

Doing Business in the UK

Introduction

This article explains in outline how an overseas business can establish a presence in England. It is only intended to give brief, general information about doing business in the United Kingdom. The UK is comprised of three separate jurisdictions, Scotland, Northern Ireland and England and Wales. While these three jurisdictions have many laws in common, this article only deals with the law in England and is written from the perspective of London.

Why London and the UK?

London is recognised as an attractive destination for overseas companies where they can expand their businesses to an international level. It is a truly international business centre that many international businesses use as a centre for their European operations. Recent falls in the value of Sterling and lower property prices in London have made London more accessible than for some time.

Among the many reasons why the UK is one of the top destinations for overseas companies, the flexible procedures for setting up a business are an important factor. According to the World Bank, the UK is the easiest country in Europe to set up a business – with a 13-day process compared with a European average of 32 days.

As general rule overseas investors do not need permission to establish a presence in the UK, although specific sectors, such as financial services, are highly regulated and such business may require authorisation from the Financial Services Authority (“FSA”).

What you can do

There are number of alternatives for overseas businesses wishing to establish a business in the UK.

Companies wishing to establish a permanent presence of their own may choose between establishing a subsidiary or registering a branch under the branch registration regime. Agency and distribution arrangements as well as joint ventures, partnership and other contractual arrangements can also offer alternative methods of participating in business in the UK, but will mean less than full ownership and involve ongoing third party participation.

There are five main ways of bringing an overseas business to the UK:

1. The Appointment of an Agent or a Distributor

This generally has the lowest set up costs.

An agent normally sells on behalf of and in his principal's name and not on his own account and gets commission on the goods or services sold. A distributor, on the other hand, is independent. He purchases goods or services from the principal and re-sells them on his own account.

Many agency and distribution agreements will have clauses concerning exclusivity. The point of adding exclusivity clauses into such contracts is to establish an efficient way of servicing the market by channelling all orders through the agent or distributor. However, this may well have the effect of restricting competition in favour of the agent or distributor.

Such an effect may be unlawful under competition law and Article 81 of the EC Treaty prohibits any agreements and concerted practices which may affect trade within the EU or which aim to prevent, restrict or distort competition within the EU.

Every business is likely to be in a different position and the EU rules, as well as local competition law, combine in a complex web. In a market with many suppliers and competing products there may be little or no potential impact. In a specialised market with restricted supply it may be very different.

Each case should be looked at separately and this paper does not attempt to set out any guidelines. The European Commission can grant exemptions from this prohibition if there are certain types of overriding benefits. However, Article 82 of the EC Treaty completely forbids the abuse of a dominant position to the extent that it may affect trade between members of the EU.

2. Establishing a Branch in England

A branch will have to be registered with the Registrar of Companies but, generally, is subject to fewer reporting requirements and formalities than a limited company. The annual accounts of an overseas company, including the UK branch accounts, must be filed at Companies House and are available to the public.

Opening a UK branch does not provide the protection of limited legal liability which would be afforded by a UK subsidiary as a private limited company.

The owner of a UK branch is therefore responsible for the debts and liabilities the branch and any judgment against the overseas company may be enforced against the property of the branch. If this causes concern, the owner may prefer to carry on the venture through a separate limited liability company instead of a branch.

There are also other important issues. A branch of an overseas company in the UK will normally be seen as a "permanent establishment" in the UK, and the overseas company liable for UK corporation tax on the branch's profits.

There may be scope for some tax planning. For example, a foreign company might start UK operations through a branch whilst it is making losses and then incorporate the branch once it becomes profitable, particularly if the UK corporate tax rate is lower than the rate in the home country. However, each case needs to be considered on its own merits.

3. Setting up a Company in the UK

The Companies Act of 2006 is being brought into force in stages and is intended to be completely in force in October 2009. The earlier Companies legislation (primarily the 1985 Companies Act) therefore remains relevant at present.

Whilst, strictly, four types of company may be formed under the Companies Acts, the commonest is the "private company limited by shares". The members are shareholders and, if they have fully paid up their shares, have no further liability for the obligations of the company unless they specifically incur it in some other way (for example, by giving a guarantee). This type of company can be formed with a minimal share capital. However, if an under-capitalised company seeks to borrow disproportionate amounts of money from its parent company, certain taxation consequences may follow.

4. Partnership

Until recently, only two forms of partnerships, neither of which is a separate legal entity from its individual partners, were possible in English law:

Ordinary Partnership

In an ordinary partnership the partners collectively conduct business in common with a view to profit. Each is entitled to participate in the management and in the sharing of the profits. All partners are jointly and severally liable without limit for all the debts of the partnership. However, as between themselves, the partners may arrange matters differently, so that some have greater management roles and profit shares than others.

Limited Partnership

A limited partnership is not common and was made possible by the Limited Partnerships Act of 1907. Here it is possible for all the partners except one to be 'limited partners'. A limited partner contributes a certain amount of money, e.g. £500, and is not responsible for any obligations incurred by the partnership after he has paid that amount. There will typically be one general partner who will have all the management of the business and face all the liabilities. No limited partner may have any say in the management of the business. However, for tax purposes, the profits and losses of the business are genuinely partnership profits and losses. This may make a limited partnership attractive to certain investors for certain types of business. Limited partnerships are occasionally used for specific purposes where tax planning is important. The general partner can be a limited liability company.

Limited Liability Partnership

The Limited Liability Partnerships Act of 2000 made these possible. A Limited Liability Partnership or "LLP" is a familiar legal entity in other jurisdictions and has some of the features of a limited company (i.e. separate legal personality and limited liability for its members), but retains much of the organisational flexibility and substantially all of the tax status of a partnership. LLPs are subject to specific rules and have certain statutory filing obligations. They offer a realistic alternative to forming a private limited company.

5. Joint Ventures

If an overseas company wishes to carry on business in the UK in association with one or more other companies it may choose to do so in a joint venture. The joint venture can take a variety of forms:

- a partnership;
- a contractual joint venture in which the parties agree to carry on business together under the terms which do not form a partnership between them; and
- an incorporated joint venture in which the parties agree to carry on business through a limited company or a limited liability partnership.

How you make your decision

Before deciding on the type of business structure, a number of matters must be considered. These will include issues of liability, taxation, potential expansion plans, ownership and the need for and availability of UK based staff and management. Certain business types may also qualify for government or other support, which should be investigated, but could affect a decision as to what is most appropriate.

Different businesses require different structures and understanding what is available in the UK by way of legal form can help determine the strategic possibilities for business growth beyond the UK.

Taxation often plays a significant role in determining the type of legal entity to be established in the UK.

Bargate Murray advises on every type of business start-up and can help overseas companies to select the most suitable structure for their presence in the UK.

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