General Data Protection Regulation (GDPR)

GDPR has applied across Europe since 25 May 2018 and brought considerable changes to data protection law. Many of the principles within the GDPR regulations were subsequently enshrined in the UK Data Protection Act (DPA) 2018, which organisations must abide by.

The previous data protection framework in Europe was based on the Data Protection Directive 95/46/EC, which was in place before online services and cloud technology were used and the GDPR and DPA updated the law to attempt to further protect personal data of individuals.

Many of the GDPR and DPAs core concepts are similar to the old data protection regime and sufficient compliance with the previous law put businesses in a good position to achieve compliance with GDPR and DPA, however, the new law also brought some significant changes.

Some key points to note in relation to GDPR compliance include:

- The law applies to businesses outside of the EU where their processing activities relate to the offer of goods or services or monitoring the behaviour of data subjects in the EU.
- Consent from data subjects for the processing of their personal data is harder for organisations to obtain and rely on given the standard for obtaining consent has become more onerous.
- Data controllers must (unless exceptions apply) notify data breaches to their relevant supervisory authority without undue delay and, where feasible, within 72 hours of awareness.
- GDPR introduced tougher sanctions for business, including very high revenue based fines. Supervisory authorities are also afforded a wide range of investigative and corrective powers.

The GDPR has adopted a tiered approach to penalties for breaches of the law and significantly increased fines for breaches.

In the most serious cases, fines can be made up to the higher of four per cent of annual worldwide turnover and €20million.

There have been a number of key enforcement actions taken by supervisory authorities since the GDPR was introduced. As such, it is important for businesses to take advice and constantly work towards compliance in order to minimise their risk of enforcement action under the current data protection regime.

## Persons with significant control register

The PSC Register, or 'persons with significant control' register, brought into effect by the Small Business, Enterprise and Employment Act 2015, is a new statutory register which all UK companies and LLPs are required to maintain for the purpose of identifying who ultimately controls that UK LLP or company. A UK place of establishment (i.e. the UK branch of an overseas company) is not a UK company and so does not have to keep a PSC register.

The information on the PSC register must be provided to Companies House as part of the filing of the Confirmation Statement, so as to create a central register of all persons who ultimately own and govern companies in the UK.

Any failure by a company and its officers to comply with its obligations to identify a PSC and maintain a PSC Register will be liable to a criminal offence.

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