Doing Business and Investing in the UK

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PricewaterhouseCoopers

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[1] 'PricewaterhouseCoopers' refers to PricewaterhouseCoopers LLP (a limited liability partnership in the United Kingdom) or, as the context requires, other member firms of PricewaterhouseCoopers International Limited, each of which is a separate and independent legal entity.

Foreword by Minister for Trade & Investment

I am delighted to provide this foreword to the 2009 edition of the PricewaterhouseCoopers guide, *Doing Business and Investing in the UK.*

Despite these tough times, we remain confident that the UK is well placed to handle challenging business conditions. The UK remains one of the most open markets in the world; we continue to welcome foreign investment and talent.

Our creativity and flexibility have enabled us to adapt the UK's offering to changing economic and financial circumstances – not just in terms of products and platforms, but also in structuring and articulating solutions when decisive action is required. The principles-based UK regulatory system remains transparent and fair – there is no distinction in the treatment of overseas companies compared to UK-based firms – with clear lines of responsibility for regulated firms to a single regulator. The UK is an ideal choice for a European base, serving as an effective gateway to Europe and a springboard to the rest of the world.

For companies to grow, they need outstanding support networks. The UK has well-established clusters of business services that are ranked among the best in the world. These networks offer global business leaders the opportunity to interact with the very best of their international peers. In short, they plug companies into a vital international network of connections.

All this helps to ensure that the UK – and the overseas companies that invest here – stay ahead of the game.

A unique, multicultural and entrepreneurial economy, the UK is at the hub of international business, bringing the world to every company's door.

E. Mervyn Davies

Lord Davies of Abersoch, CBE

Minister of State for Trade & Investment

Welcome by Chairman

Welcome to the 2009 edition of our guide, *Doing Business and Investing in the UK.*

This book has been written for companies and individual investors planning to enter the UK market. The UK has consistently attracted considerable investment from overseas and has a long and successful history of trade with the rest of the world. Now, more than ever, the importance of attracting foreign investment into the UK is critical. Even in the current economic climate, the UK remains attractive with its open market and diversified economy. It is one of Europe's most competitive locations for business and personal taxation, acting as a gateway to the European Union.

This guide provides insight into the key aspects of undertaking business and investing in the UK, from establishing an entity to dealing with employees. It provides answers to the many questions facing the community of overseas investors and is a great starting point for anyone looking to conduct business in the UK.

PricewaterhouseCoopers has long been advising companies and individuals on how to establish themselves in the UK. We have expert knowledge and practical experience in the full range of business issues as well as offices across the UK, with experts ready to advise across all industries.

I hope that you find this book interesting and useful. If you have any questions or comments, please do not hesitate to contact me or one of my fellow partners.

Ian Powell

Chairman and Senior Partner
PricewaterhouseCoopers LLP

About PricewaterhouseCoopers

PricewaterhouseCoopers provides industry-focused assurance, tax and advisory services to build public trust and enhance value for its clients and their stakeholders. More than 155,000 people in 153 countries across our network share their thinking, experience and solutions to develop fresh perspectives and practical advice.

In the UK, PricewaterhouseCoopers aims to be recognised as the country's leading professional services firm by bringing real value to our clients, investing in our people and supporting our local communities. We are able to draw on the knowledge and skills of more than 16,000 partners and staff in offices around the UK.

You can discover more about PricewaterhouseCoopers UK on our website at www.pwc.co.uk.

About this book

How to use this book

This guide is designed so that you, the reader, can go directly to any section that is of interest to you. That said, we hope you will take the opportunity to read the guide in its entirety.

Whichever way you use it, we hope that you find the guide useful should you choose the UK as the location for your business.

The purpose of this book

This guide does not attempt to cover every issue nor does it cover specific tax and regulatory issues relating to particular industries/sectors that might impact on you when doing business in the UK. It merely seeks to answer the questions that most commonly arise.

Legal differences

The UK consists of three distinct jurisdictions:

- England and Wales
- Scotland
- Northern Ireland

each of which has its own legal system. Although the three systems broadly adopt the same approach to business, there are some important distinctions. Accordingly, if you are planning to set up your business in Scotland or Northern Ireland, we would recommend that you take expert advice.

Please note that we will, for the purposes of this publication:

- focus on issues to be considered when setting up a business in England or Wales
- view the UK as a single jurisdiction in which the laws of England and Wales apply throughout.

The United Kingdom – a profile by UK Trade & Investment

Warwick Castle, Warwickshire

The United Kingdom – a profile by UK Trade & Investment

The World Bank ranks the UK as the top European country in which to operate a business. It takes only 13 days to set up a business in the UK, compared to the European average of 32 days. In fact, the UK is the easiest location in which to establish and run a business in Europe. It has an open, transparent and business-friendly system to encourage the formation of new businesses.

There are already more than 2.6 million registered companies in the UK. Over 350,000 new companies are registered each year. No permission is required to establish a business presence.

The UK is one of the easiest countries in which to register a property. Cushman & Wakefield rates the UK above France, Germany, Ireland and Italy for ease of registering property.

Numerous globally ambitious companies have already chosen to set up in the UK because of its record of success, confidence, ambition and know-how. A climate of creativity makes for innovation in science, finance, design and the arts. The UK has a well-established legal and regulatory framework and a flexible labour force. Its multicultural population stimulates diversity of thought and talent.

Geography and history have always brought the UK an international outlook. It has a global business culture that plugs companies into an international network. The UK offers ease of access to many overseas markets. In particular, as the business gateway to the European Union, the UK is a very attractive place to set up and do business and serves as a springboard for global growth.

The UK is a magnet for foreign investment. In 2007 UNCTAD (United Nations Conference on Trade and Development) revealed that the UK attracted and retained over US$1 trillion of investment, the highest level in Europe and the second largest in the world. UK government figures show that in the year 2007-08 there were over 650 new inward investment projects, a strong endorsement of the UK's attractiveness as a business location.

In late 2008 the UK government took a leading position in international efforts to tackle the global economic downturn. It has also introduced measures to stimulate the UK economy. The reduction in VAT and increases in public spending are intended to help maintain levels of demand and consumption.

The UK has an excellent record for recovery. Prior to the current downturn, it had bounced back from the slump of 1990-92 better than any other G8 country.

UK Trade & Investment (UKTI) is the UK Government's inward investment agency. Its comprehensive range of services can not only help businesses coming to the UK get up and running in Europe's top inward investment location but do so with speed and confidence. It can help companies with research, building contacts, choosing a location, setting up an office and growing a business.

UKTI works in partnership with Development Agencies in the English regions and in the devolved administrations of Wales, Scotland and Northern Ireland to provide coverage of opportunities throughout the UK. It holds details of commercial property and a range of premises available to businesses, including such options as science parks and business incubator facilities.

Common questions

Angel of The North, Gateshead, Tyne and Wear

What type of legal presence do I
require?

How do I establish the entity?

What tax issues do I need to consider?

What other areas do I need to consider
prior to commencing trading?

How do I deal with my employees?

What regulatory matters do I need to consider?

What other factors impact my ‘doing business in the UK’?

How do I acquire a business in the UK?

How do I list on a UK stock exchange?

What type of legal presence do I require?

- Choice of entity
- Place of business
- Branch
- Subsidiary

London Eye, London

Choosing your entity

There are three principal ways for a foreign investor or company to carry on business in the UK. You may:

- register a place of business
- register a branch of your company in the UK
- incorporate a private limited company.

Before making your choice, you should consider the following questions:

- How substantial will your business activity in the UK be?
- What risks do you anticipate during the initial set-up?
- How long do you expect to do business in the UK?
- What are the associated regulatory costs?
- What are the disclosure requirements?
- What are the tax implications?
- What are the commercial considerations?

1. A place of business

Registering a place of business is only appropriate to non-trading entities. There must be no selling activity in the UK and any employees should not receive a commission on sales.

A place of business is:

- a contact point to your company
- a non-taxable branch of your company.

Every entity with a non-trading office in England and Wales must establish a place of business. Within a month, you must submit the following documents to the UK Registrar of Companies:

- a completed form (Form 691) that provides such information as:
  - the official name of your company
  - the country of incorporation
  - the address of the place of business in the UK
  - details of the directors and secretaries
  - details for the person authorised to accept service of process on behalf of the company
- a certified copy of your company's constitutional documents
- a certified translation of those documents (if they are not in English)
- the registration fee (£20 for the standard service; £50 for same day registration).

2. A branch

A branch is:

- a part of your company (and thus does not have a separate legal existence in the UK)
- subject to tax in the UK.

It provides:

- a more substantial presence than a place of business
- the opportunity to engage in trading activity with customer and/or post-sales support.

Within a month of opening a branch, you must submit the following documents to Companies House:

- a completed form (Form BR1) that provides such information as:
  - the official name of your company
  - the country of incorporation
  - details of the directors and secretaries, including the extent of their authority to represent your company
  - details of a person authorised to represent your company in respect of the business of the branch and the extent of their authority to represent the company
  - details of a person authorised to accept service of process on behalf of your company.
- a certified copy of the company's constitutional documents
- a copy of the company's latest set of audited accounts (if the company is required to file accounts publicly in its country of incorporation)
- a certified translation of those accounts and the company's constitutional documents (if they are not in English)
- the registration fee (£20 for the standard service; £50 for same day registration).

You have the option of establishing the branch through a new subsidiary of your company. This has two benefits:

- you would not have to register your company's accounts, merely the subsidiary's
- your company's liability would be limited.

3. Private limited company

A private limited company is:

- a separate legal entity
- with its own limited liabilities.

If you choose to set up a private limited company as a UK subsidiary, your company will not be liable for the debts and other liabilities of the subsidiary beyond the amount of the subsidiary's share capital, unless your company has provided an express guarantee in respect of the subsidiary's liabilities.

On the one hand, a private limited company:

- is much more substantial than a place of business or a branch and thus offers far greater assurance for customers and others who come into contact with the business
- offers flexibility of ownership (it can have one or more shareholders).

On the other hand, it must comply with accounting, audit and regulatory requirements. The main compliance obligations for a private limited company are:

- filing an annual return with the Registrar of Companies. This contains information about the company as at the anniversary of incorporation, such as share capital and officers
- filing statutory accounts for the company for each financial year/period and circulating those accounts to its members
- notifying the Registrar of Companies of any event-driven changes to the company (for example, resignation and appointment of directors, a change in the share capital and a change of registered office address)
- maintaining statutory registers for the company.

Other options

It is also possible to form:

- limited partnerships
- limited liability partnerships in the UK or in a European country.

How do I establish the entity?

- Legal registration requirements
- Corporate name availability
- Directors' duties
- Companies Act 2006

Edinburgh Castle, Scotland

Legal requirements

Registration requirements

A business seeking incorporation as a private limited company must file the following with Companies House:

- signed Memorandum of Association – the Company's name and business activities (objects)
- signed Articles of Association – the rules under which the company will be run
- completed Form 10 – details of the Registered Office, director(s) and secretary if you wish to appoint one (appointment of a secretary is optional for a private limited company)
- completed Form 12 – a statutory declaration confirming compliance with the various requirements
- the registration fee (£20 for the standard service; £50 for same day registration).

When satisfied that all formalities have been followed, the Companies Registrar issues a certificate of incorporation. This is conclusive evidence that the company is duly incorporated and established, so the company may commence trading immediately.

For the information you must provide when commencing the formation process, please refer to Appendix A.

Additional requirements

Every company must:

- have at least one natural director (ie, an actual person rather than a corporation)
- appoint auditors, unless its turnover and balance sheet total are below specified thresholds
- keep a register of its shareholders (known as members), including their names and addresses, the number and class of shares they hold and the date when they became members of the company
- keep a register of charges (mortgages and other secured interests)
- keep a register of its directors and secretary – if it chooses to have a secretary (see below)
- deliver to the Register of Companies (on Form 363a) an annual return (accounts), no later than the filing deadline, which is 28 days from the made-up date of the annual return
- deliver to the Register of Companies statutory accounts for each financial year/period, no later than the filing deadline for delivery of the accounts, which is nine months from the end of the accounting reference date.

There are penalties for not meeting these obligations.

With effect from 6 April 2008, there is no longer a requirement to appoint a company secretary. However, a company may still appoint a secretary if it so wishes.

Is my corporate name available?

You may not choose a name for your private limited company that has already been registered on the UK companies register.

If you choose a name that:

- is identical to
- similar to or
- incorporates the registered trade mark of a third party

you may be in danger of infringing that trade mark.

If you choose a company or trading name that is identical to or similar to that of another company, you also risk becoming the target of a 'passing off' action by that other company.

Trade mark infringement and passing off is usually limited to situations where the two businesses are in a similar trade. However, it can occur even where the businesses are not in a similar trade.

To avoid these problems, you should conduct a series of searches, including searches at Companies House and the UK Intellectual Property Office, as well as wider searches for businesses using the relevant name. It is recommended that you employ the services of a professional firm that specialises in this area of the law.

Your company's name may not include such words as 'International', 'British', 'Holdings' or 'Group' without the prior approval of the Registrar of Companies. Certain other words, such as 'Pharmaceutical', require third party consent.

What are my duties as a director?

As a director, you are responsible for the day-to-day management of the company and you are subject to various statutory duties that, if breached, can result in personal liability. The duties, which are set out in the Companies Act 2006, include the requirement to:

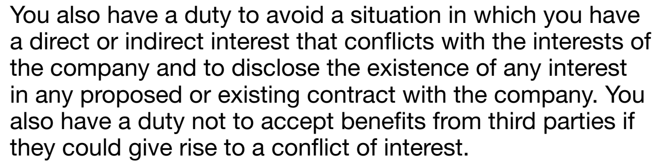
(a) act in accordance with the company's constitution and only exercise your powers for the purpose for which they were conferred and

(b) act in a manner that you consider, in good faith, to be the most likely to promote the success of the company for the benefit of its members as a whole. When exercising this duty, you must have regard to a number of issues, including:

- the likely consequences of any decision in the long term
- the interests of the company's employees
- the impact of the company's business on the community and the environment
- the need to foster the company's business relationships with suppliers, customers and others
- the desirability of the company maintaining a reputation for high standards of business conduct
- the need to act fairly between members.

In discharging your duties, you must also exercise:

- reasonable skill, care and diligence and
- independent judgement.



You also have a duty to avoid a situation in which you have a direct or indirect interest that conflicts with the interests of the company and to disclose the existence of any interest in any proposed or existing contract with the company. You also have a duty not to accept benefits from third parties if they could give rise to a conflict of interest.

In cases of actual or prospective insolvency, your duties are still owed to the company but you must act in the best interests of the creditors, rather than its shareholders. Personal liability is also imposed in certain situations for permitting an insolvent company or prospectively insolvent company to continue trading unless you can demonstrate that it is beneficial for the creditors to continue to do so.

The above is a merely a summary of a director’s duties. For a comprehensive statement, you should seek legal advice or refer to the Companies Act 2006.

Companies Act 2006

The formation, management and organisation of a company in the UK are largely governed by the provisions of the Companies Act 2006. By 1 October 2009, this will have superseded and entirely replaced the Companies Act 1985. Whether you choose to establish a new company or acquire an existing one, the provisions of the Companies Act 2006 will have a significant impact on your company.

The Act governs:

- the establishment of companies
- how they are operated, owned, governed and managed
- the extent to which they are required to publish information relating to their affairs (including their financial affairs)
- their liabilities and duties to their members and other stakeholders.

It addresses among other things:

- how share capital is organised, reduced and increased (and the records that must be kept of the company's ownership)
- how directors must regulate their affairs
- the requirement for a company to be audited
- how creditors of a company can protect themselves (and how their competing claims shall be dealt with in the event of insolvency)
- how a company can be wound up and its affairs brought to an end.

The 2006 Act has, in many areas, materially changed the rules that apply to companies. These are too numerous and complex to cover here. However, it is important to note that, as a result of these changes, previous knowledge or advice may be out of date. Consequently, expert legal advice should be taken to ascertain the current position.

What tax issues do I need to consider?

- Corporation tax
- Repatriation of profits
- VAT
- Personal taxation
- Payroll taxes

The Eden Project, Cornwall

Corporation tax

There is only one major tax on a company's profits, which is currently levied at a maximum rate of 28%. Rules are fixed in advance and announced in the Budget each year.

Registration for UK corporation tax

Within three months of commencing trade or becoming active, a UK company/branch is required to notify Her Majesty's Revenue & Customs (HMRC) that it falls within the charge to UK corporation tax. Failure to notify can result in a penalty.

The charge to corporation tax

A company (including the subsidiary of an overseas company) that is resident in the UK for tax purposes is liable to corporation tax on its worldwide profits and chargeable gains.

UK branches of non-UK resident companies are liable to UK corporation tax generally on:

- trading income arising directly or indirectly through the UK branch
- income from property or rights used by or held by or for the UK branch
- chargeable gains accruing on the disposal of assets situated in the UK and used for the purposes of the branch.

Corporation tax is assessed on a company's total taxable profits (see below) and chargeable gains in respect of each 'accounting period'. The income tax year applicable to individuals, which runs from 6 April to the following 5 April, is irrelevant for corporation tax purposes. The rate of corporation tax is set for the financial year ending on 31 March. If the rate is changed, the profits of an accounting period that straddles the date of change are apportioned and charged at the appropriate rates.

Corporation tax rates

The rates of corporation tax applicable in the financial year 2007 (1 April 2007 to 31 March 2008) and the financial year 2008 (1 April 2008 to 31 March 2009) are as follows:

Taxable Profits	Rates of corporation tax financial year 2008 (%)	Rates of corporation tax financial year 2009 (%)
Up to £300,000 (small companies rate)	20	21
Upper marginal rate*	32.5	29.75
Full rate	30	28

(*This rate applies to taxable ‘profits’ between £300,000 -1.5m)

A further increase in the small companies rate (SCR) of corporation tax – to 22% was due to take effect from 1 April 2009. This proposed increase has now been postponed until 1 April 2010.

Where there are active associated companies (ie, companies under common control), including overseas companies (but not dormant companies), the limits (see above table) are reduced, in effect spreading the limit across all the active companies.

Taxable profits

Profits charged to corporation tax are calculated by adding together income from various sources. These will principally include trading profits, rents, investment income, deposit interest and capital gains.

Taxable trading profits are calculated in accordance with generally accepted accounting principles, with certain statutory adjustments. Some of the most common adjustments include:

- expenditure that is incurred wholly and exclusively for business purposes may be deducted
- amortisation of capital expenditure deducted in the accounts by way of depreciation must be added back to the net profit or loss figure in the accounts and statutory 'capital allowances' are deducted instead
- certain expenses are allowed to be deducted against total profits, rather than trading profits, on a 'paid basis' (eg, patent royalties)
- general provisions and provisions for contingent or future losses contained in the accounts must be added back, as only specific provisions are permitted to be deducted for tax purposes
- the expenditure on intellectual property assets is tax deductible based on amortisation rates in the company's accounts, with profits on sales being taxed as income (and not capital gains).

Capital allowances

Capital allowances allow the cost of the capital assets to be written off against a business's taxable profits. They take the place of commercial depreciation charged in accounts. The main rate of capital allowances for general spending on plant and machinery is 20% a year (25% before 1 April 2008) on the reducing balance basis. Although there are some specific exceptions, most assets qualifying as plant and machinery are pooled together and the value of the pool is written down accordingly.

From 1 April 2008, the Annual Investment Allowance gives a 100% writing down allowance on the first £50,000 spent on general plant and machinery in a period. This is time apportioned where an accounting period is less than 12 months or where a 12-month accounting period spans April 2008.

Dividends

A corporate shareholder resident for tax purposes in the UK will not normally be liable to UK corporation tax on any UK dividend received. However, in order to bring UK law in line with EU law, wholesale changes to the taxation of intra-group dividend income have been drafted. UK dividends received by UK corporate shareholders may be taxable from 1 April 2009 unless an exemption applies and they do not fall foul of anti-avoidance provisions. Dividends from overseas companies are taxable, but relief is given for foreign taxes already incurred subject to certain formulae. There may be the potential for dividends from EU-parented companies to be exempt from UK corporation tax, subject to various anti-avoidance provisions.

Dividends declared by a UK company carry a 'notional tax credit' of 1/9 (ie, 10% of the 'grossed-up' dividend).

In relation to UK-resident individuals, the notional tax credit is set off against the individual's income tax liability on the grossed-up dividend.

This notional tax credit is disregarded for UK resident companies.

Relief for trading losses

Trading losses may be utilised in five principal ways by UK resident companies:

- against other income or chargeable gains arising in the same accounting period
- against profits of any description in the previous accounting period
- against trading income from the same trade arising in subsequent accounting periods and
- as group relief in the same accounting period to qualifying companies
- against trading profits of the previous three years – subject to a limit of £50,000 for the earliest two periods. (This legislation only applies for trading losses arising in accounting periods ending between 24 November 2008 and 23 November 2009.)

Chargeable gains

UK resident companies pay corporation tax on their chargeable gains at the relevant corporation tax rate. Branches of foreign companies are also liable to corporation tax on chargeable gains arising on the disposal of any assets that are situated in the UK and used for the purposes of the branch or its trade.

The chargeable gain is calculated as the difference between the net proceeds of sale of a chargeable asset and its purchase price together with any allowable expenditure (such as the incidental costs of acquisition) incurred on that asset. The resulting gain is then reduced by an 'Indexation Allowance' to ensure that the proportion of any gain produced by inflation is not taxed.

There is often an exemption for capital gains and losses on substantial (more than 10%) shareholdings in trading companies disposed of by corporate shareholders. This is commonly referred to as the 'Substantial Shareholders' Exemption'. However, a non-UK company directly owning shares in the UK will not be charged, so capital gains on the disposal by a non-UK company of shares in a UK company are generally not subject to UK taxation.

Corporation tax administration

Companies have to 'self assess' in a similar way to individuals. The times at which corporation tax is payable depend on the size of the company/group paying the tax.

For companies whose annual profits are less than £1.5m or whose annual tax liability is less than £10,000, tax must be paid within nine months of the end of an accounting period. These thresholds are based on a 12-month accounting period and the limits are pro-rated for accounting periods of less than 12 months. If the correct amount due has not been determined, an estimated amount must be paid.

For companies whose taxable profits are estimated to be £1.5m or more in a 12-month period, and whose annual corporation tax liability exceeds £10,000, corporation tax must be paid on account by quarterly instalments, beginning six months and 13 days from the start of the accounting period.

The above thresholds are adjusted for the number of active associated companies within the worldwide group and for accounting periods of less than 12 months.

Where deadlines are not met, interest is automatically charged and financial penalties may be imposed.

Repatriation of profits

A UK company can repatriate profits to the home territory of its parent company in a number of ways, the most common being via dividend. Other options include management charges, interest on loans, etc. The main impact is withholding taxes and transfer pricing. In the case of a dividend, the UK does not impose a withholding tax charge. This is the case whether or not the parent company or individual shareholder is in a treaty country or a tax haven.

The deductibility of costs for intra-group supplies, services and finance costs may be (usually depending on the size of the group) subject to the UK transfer pricing rules, in which case the company/branch needs to be comfortable that an arm's-length standard has been applied. A UK company also needs to be able to demonstrate that it is adequately capitalised to support a deduction for intra-group interest payable.

A further interest cap may be introduced from 1 April 2009 (but could be deferred until 1 July 2009). The extent of the cap is dependent on the amount of net external finance cost payable by non-UK group companies. The draft legislation is extremely complex and specialist advice should be sought.

VAT

The system of Value Added Tax (VAT) in the UK is essentially the same as that used in the rest of the EU. There remain, however, some significant and confusing differences of detail between different member states of the EU.

VAT is charged on the supply of goods and services in the UK made by a taxable person in the course of furtherance of a business, unless the supplies are an exempt supply. A UK taxable person is anyone registered or liable to be registered for UK VAT.

VAT is effectively a tax on consumer expenditure. So, in theory, the final burden of the tax should not fall on business activity. This objective is achieved by an arrangement known as the input/output system. When a business buys goods or services, it pays VAT to the supplier (input tax). When the business sells goods or services, whether to another business or to a final consumer, it is required to charge VAT (output tax) unless the supplies are specifically relieved from the VAT charge. The business must periodically total the input tax it incurs and deduct this from the output tax charged, paying the balance to HM Revenue and Customs. The result of this is that the final consumers bear the cost of VAT on the final price of the goods or services they purchase.

In the 2008 Pre-Budget Report, a temporary reduction in the standard rate of VAT from 17.5% to 15% was announced. This reduction applies from 1 December 2008 to 31 December 2009.

There are three rates of VAT on taxable supplies in the UK:

- standard rate 15%
- zero rate
- a reduced rate that applies to limited goods and services.

Unlike some EU member states, the UK has a fairly high VAT turnover registration limit (currently £74,000). This means that a large number of small turnover businesses are not within the VAT system.

A taxable person is liable to register for VAT if their combined value of taxable supplies in the UK exceeded the registration limit in the preceding 12 months, or there are reasonable grounds for believing that the value of taxable supplies to be made in the next 30 days alone will exceed the registration limit. A business may also de-register if the anticipated value of the taxable supplies in the next 12 months is less than the de-registration limit (currently £65,000). It is highly likely that a company seeking to set up in the UK will wish to register for VAT or be required to do so. The registration process requires the non-resident company to complete a registration form verifying the basis under which it will become a taxable person, provide statistical information, etc. The registration should be processed in three weeks. However, HMRC has recently been taking up to 12 weeks.

The standard VAT reporting requirement for a company/branch after registration is to submit returns to HMRC every three months. If a business wants to recover its input VAT more quickly, it may request permission to submit monthly VAT returns.

Personal taxation

In the UK, an individual is assessed for income tax for the financial year starting on 6 April in one year and ending on 5 April in the following year. For the 2008/2009 tax year, the starting rate of income tax is 20% for the first taxable slice of income up to £36,000. The highest rate of tax is 40%, which is charged on taxable income over £36,000. A table is attached at Appendix C with the rate in the UK.

Income tax

An individual's liability to UK tax depends on where they are resident, ordinarily resident or domiciled. The system for taxing individuals moving to the United Kingdom is unique. The concept of domicile in the UK generally means that an individual must be both domiciled and resident in the UK if UK tax is to be levied on his or her worldwide income and gains.

If a person is resident and domiciled in the UK, then they will be subject to worldwide taxation in respect of their income, gains and assets. If, however, the individual is not domiciled in the United Kingdom, foreign source income and gains are, for income tax purposes, taxable only when remitted to the UK. A taxable remittance arises when overseas income is brought into the UK. Since 6 April 2008 there have been a number of changes to the UK taxation of non-domiciles. However, it is still possible to benefit from the 'remittance basis'.

Since April 2008, the remittance basis has no longer automatically applied to individuals, unless they have been UK resident for less than six out of the past nine years or have unremitted income of less than £2,000. To continue to use the remittance basis on foreign source income, a £30,000 charge is payable to HMRC. Individuals also lose their personal allowances (both for income and capital gains tax) should this option be taken up. However, existing tax treaties may potentially override this and professional advice should be sought by individuals in this position.

Capital gains tax (CGT)

Individuals who are resident or ordinarily resident in the UK are liable to capital gains tax on:

- worldwide gains – if domiciled in the UK
- gains remitted to the UK – if domiciled elsewhere.

The capital gains tax laws are similarly beneficial for non-domiciled residents of the UK in that gains realised on the disposal of foreign assets (eg, shares in a non-UK resident company) are exempt from taxation unless remitted to the UK.

Inheritance tax (IHT)

Property situated outside the UK that is owned by a non-domiciled resident of the UK is treated as excluded property for IHT purposes (ie, not taxable upon death), as it is not considered part of their estate. Foreign-situated property, such as shares in a foreign company, is excluded property where the owner of the property is not domiciled in the UK (subject to the deemed domicile rule).

Payroll taxes

All UK employers must operate a ‘Pay As You Earn’ (PAYE) payroll system. Over each UK tax year, an employer must account to the HMRC for the full amount of any tax and National Insurance contributions that it must deduct from payments made to employees. UK employers are required to operate the system without exception and to make appropriate records and complete the necessary filings. They must also account for Employers Social Security.

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What other areas do I need to consider prior to commencing trading?

- Bank account set-up
- Business insurances
- Property and real estate
- Exchange control

Thames Barrier, London

Bank account set-up

Generally, all new businesses will need a bank account to conduct business. If you need a bank account in the UK, the major UK retail banks are likely to have branches close to your chosen site.

You should not underestimate the time it will take to establish a business bank account. So, the earlier you commence communications with the bank, the better. This is particularly important if you intend to have direct payment arrangements set up to enable your employees to be paid directly by bank transfer from the outset of business.

Business insurances

Apart from Employee Liability Insurances, most insurances are at the discretion of the company. Ideally, a company may consider extending cover from its home country for some insurances, such as director and officer insurance, public liability and product liability. Alternatively, it may seek a broker to obtain local cover and include property and content insurances as well as various employee insurances for travel, health, etc.

Acquiring land and premises

Acquiring land or taking a lease of premises in the UK tends to be a more lengthy process than in other countries. When doing so, you should take advice from specialist advisers – known as estate agents or surveyors – to ensure that:

- the price/premium and rent and service charge demanded by the seller or landlord are not too high
- the other terms are fair and commercial and not too much in favour of the seller or landlord.

Leases tend to be long and complicated and even the simplest of property transactions can produce complications. You should also seek the advice of a specialist property lawyer before making any commitment.

One-year leases are available on occasion. However, these tend to be granted only for premises where the landlord is providing all the services.

Leases usually last for at least five years. Some contain break clauses that allow the tenant to terminate the tenancy after, say, two or three years. However, such clauses inevitably come at a price.

Landlords usually demand that tenants pay a deposit or provide a guarantee as protection against non-payment of rent and other expenses. The landlord is almost certain to demand a deposit or guarantee when the tenant is a new company.

Before making any alterations or improvements to your premises, you should check the lease to see if the landlord's consent is required.

Once you have selected your property or premises, you should consider such issues as:

- funding the acquisition price or lease premium and/or security deposit and rent
- fitting out the premises
- whether you can recover any VAT payable on the rent and fitting-out costs
- the amount of Stamp Duty Land Tax payable and whether the interest requires registration at HM Land Registry.

These all have tax consequences and you should obtain advice before taking any action.

Exchange control

The UK does not have exchange control. There is complete freedom of movement in respect of all capital and current account transactions, not only with member states of the EU, but with all countries.

How do I deal with my employees?

- Employee contracts
- Employee benefits
- Immigration

Tower Bridge, London

Employment contracts

UK law grants employees a range of protections that create obligations and potential risks for employers. Although these are generally less stringent than in other European countries, you will nonetheless need to be aware of them.

The obligations an employer owes its UK employees include:

- a general duty to provide a safe place of work, safe access and safe work systems, supported by related obligations to, among other things, take out employer's liability insurance, consult with employees or their representatives over health and safety issues and provide staff with certain health and safety information
- a requirement to provide a written statement of terms and conditions of employment to employees within two months of commencement of employment (A contract of employment can satisfy this obligation.)
- an obligation not to discriminate against employees (including job applicants) on a range of grounds, including race, colour, nationality, ethnic origin, age, gender (this includes sexual harassment), marital status, religion or religious belief, sexual orientation, disability, or part-time or fixed-term status
- an obligation to pay employees at least the national minimum wage, which is a fixed hourly rate and is increased annually
- various benefits and rights must be given to employees in connection with giving birth, adoption and other family situations (These include maternity absence for up to 12 months, part of which is paid, and a right to time off to deal with domestic emergencies.)
- a requirement not to allow a worker to work beyond 48 hours per week (on average over, normally, a 17-week period) without express consent (There are additional limits on working time, including daily and weekly time off and specific limits related to younger workers and night workers.)

- a duty to give each employee a minimum amount of paid holiday each year (From April 2009, the minimum will normally be 5.6 weeks.)
- a requirement to observe limitations on the freedom of an employer to process personal data obtained about its employees and job applicants, including transferring it to third parties (These limitations are strict in relation to personal data which is 'sensitive' and where the data may be transferred outside the EU to countries with lower levels of privacy protection.)
- various rights for employees to protect them in the event of termination of employment. (These include a minimum notice entitlement that can be as long as 12 weeks and a right to a statutory payment on being made redundant with more than two years' service. Where service exceeds one year, a dismissed employee has a right to claim compensation for unfair dismissal and that claim will be successful unless the employer can show a permitted reason for termination and that a fair and legal process has been followed.)

Union or other collective rights are less significant in the UK than in many other European countries. The law in the UK requires an employer to recognise a trade union or establish a national works council or committee in certain circumstances, but only where such an arrangement is specifically requested by a union or workers. As a result, many UK employers have no such arrangements in place.

It is beneficial for an employer to establish a comprehensive contract of employment to be issued to each employee. This can include all of the terms and conditions of employment, covering the rights described above, and in addition protect the employer's business interests by placing obligations on the employee. Examples are specific requirements to keep information about the business and its customers confidential, provisions securing ownership of inventions and developments made in the course of employment, and covenants restricting certain competitive activities after employment ends, such as poaching customers or key staff.

Employers frequently supplement this contract with a formal staff handbook setting out company policies, including ones that support compliance with the issues referred to above, such as discrimination/harassment and data protection.

An employer is under an obligation to make a pension arrangement available to its staff if it employs five or more people. At present, there is no obligation to contribute to this arrangement, although there are plans to change that in 2012. Otherwise, additional benefits such as bonus, health insurance and car allowance are a matter of choice for the employer.

The contract of employment is an important tool in setting out the terms of any benefits provided, most notably bonuses. Precise language in the contract can clarify the employee's rights and may save the employer unexpected costs on termination of employment.

Employee benefits

The contract of employment will include terms relating to:

- salary
- potential bonuses
- benefits provided by the employer to employees – such as the provision of a car or medical support.

Providing benefits (rather than paying a higher salary) can have tax advantages for both the employer and the employee. The employer is responsible for reporting any benefits provided to an employee in an annual return (Form P11D).

As previously mentioned, every employer of five or more people must offer a pension arrangement. However, the employer is not obliged to contribute to that arrangement. This is expected to change in 2012, when it may become obligatory for the employer to contribute to a pension arrangement.

It is common for senior executives to have equity-based incentives, such as share options. The UK offers two kinds of option plan that qualify for favourable tax treatment. These can often be structured as 'sub-plans' to a global plan and can deliver shares in a foreign company.

Immigration

The UK government is in the course of implementing the most radical changes in this country's immigration law for 30 years. These changes will effect the introduction of a new system known as the Points-Based System (PBS).

During this process, the UK is employing transitional arrangements. Thus, when setting up in this country, it is important to consider both the existing system and the system that is being introduced.

The existing system

There are a number of immigration solutions available to non-EEA employees with no ties to the UK or Europe who are required to enter the UK to assist in the set-up of a UK business.

The first employee

There are typically two routes for the first employee who is relocated to the UK in a set-up arrangement:

- the sole representative visa
- Tier 1.

1. Sole representative visa

This route is designed for a first senior employee who is to be relocated to the UK to assist with the set-up of a foreign company in the UK. It is generally required that the company must have no branch, subsidiary or other representative in the United Kingdom before the visa application is made. Broadly speaking, the senior employee must have previous experience in a senior role and cannot be a majority shareholder. The individual is tied to working for the UK sponsor. These applications can be processed within 1-3 weeks at the British Consulate in the country of which the individual is a national or where he/she resides.

2. Tier 1

The Tier 1 visa is a points-based scheme in which an individual can score points in various categories, including academic achievement, earned income, age and UK experience. The individual must be able to prove that he/she is able to speak English and has adequate funds available to meet a maintenance requirement. Upon approval, the visa allows individuals to work in any capacity, in self-employment or employment for any employer. Thus, the individual is not tied to the employer. At present, the processing of this type of application takes approximately 6-10 weeks.

Subsequent employees

Following the set-up of the company, Tier 1 and Tier 2 visas can be obtained for subsequent expatriates and any foreign new hires who are employed in the UK. There is a general requirement that, in order to sponsor an individual, the UK entity must undertake a proper labour market test (ie, provide evidence of advertising the specific role plus evidence of why local resident workers cannot undertake this position). There are certain exceptions to this route (eg, where an individual has worked for six months or more with a company abroad that has a direct link with the UK company through common ownership). Furthermore, if a business wishes to transfer an employee from a parent, subsidiary or branch of an overseas company to its UK company, it must submit supporting documents to confirm that it is a UK-based employer that is actively trading.

Business visitors

It is only possible to enter the UK on a business visit if the individual will be undertaking activities that fall within the business visitor guidance rules. It is also crucial that tax, social security, immigration and employment law issues are considered for short-term business visitors. Business visitors face serious consequences if they make false representations about their proposed activities in the UK. In such circumstances, they could face the prospect of being unable to re-enter the UK for up to 10 years. Furthermore, if employees travel to the UK and undertake activities over and above those permitted under the business visitor category, there could be a risk of illegal employment.

Illegal employment

Under UK immigration legislation, it is illegal to employ an individual who is not permitted to work in the UK. A breach of this law can lead to prosecution and hefty fines for the employer. Immigration and tax authorities, the police and customs agencies are all linked up in the UK, so government authorities can easily monitor the movements of foreign nationals in the UK. Thus, UK businesses must ensure consistency and compliance when employing foreign staff.

The new system – the Points-Based System (PBS)

The Points-Based System is a five-tier system that has replaced more than 80 existing immigration categories. All employers should familiarise themselves with Tiers 1, 2 and 5 of the new system. Tiers 1 and 2 are the most relevant tiers for start-ups.

Under the PBS, companies must also:

- keep accurate records of individuals' eligibility to work
- ensure that ongoing checks are made on individuals with temporary permission to remain in the UK on each anniversary of the individual's start date
- notify the Home Office of any changes to circumstances
- maintain robust HR policies to ensure compliance reflecting data protection and privacy principles.

Companies that fail to discharge the duties described above face removal from the Sponsorship Register. This will prevent the issue of future certificates of sponsorship.

What regulatory matters do I need to consider?

- The regulatory environment
- Accounting & audit requirements
- Consumer Credit
- Money Laundering
- Data protection
- EU & UK competition rules
- Anti-dumping regulations
- Financial Services

Clifton Suspension Bridge, Bristol

The regulatory environment

While various EU rules impact on trade in general, the UK attaches great importance to free competition. As a result:

- price controls are not imposed (other than on certain regulated sectors)
- there is a complete absence of exchange controls
- in general, no restrictions are imposed on foreign ownership or investment.

Most businesses in the UK are only impacted by regulations relating to:

- health and safety (of employees, consumers and the general public)
- certain technical standards (eg, to guarantee quality and inter-operability).

Exceptions to this include Financial Services (see page 76) and the regulated utilities (see below).

To ensure that free competition works effectively for consumers – encouraging efficiency and innovation and driving down prices – legislation prohibits certain anti-competitive practices and imposes requirements to treat customers fairly. EU and UK competition law places restrictions on certain agreements, particularly those between competitors, including cartels (see page 74). It also prohibits exploitation of a dominant position and anti-competitive practices, such as predatory pricing or refusal to supply. Sanctions include:

- fines based on the turnover of the business
- custodial sentences for executives (but only where there has been a flagrant breach of the regulations, such as price fixing).

Because mergers can reduce the effectiveness of competition, they are subject to regulatory clearance under UK and EU competition law. Those that qualify for investigation by the European Commission (by reason of their size and cross-EU dimension) must be notified to the EC. Those that qualify for UK investigation (where there are size and market share tests) do not need to be notified, but can still be investigated. The UK and EU authorities have the power to prohibit or unwind mergers, or impose remedies (such as forced divestment of parts of the merged business).

Two independent public bodies have prime responsibility for ensuring that markets function effectively, consumers are treated

fairly, and EU and UK competition law is enforced. These are:

- The Office of Fair Trading, which is the UK's consumer and competition authority
- The Competition Commission, which conducts in-depth inquiries into mergers and markets when necessary.

In most sectors, the combination of technical regulation and competition law is seen as sufficient to ensure that markets function effectively. In certain sectors, however, economic/price regulation is directly applied because of known factors that inhibit the effectiveness of competition. These are primarily the utility sectors, where the suppliers are former nationalised entities that were privatised in the 1980s and 1990s.

Specialist regulators have been established in these sectors. Each has responsibility for enforcing competition law in its sector (effectively assuming the powers of the Office of Fair Trading in that sector). It also carries out other functions, notably placing limits on price increases and imposing licence conditions on other aspects of the business, such as required coverage of the market and compulsory access to its infrastructure for other operators.

The main sectors subject to economic/price regulation are:

- energy (gas and electricity) – regulated by the Office of the Gas and Electricity Markets (Ofgem)
- water – regulated by the Water Services Regulation Authority (Ofwat)
- telecommunications and broadcasting – regulated by the Office of Communications (Ofcom)
- postal services – regulated by the Postal Services Commission (Postcomm)
- airports – regulated by the Civil Aviation Authority (CAA)
- railways – regulated by the Office of Rail Regulation (ORR).

Price regulation generally takes the form of a cap on the prices that the regulated business can charge. Price caps are generally fixed for five-year periods, based on business plans. If the regulated business is more/less successful than envisaged in the plan, then it makes higher/lower-than-required returns. This gives the regulated business an incentive to be efficient during the period of the price cap. However, when setting new price controls, the regulator will take into account past under- or over-performance.

What are the accounting and audit requirements?

Books and records

The UK Companies Act requires that accounting records explain the company's transactions and enable the directors to ensure that the annual accounts comply with the requirements of the Act. These records must in particular detail the following:

- all sums of money received and expended, and the reason for the receipts or expenditure
- the assets and liabilities.

If the company's business involves dealing in goods, records must be kept of the following:

- all stock held (inventory) at the date to which the accounts have been drawn up, and all stocktaking records from which such statements have been prepared
- all goods sold and purchased, including the identity of the buyers and sellers (except in the case of goods sold in ordinary retail trade).

There is no requirement as to the form in which accounting records must be kept, but they must be able to disclose with reasonable accuracy, at any time, the financial position of the company.

The accounting records must be kept at the company's registered office or at such other place as the directors think fit. The records may be kept outside the UK, but, if they are, certain accounts and returns must be sent to and retained in the UK. Private companies must retain their accounting records for three years, public companies for six years (but will be obliged to retain them for longer periods for tax purposes).

Accounting reference period

The accounting reference period determines a company's 'financial year', in respect of which accounts must be prepared. Each financial year ends on the last day of the accounting reference period or within a period of seven days before or after that date.

The accounting reference period is generally 12 months in duration, except the first accounting reference period, which may be fewer than or more than 12 months but must not be more than 18 months after the company's date of incorporation. A company may nominate an 'accounting reference date' (ie, the day on which an accounting reference period ends). If it fails to do so, then it will be assigned an accounting reference date that is the last day of the month in which the anniversary of its incorporation falls.

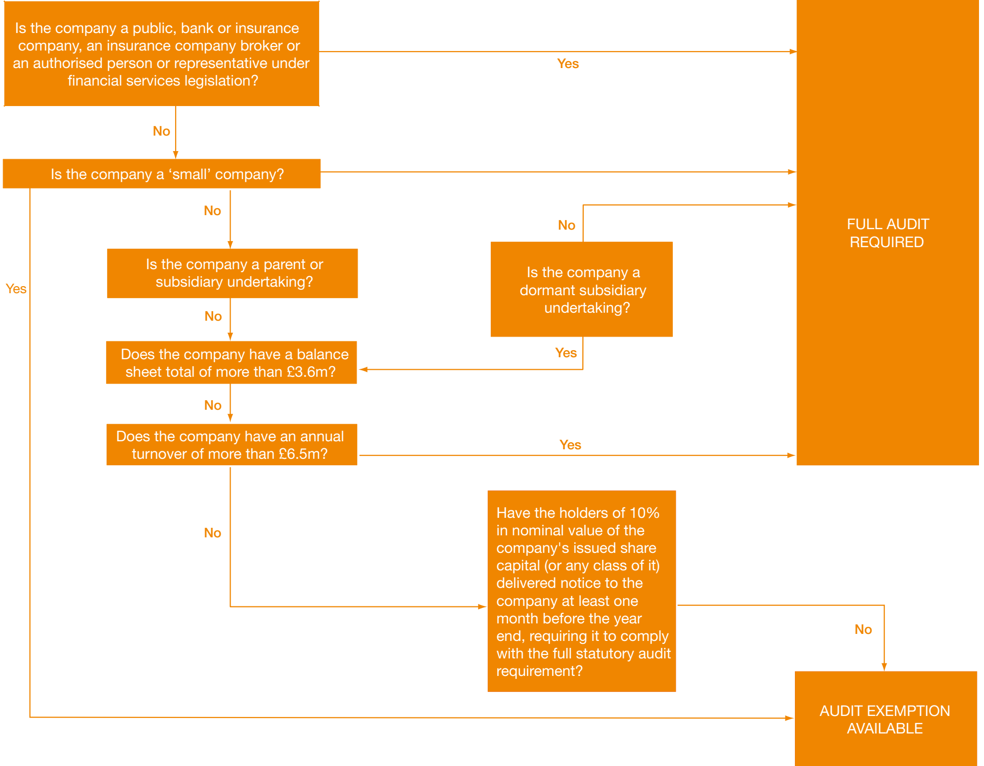
A company may alter its accounting reference date, subject to certain limitations. A branch generally takes on the accounting reference date of its parent company.

A private limited company must file its accounts at Companies House within nine months of the accounting reference date.

Audited financial statements

Not all businesses require statutory audits. At the present time, however, all businesses incorporated under the Companies Acts do require statutory audits, subject to an exemption for small companies. A branch is required to produce its main company's accounts (as audited in its home country) for filing with the UK Company Registry. If no such accounts are filed in the home country, then the branch must file s700 accounts, which do not need to be audited. Such businesses must appoint an independent auditor qualified to report as outlined below.

When do I need an audit?



Note re diagram: If the answer to the question ‘Is the company a dormant subsidiary undertaking?’ is yes, the company should prepare dormant accounts.

There is no specific requirement under tax law for the production of audited accounts. However, the revenue authorities normally insist on receiving audited accounts where these are required by the Companies Acts or other relevant legislation (eg, home territory/as a branch).

The auditors are required to make a report to the members on every balance sheet and profit and loss account (cashflow, statement of total recognised gains and losses (STRGL), etc) and on all group accounts laid before the company in general meeting. The auditors’ report must state whether the accounts have been properly prepared in accordance with the Companies Act and whether they show a true and fair view. In forming their opinion, auditors must also consider whether the following conditions have been satisfied:

- Have proper accounting records been kept?
- Are the annual accounts in agreement with the accounting records?
- Have they received all information, explanations and returns necessary to form this opinion?

If they are not satisfied in any of these respects, the auditors must declare that fact in their report.

Auditors

A company's first auditors are usually appointed by the directors. A private company is not required to hold a general meeting, so the auditors will be deemed to hold office until they resign or are removed. If a private company chooses to hold a general meeting, the auditors will be appointed by the shareholders at the general meeting to hold office until the end of the next general meeting.

Accounts and reports

A company must prepare individual accounts for each financial year, comprising:

- directors' report
- a balance sheet as at the last day of the financial year
- a profit and loss account for the period of the financial year
- a cash flow statement (unless a company is small or medium-sized).

Frequency of reporting

Annual reporting is required for private companies. Listed companies must also prepare half-yearly reports (previously known as interim results) and Interim Management Statements if they do not publish quarterly reports.

Accounts signatories

A company's annual accounts must be approved by the board of directors and signed on the board's behalf by one director. The signature must be on the company's balance sheet. The date the directors approved the accounts should be stated, ideally next to the signature on the balance sheet.

Circulation of accounts

A copy of the accounts, together with the directors' and auditors' reports on those accounts, must be sent to the persons entitled to receive them by no later than the end of the period for delivering the accounts and reports or, if earlier, the date on which it actually delivers its accounts and reports.

Public availability of accounts

Accounts are available for public inspection, on payment of a small fee, at the UK Companies Registry. Public companies must file a complete set of accounts with the Registrar of Companies. Private companies must also file a complete set of accounts unless they are classified either as 'medium-sized' or 'small' companies, when (with certain exceptions) they may file abbreviated accounts.

The following exemptions from preparing or filing accounts are allowed:

Public company – No exemptions exist.

Private limited company – Small and medium-sized companies are exempt from the requirement to file full accounts.

A company qualifies as 'small' if, for the year in question and (except in the case of a new company) for the preceding financial year, two or more of the following conditions are satisfied:

- the amount of its turnover for the year is not more than £6.5m
- its balance sheet total is not more than £3.26m
- the average number of persons employed by the company in the year (determined on a weekly basis) does not exceed 50.

A company qualifies as 'medium-sized' if, for the financial year in question and (except in the case of a new company) for the preceding financial year, two or more of the following conditions are satisfied:

- the amount of its turnover is not more than £25.9m
- its balance sheet total is not more than £12.9m
- the average number of persons employed by the company in the year does not exceed 250.

Both small and medium-sized companies are exempt from the requirement to state whether or not the accounts have been prepared in accordance with applicable accounting standards.

A small company need not file a profit and loss account or directors' report and is permitted to file a modified balance sheet.

A medium-sized company may file a modified profit and loss account and need not disclose, in the notes to the profit and loss account, certain details relating to turnover and profits (or losses) attributable to different classes of business carried on by the company. Apart from these exemptions, a medium-sized company must file full individual accounts in all other respects.

Where the directors take advantage of the filing exemptions for small and medium-sized companies, the balance sheet must contain a statement declaring this fact. The accounts must be accompanied by a special report of the auditor stating that, in the auditor's opinion, the company is entitled to the exemptions claimed and that the accounts have been properly prepared.

Branches must file their parent company's accounts if they are publicly available in the home country. If not, a modified (simple) set of accounts must be filed.

Consumer Credit

If your proposed business will:

- offer any kind of regulated consumer credit or hire or
- be involved in regulated activities relating to consumer credit or consumer hire

it will need to be licensed under the Consumer Credit Act 1974 (CCA). There are criminal and other sanctions for a failure to comply with the CCA licensing requirement. The Office of Fair Trading (OFT) is the government department responsible for licensing businesses engaged in regulated consumer credit activities.

Before the OFT issues a licence, it must be satisfied that you are a fit person to engage in the activities identified on the licence application. Once the OFT has granted you a licence, you will need to maintain the required standard of fitness and ensure that you comply with the requirements of the CCA in relation to your consumer credit or consumer hire business.

Money Laundering Regulations 2007

The Money Laundering Regulations 2007 require certain businesses to register with their relevant supervisory authority, have systems in place to prevent money laundering and report suspicious transactions. The categories of business within the scope of the regulations include:

- credit institutions
- financial institutions
- auditors, insolvency practitioners, external accountants and tax advisers
- trust or company service providers
- estate agents
- high-value dealers
- casinos.

You should, therefore, establish at an early stage whether your new business:

- will be subject to the regulations
- needs to be registered with a relevant supervisory authority.

Data protection

You must comply with the Data Protection Act 1998 (DPA) in relation to your business's collection and use of details relating to individuals, such as customer or employee records.

The DPA regulates the processing of personal data about 'data subjects' (ie, the individuals to whom the personal data relates). It imposes obligations on a 'data controller' (ie, an entity that decides how the data will be used). Your business will be a data controller except to the extent it holds personal data solely on behalf of another entity.

Data is 'personal data' to the extent individuals can be identified from:

- such data or
- such data together with other information that is in the possession of, or likely to come into the possession of, the data controller.

The DPA is based on eight principles that set out how data must be processed. 'Processing' includes collection, storage, use, disclosure and deletion.

The first principle is fundamental to the requirements of the DPA and requires that personal data is processed 'fairly and lawfully'. Specific obligations for fair and lawful processing include:

- satisfying one or more specified conditions (for example, obtaining the consent of the data subject or demonstrating that the processing is necessary for legitimate interests and does not prejudice the rights or legitimate interests of the data subjects)
- to the extent your business processes 'sensitive personal data' (ie, data relating to health, racial or ethnic origin, political opinions, religious beliefs, trade union membership, sexual life or criminal offences), satisfying additional specified conditions. It is often necessary to obtain explicit consent of the data subjects

- providing data subjects with certain information when collecting data from them (or, if data is not collected directly from them, then before processing their data). This information must include:
  - the identity of the data controller(s) for the data
  - the purposes of the intended use of the data
  - any other information that is necessary to enable the processing to be fair. It is good practice to provide data subjects with a privacy statement providing details of how their data will be used.

Other requirements of the DPA include:

- you may need to obtain a registration with the UK Information Commissioner's Office covering the purposes for which your business will process personal data
- the scope of data you collect must be adequate and relevant for the purposes for which it was collected, and must be kept up to date
- personal data must be kept secure from unauthorised use or accidental loss. This includes a requirement to enter into a written contract with any 'data processor' who processes data on behalf of your business (eg, a service provider), imposing controls on how such data processor handles the data
- you must not hold personal data for longer than is necessary
- transfers of personal data to countries outside the European Economic Area (EEA) are prohibited unless the recipient country ensures an 'adequate' level of data protection for individuals.

In relation to the latter requirement, as at the date of publication, the laws of Switzerland, Argentina, Guernsey, the Isle of Man and, to a more limited extent, Canada, are recognised by the EU Commission as meeting the adequacy tests. In relation to the US, transfers of data to companies that join the US 'Safe Harbor scheme' meet the adequacy criteria. For all other countries, however, other exceptions must be relied on.

There are several additional exceptions to the restriction on transfers of data outside the EEA, including:

- if the data subject has consented to the transfer (However, the data subject must be made aware of the risks associated with the transfer and obtaining such informed consent is often difficult to achieve.)
- if the transfer is necessary for the performance of a contract with the data subject or
- if the rights of the data subject are protected by the transferor and transferee entering into a contract based on EU-approved terms (under which the data subjects have direct enforcement rights).

EU & UK competition rules

Under European Commission and UK competition law rules, certain agreements that have the effect of restricting or distorting competition within the EU are prohibited – unless they fall within certain automatic exclusions or exemptions (certain types of agreement are exempted as being acceptable provided certain types of restrictions are avoided; there is also exemption for agreements that do not have an appreciable effect on trade). There is no longer a process for clearing agreements with the competition authorities, so companies have to rely on their own assessment.

A clause or entire agreement that is anti-competitive and does not fall within obvious exemptions will be void and unenforceable. This could threaten the entire agreement.

In such circumstances, a party to an agreement may be able to make a claim for damages against the other party. Third parties affected by the agreement may also be able to claim damages. Finally, damages or other remedies could also be sought by national competition authorities or even by the European Commission.

The above rules also apply to actions by associations of businesses or concerted practices – that is, all types of behaviours involving several parties, not just written agreements. In addition, the rules prohibit abuse of a dominant position that affects trade between EU states. There are also controls on some mergers and joint ventures.

Anti-dumping regulations

If you sell a product on an export market for a price that is lower than the price you charge on your domestic market, you risk an accusation of 'dumping'. This is regarded as an unfair trade practice.

If you are suspected of dumping, you may be:

- investigated by the European Commission
- required to pay anti-dumping duties.

The Integrated Tariff of the United Kingdom provides information on imported products subject to import duty.

Financial Services

The Financial Services industry is strictly regulated in the UK by the Financial Services and Markets Act 2000 as amended (FSMA) and its subsidiary legislation. Under the FSMA, any person who carries on a regulated activity in the UK must be authorised by the Financial Services Authority (FSA) or benefit from an exemption. A business that is in breach of this requirement may be committing a criminal offence. It will also be unable to enforce its agreements and may have to return money and pay compensation to its customers.

It is important, therefore, to establish at an early stage whether your proposed business requires you to apply for authorisation to carry on regulated activities. If your business does need to be authorised, certain individuals within the business, including, for example, the chief executive officer, will also need to be approved by the FSA.

It is also worth bearing in mind that the type of entity you choose to carry on a Financial Services business in the UK may be influenced by your proposed business model. For example, if you are based in a non-EEA country, and your new business is established as a UK limited company, it may be able to exercise rights under EU Single Market Laws to 'passport' certain Financial Services activities into other EEA states. Passports rights will not be available if your UK business is set up as a branch.

Before it provides authorisation, the FSA will need to be satisfied that your business meets certain fundamental conditions, including, for example, that the business will have adequate resources. Once authorised, your business will need to comply with relevant FSA rules and requirements, including the applicable regulatory capital requirements.

Examples of the types of business that are likely to require authorisation include:

- banks
- investment firms
- insurance companies and insurance intermediaries
- mortgage lenders and intermediaries.

Financial Services regulatory requirements

If you intend to carry out regulated activity in the UK, you will fall under the supervision of the Financial Services Authority (FSA). In such circumstances, your company will have to comply with any FSA regulations that apply to the business to be carried out by your company. Those regulations are set out in the *FSA Handbook.*

The globalisation of business means that regulators now operate on a more international basis. However, different regulators continue to take different approaches to managing relationships and adopt different supervisory techniques. It is vital, therefore, to understand the FSA's approach and techniques and build strong relationships with your UK supervisors.

Every regulated legal entity established in the UK must be adequately capitalised. The minimum level of capital required is determined by the FSA's Prudential regulations and the nature of the permissions granted by the FSA.

In practice, the FSA requires most firms to assess their risks and undertake an Independent Capital Adequacy Assessment Process (ICAAP). After receiving the results of the ICAAP, the regulator will adjust the level of capital proposed in the ICAAP to one that it deems appropriate and proportionate. The regulator is the final arbiter on this issue.

There is currently much debate among regulators about capital levels. In its recent report (the Turner Report), the FSA strongly hints at changes and an increase to these requirements, in particular for more complex firms.

The nature and extent of the FSA's relationship with a company is determined by on how much of a risk the company is deemed to present to the FSA's four statutory objectives:

- market confidence – maintaining confidence in the financial system
- public awareness – promoting public understanding of the financial system
- consumer protection – securing the appropriate degree of protection for consumers
- reduction of financial crime – reducing the extent to which businesses can be used for purposes connected with financial crime.

The framework the FSA uses to assess this risk is ARROW (Advanced Risk Responsive Operating frameWork). This involves the regulator:

- establishing a 'close and continuous' relationship (periodic meetings) with management and
- undertaking regular (currently a 1-3 year cycle) on-site supervisory visits to understand a business's risks and how they are managed.

Under the FSMA, the FSA has authority to take enforcement action against regulated firms for breaches of the FSMA and FSA rules. A range of enforcement actions is available to the FSA. It may, among other things, withdraw a firm's authorisation; discipline firms and individuals; apply to the courts for injunctions and restitution orders; and bring prosecutions for various offences.

The FSA places great emphasis on the importance of corporate governance, systems and controls. It focuses in particular on the effectiveness of companies' arrangements and the responsibility of senior management for oversight of their businesses. The FSA's move to 'outcomes-focused' regulation has meant that it is no longer possible for companies to rely on prescriptive rules; instead, they must demonstrate that they are achieving the correct outcomes. Ultimately, responsibility for this falls to senior management. Not surprisingly, given the recent market turmoil, there has been an increased number of FSA enforcement cases against senior management as a result of failings relating to corporate governance, systems and controls.

Senior management must ensure that their businesses have sound compliance risk management frameworks. These should be flexible enough to allow business growth and changes in regulation, and be proportionate to the nature, scale and complexity of those businesses. Compliance risk management frameworks should meet certain FSA monitoring requirements – eg, in relation to a firm's major exposures, liquidity and capital position.

Upon being authorised by the FSA, companies are required to comply with certain ongoing reporting requirements, the frequency and nature of which are set out in the Supervision (SUP) section of the *FSA Handbook*. These requirements cover such areas as transaction reporting, compliance reports and financial reports, and vary according to the nature of the company's business. UK banks are also required to submit Prudential reports to the Bank of England. It is essential to have systems in place to ensure that these reports are accurate, complete and submitted in a timely manner.

What other factors impact my 'doing business in the UK'?

- Customs and import duty planning
- Transfer pricing
- Grants
- Intellectual property
- Research and development

Severn Bridge, England/Wales

Customs and import duty planning

After establishing a business in the UK, you may import goods into the UK that will be subject to import duties and import VAT. The rules relating to this area are complex, so it is important to seek advice before the imports begin.

Transfer pricing

UK tax legislation prevents the avoidance of corporation tax by pricing goods at an artificial level in order to achieve profits in tax havens or in countries with lower rates of taxation. Accordingly, transactions (including the giving of loans) between 'associated persons' (namely, persons who are under common control or who control one another) are treated as transactions taking place at 'market value'. Since 2004, transactions between UK companies are also caught by the transfer pricing legislation.

Examples of intra-group supplies and services caught by transfer pricing include head office services, intra-group loans, free use of intangible property, etc.

Transfer pricing rules do not apply to small or medium-sized groups, whether UK-to-UK or cross-border transactions, unless:

- an enterprise elects irrevocably for them to apply
- there are transactions with a resident of a non-qualifying territory.

Grants

Various financial incentives and other forms of support can be obtained by businesses wishing to establish or develop operations in the UK. The availability and potential level of grant support is influenced by the following factors:

- geographical location within the UK
- the number and quality of jobs created or safeguarded
- the need for assistance
- the size of the company to be assisted.

Incentives are available for both manufacturing and service sector companies.

Some of these incentives are targeted specifically at SMEs (small and medium-sized enterprises). Broadly, an SME is a company that has:

- less than 250 employees and
- not more than 25% of its share capital is owned by non-SMEs

and either:

- a turnover of less than €40m or
- a balance sheet total of less than €27m.

Further information on UK grant incentives has been provided at Appendix B.

Intellectual property

You should take steps to protect your company's (and, where necessary, the rest of the group's) intellectual property, especially as those rights that require registration (eg, patents and trade marks) are territorial in nature and therefore require active steps to ensure protection in the UK. You may, for example, wish to register trade marks to protect your company's or group's corporate name, trading style or product/service brands. This can be done through a UK-only or pan-European trade mark registration procedure.

In the UK, intellectual property rights (IPRs) are increasingly regarded as a company's most valuable assets. This means that effective protection and enforcement of IPRs is of crucial importance, as is ensuring that third parties' IPRs will not be infringed.

Accordingly, you should also ensure that your business operations do not infringe the IPRs of other businesses. This can to a considerable extent be achieved by conducting searches of the relevant intellectual property registers.

In the UK, IPRs are protected by a complex set of laws derived from English common law as well as UK legislation and European legislation. The most common rights to consider are:

- patents
- registered trade marks
- rights in passing off (common law rights for protecting an unregistered trade mark)
- copyright and associated rights
- registered and unregistered designs
- database rights
- confidential information, trade secrets, know-how (strictly speaking, these are not IPRs but are often treated as such).

There are other types of rights. For example, there are rights to protect plant varieties and semi-conductor topographies.

Some of these IPRs (including patents, registered trade marks and registered designs) require registration in order for a right to arise. Other rights (such as those relating to copyright, passing off and unregistered design rights) arise automatically.

In many cases – but not all – IPRs developed by an employee will be owned by the employer. In situations where IPRs are created by someone outside of the organisation (through the use of outside consultants, for example), you should protect your right to own those IPRs through a contract, as the rights many not vest automatically in the company.

You should seek expert legal advice in order to:

- identify your IPRs
- avoid infringing the IPRs of others
- secure protection where active steps are required
- where necessary, approach any third parties who you think may be infringing your IPRs.

Patents

Patents are monopoly rights that protect technical inventions that are capable of industrial application. They are capable of protecting both products and processes. Patent registration provides a powerful monopoly but registration and enforcement can be both complex and expensive.

You can apply for a patent in the UK through the UK Intellectual Property Office (UKIPO) or the European Patent Office (EPO). A European patent (EP) is a collection of national patents registered by means of a single application that designates a number of European states. It offers the convenience of a single search and examination, but does involve some national formalities as well, such as filing translations. An EP differs from the UK process in that there is a central opposition procedure that allows third parties to oppose the patent during the nine months following the grant. In contrast, for UK applications, there is no such opposition, although third parties are allowed to file observations during the final examination stage.

It is also possible to enter either system by means of an international application under the Patent Co-operation Treaty (PCT).

The patent application process can be complex and there are a number of filing options depending on where the patent needs to be protected, available budgets, where the invention originates as well as other legal, commercial and confidentiality considerations. Professional advice is recommended – prior to any disclosure of the invention other than by way of a written confidentiality agreement.

Priority

You can apply for a patent in the UK or through the EPO by claiming priority from another foreign filing.

Priority is based on the first application for the same invention made anywhere in the world. If you do apply for a patent designating the UK within the 12-month period, then, for the purposes of assessing novelty of the invention, the priority date will be deemed to be the date on which the first application was made.

You will lose the right to be granted patent protection in the UK or anywhere else in Europe if you fail to make an application designating the UK (either directly or through the EPO or under an international PCT application) within 12 months of making an application for a patent in any country in the world.

Revocation

Even after grant, a patent can be vulnerable – it may be revoked if its validity is challenged at any time by a third party.

For a patent to be valid (and, indeed, for it to be granted in the first place), an invention must, on the priority date, be:

- novel (not 'anticipated by the prior art')
- inventive (not 'obvious to a person skilled in the art')
- capable of industrial application
- not excluded from patentability (schemes, rules or methods for performing mental acts, playing games or doing business as well as computer programs are excluded).

Questions of validity are addressed to some extent during the patent examination stage. However, third parties may apply for revocation after grant or counter-claim invalidity in an infringement action. Validity is examined thoroughly by the courts and patents are regularly revoked as a result. Applications for revocation and declarations of non-infringement may be brought whether or not there are court proceedings in progress.

Infringement of patents

Unless the patentee's consent has been obtained, a patent can be infringed in the UK by a third party:

- making, disposing of, offering to dispose of, using, importing or keeping a patented product or a product obtained directly by means of a patented process
- using or offering for use in the UK a patented process (knowing that use without consent would be an infringement, or where it is obvious that this would be the case)
- disposing of, offering to dispose of, importing or keeping any product obtained directly by means of a patented process or
- supplying or offering to supply in the UK with any of the means relating to an essential element of the patented invention for putting the invention into effect. (In order to infringe, the supplier must also know, or have reason to believe, that such means are suitable for putting or are intended to put the patented invention into effect in the UK.)

The acts of infringement are broad and, on the whole, do not necessarily require knowledge of the patent.

Patent actions

Patent-related legal actions are heard by specialist judges who sit without a jury in specialist patents courts.

Patent litigation in the UK is relatively expensive. This is because of the often technical subject matter and the resulting highly complex nature of the law. Infringement proceedings will often involve counter-claims for invalidity that require a thorough examination of novelty and inventive step. Since it is almost certain that an infringer will counter-claim in this way, substantive and detailed examination of validity is usual in any court action.

Remedies for a proprietor include:

- a temporary or permanent injunction
- delivery up or destruction of goods
- the award of damages or an account of the infringer's profits
- awards of legal costs.

Trade marks

A company's:

- trading name
- product/service brands as well as associated strap lines
- logos
- other aspects of get-up or brand image

can be protected as registered trade marks. A wide variety of marks can be registered: a word, design, shape, colour, smell or sound – so long as it can be described graphically.

Logos may also have copyright protection if they meet the necessary criteria – see copyright section below.

You may still have some rights in relation to your brand, even if it is not registered as a trade mark – see paragraph on passing off below.

Nonetheless, registration is still advisable, because it confers a statutory monopoly in the use of that trade mark in relation to the goods or services for which it is registered and similar types of goods and services. As a result, an action for infringement of a registered trade mark is much simpler than a passing off action.

Registration

There are three ways to obtain a registered trade mark that covers the UK. You can apply for:

- a UK registered trade mark at the UK Intellectual Property Office
- a European Community trade mark at the Office of Harmonisation for the Internal Market (OHIM) that covers all EU countries or
- an international mark under the Madrid Protocol. (Under this system, a single central application can result in multiple separate national trade mark registrations that are treated independently but administered centrally.)

Trade marks are registered in relation to specified good and services. One application can be used to cover multiple classes of goods and services at the same time.

A trade mark cannot be registered unless it can be represented graphically. Moreover, a trade mark cannot be registered if it is not sufficiently distinctive or if it is merely descriptive of the goods or services to which it is being applied.

After an application is made to the relevant registry, it will be examined to ensure that is satisfies the above criteria. If the examiner does not raise an objection, it will be advertised in an official journal. Following advertisement, third parties have a period of three months in which to oppose the trade mark application (eg, on the basis that it is too similar to an existing registration owned by the relevant third party).

Once registered, a trademark can be revoked (upon application by a third party), if it remains unused by the proprietor (or the proprietor's licensee) for a continuous period of five years or if a third party argues that it is invalid and should not have been granted.

If you are the proprietor of a registered trade mark (or trade mark application), you should keep an eye on the official journals so you can oppose applications for trade marks that may be confusingly similar to your own.

What constitutes an infringement?

An infringement occurs when a third party without consent uses in the course of trade:

- an identical mark on identical goods or services to those registered
- an identical mark on similar goods or services – and there is a likelihood that the public will be confused or
- a similar mark on identical or similar goods and services to those registered – and there is a likelihood that the public will be confused.

Further, a trade mark that has a reputation in the UK is infringed if a third party, without due cause, uses an identical or similar mark in relation to any goods or services (even if dissimilar to those covered by the registered mark), and this takes advantage of, or is detrimental to, the character or repute of the registered trade mark.

Examples of acts of infringement include:

- using the mark on goods and packaging

- offering goods for sale under the mark
- supplying services under the mark
- importing or exporting goods under the mark
- using the mark on business papers
- using the mark in advertising
- using the mark as part of a corporate or trading name
- using the mark on a website
- using the mark orally, for example, in a radio or TV advertisement.

The remedies for infringement of a trade mark are similar to those for patent infringement.

Comparative advertising

While unlicensed use of another person's trade mark is generally not allowed, a person may use a competitor's trade mark in an advertisement provided such use:

- is 'in accordance with honest practices in industrial or commercial matters' and
- does not take 'unfair advantage of, or be detrimental to, the distinctive character or repute of the registered trade mark'.

The UK courts have taken a view that, unless an advertisement is significantly misleading, it should be allowed.

Passing off

If you have not registered a mark, you may be able to enforce your common law rights through a "passing off" action.

In order to succeed in a passing off action, you will need to prove:

- you have goodwill or a reputation in the name, logo or 'get-up' in question such that members of the public associate the mark with your goods and/or services
- there has been a misrepresentation by that third party leading or likely to lead members of the public to believe that the third party's goods/services and goods/services of your business are the same
- you have suffered or are likely to suffer damage (financial loss) as a result of the misrepresentation.

Passing off actions are more complex – and considerably more expensive – than actions for registered trade mark infringement.

Use of new trade marks

Before launching a new branded product or service, or commencing use of a company or trading name, it is prudent to take steps to ensure that the trading names or logos you wish to use do not infringe anyone else's trade mark or similar rights. It is advisable to:

- carry out searches of the relevant registers in the territories in which you want to use a brand
- conduct internet searches and other searches of business directories to identify any unregistered use of the proposed mark.

Registered and unregistered designs

Designs in the UK may be protected by a number of rights:

- European Community registered design (CRD)
- UK registered design (UKRD)
- European Community unregistered design
- UK unregistered design.

Registered designs (RDs)

The two RDs are substantively similar. Only their geographical remit is different; the CRD is a unitary right that covers the whole of the EU while the UKRD covers only the UK.

In determining whether a design may qualify for protection as an RD, the following two definitions are of critical importance:

- 'design' means: 'the appearance of the whole or a part of a product resulting from the features, in particular, the lines, contours, colours, shape, texture or materials, of the product or its ornamentation'
- 'product' means: 'any industrial or handicraft item other than a computer program and, in particular, includes packaging, get-up, graphic symbols, typographic typefaces and parts intended to be assembled into a complex product'.

Essentially, registered design rights protect the outward appearance of the whole or a part of a product.

In addition, the design (as defined) must:

- be new (ie, not identical or substantially similar to another design publicly disclosed prior to the application date)
- have individual character (ie, produce a different overall impression from other designs) and
- not be solely dictated by the technical function of the product.

RDs last for an initial period of five years. They can be renewed for successive periods of five years up to a maximum of 25 years.

Infringement

Subject to a few exceptions, infringement of an RD occurs if a third party, without the consent of the proprietor for commercial purposes, uses the design or any design that does not produce on the informed user a different overall impression. The term 'use' includes:

- making, offering, putting on the market, importing, exporting or using a product in which the design is incorporated or to which it is applied and
- stocking such a product for those purposes.

Community unregistered design (CUD)

Companies that create numerous new designs on a frequent basis may consider the registration of each design to be inappropriate. In such instances, companies may wish to rely on the CUD.

To qualify for protection as a CUD, a design must meet the specifications set out above for an RD.

The advantage of the CUD is that it arises automatically – there is no process for registration. However, a CUD only provides short-term protection: the right lasts for three years from the date the design was first made available to the public. Furthermore, the CUD enables the owner of the right to prevent a third party from using the design only if such use results from copying.

UK unregistered designs (UKUDs)

A UKUD arises automatically in respect of an 'original design' that comprises 'any aspect of the shape or configuration (whether internal or external) of the whole or part of an article'. However, it does not subsist in:

- a method or principle of construction (which would be covered by patent law)
- the aspects of a design of an article that:
  - 'enable the article to be connected to, or placed in, around or against, another article so that either article may perform its function' (the so-called 'must fit' exception) or
  - 'are dependent upon the appearance of another article of which the article is intended by the designer to form an integral part' (the so-called 'must match' exception)
- surface decoration.

It is significantly different from other types of design right in that it does not require any kind of aesthetic appeal on the part of the viewer. Indeed, the UKUD can even protect designs that the human eye cannot see (such as semiconductor topographies).

Essentially, the purpose of the right is to give relatively short-term, informal protection to technical designs.

UKUDs expire 15 years after the end of the calendar year in which:

- the design is first recorded in a design document or
- an article is first made to the design

– whichever is the sooner.

Alternatively, if an article made to the design is made available for sale or hire anywhere in the world within five years of that calendar year, the right will expire 10 years after the end of the calendar year in which such sale or hire first occurred.

Infringement

A third party infringes a UKUD if, without the consent of the proprietor, it:

- reproduces the design for commercial purposes either directly or indirectly so as to produce articles that are exactly or substantially to that design or makes a design document recording the design for the purpose of enabling such articles to be made (primary infringement) or
- knows, or has reason to believe, that it is dealing with an infringing article (secondary infringement).

For the purposes of secondary infringement, 'dealing' means:

- importing into the UK for commercial purposes
- possessing for commercial purposes
- selling, letting for hire or offering or exposing for sale or hire, in the course of a business.

Copyright

Copyright prevents third parties from copying or otherwise exploiting a copyright work without the permission of the owner. In the UK, it arises automatically on the creation of a work (although literary, dramatic and musical works must be recorded, in writing or otherwise). Registration of the right is not required.

Copyright protects the following types of work:

- original literary, dramatic, musical or artistic works
- sound recordings, films or broadcast
- the typographical arrangements of published editions.

Computer programs are protected by literary copyright. Databases may attract copyright protection, but are more likely to be protected by the 'database right', which prevents third parties from extracting or re-using the contents of a database without the consent of the owner.

Overseas companies that have copyright protection in their home countries are likely to find that their copyright is also recognised in the UK under one of the many copyright conventions in existence, which should not require any additional steps to protect the rights in the UK.

Research and development

Relief for expenditure of a revenue nature on research and development that is related to the company's trade and is undertaken by the company or on its behalf is wholly allowable as a deduction. In certain circumstances, enhanced relief is available.

Expenditure of a capital nature on research and development related to the company's trade is also wholly allowable as a deduction (ie, 100% allowances are available). This covers capital expenditure on the provision of laboratories and research equipment. However, no allowance is available for expenditure on land. If any proceeds are received from the disposal of the capital assets, the receipt is taxed as a trading receipt.

R&D relief: small and medium-sized enterprises

Certain companies incurring research and development expenditure of a specific nature on or after 1 April 2000 are entitled to claim R&D tax relief.

A standalone company (or the group where the UK company is part of a group) must be a small or medium-sized enterprise, as defined by the EU. Until 31 July 2008, the company (together with any company of which it owns 25% or more) should have had:

- fewer than 250 employees and
- either:
  - an annual turnover not exceeding €50m or
  - an annual balance sheet total not exceeding €43m.

From 1 August 2008, these limits doubled.

The company must have spent at least £10,000 on qualifying research and development expenditure in the accounting period, the limit being scaled down for short accounting periods. Qualifying research and development expenditure is revenue expenditure which is allowable on:

- staff costs
- software or consumable items.

Consumable or transformable material includes fuel, power and water. Where the expenditure is only partly employed directly in relevant R&D, a reasonable apportionment is acceptable; generally, headcount is used. Expenditure on software or consumable items employed in the provision of such services as secretarial work or administration is not to be treated as expenditure directly related to qualifying R&D.

Qualifying expenditure on externally provided workers

If the workers are supplied by an unconnected company, 65% of the payments made in respect of them will be qualifying expenditure.

The research and development may be undertaken by the company, or directly on its behalf. Any intellectual property resulting must belong to the company. The R&D must be related to the company's trade, or to the medical welfare of workers in that trade. Expenditure for which state aid is received is excluded.

Staff costs include:

- salaries and benefits
- secondary class 1 national insurance
- pension contributions in respect of workers employed in research and development.

A straight apportionment of staff costs will be used when employees or directors directly involved in R&D do not spend all their time on R&D.

Costs of support staff, such as secretaries, are not included.

Enhanced R&D tax relief is given by increasing the deduction for qualifying research and development from a 100% deduction to 150% deduction.

R&D tax credits

Where a company has a 'surrenderable loss', it may claim an R&D tax credit. Generally, a surrenderable loss arises where the company incurs a trading loss.

The surrenderable loss is the lower of:

- the unrelieved trading loss or
- 175% of the qualifying research and development expenditure (150% before 1 April 2008).

The R&D tax credit is equal to the lower of:

- 14% of the surrenderable loss (16% before 1 April 2008)
- the PAYE and NICs due for tax months ending in the accounting period. (Statutory sick, maternity, paternity and adoption pay are ignored.)

Where the R&D tax credit is claimed, the trading loss carried forward is reduced by the corresponding amount.

The R&D tax credit will be paid to the company by HMRC or may be set against any corporation tax liabilities due.

R&D relief: large companies

For a large company, the relief given is 130% (125% for periods ending before 1 April 2008) of the qualifying costs (not 150% as applies for R&D tax relief for small and medium-sized enterprises).

Relief is given to large companies if they have spent at least £10,000. This limit is reduced for short accounting periods.

Qualifying R&D expenditure is:

- expenditure on staffing costs, software and consumable items, and expenditure on externally provided staff in respect of relevant research and development carried out by the company on its own behalf or subcontracted to it by a large company, or by a person who is not trading and taxable under Schedule D Case 1
- expenditure on relevant research and development sub-contracted by the company to a research organisation, university, etc, to an individual or to a partnership of individuals or
- contributions to independent research and development carried out by a research organisation, university, etc, by an individual or by a partnership of individuals, provided the research and development expenditure is relevant to the company's activities.

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How do I acquire a business in the UK?

- Acquiring a UK public company
- Acquiring a private company or business

National Gallery, Trafalgar Square, London

General overview

One of the ways in which overseas investors can access UK markets is by acquiring a business that already operates in those markets. While there are hurdles to be cleared, the process is not unduly difficult and appropriately experienced professional advisers will be able to guide you through it.

There are relatively few restrictions as to who may acquire or operate a UK company, whether public or private. In general, legitimate foreign investors should be able to make acquisitions without legal impediment.

There are various legal limitations relating to the public interest and to the promotion of competition within industry sectors that may apply to specific acquisitions. These are not discussed further here, so you should ask your professional advisers to consider and advise on their applicability.

This section deals with the process for acquiring shares in a public company, for acquiring shares in a private company, and for acquiring the assets and liabilities of a business without acquiring the shares of the company that owns them.

Acquiring a UK public company

Overview

In the UK, a listed company will in almost all cases be a public company. However, not all public companies (PLCs) are listed. The rules relating to the takeover of public companies apply whether the company is listed or not.

Acquisitions of public companies (listed and unlisted) are governed by the City Code on Takeovers and Mergers, commonly referred to as the Takeover Code or simply the Code. However, the Takeover Panel (which administers the Takeover Code) will in practice often permit derogations from some or all of the Code for acquisitions of unlisted public companies, depending on the circumstances. Your advisers will be able to engage with the Takeover Panel in this area if appropriate.

The takeover process is led by the bidder, who should seek effective advice from suitably experienced lawyers and from a bank or broker who will advise on the financial aspects of the bid. While offers were traditionally made in the UK by investment banks on behalf of a bidder (or 'offeror'), this is no longer market practice and the bidder makes the offer directly.

The Takeover Code is designed to ensure fairness between shareholders, who are given certain rights and sufficient time to decide on whether a takeover should proceed. There are six 'General Principles', derived from European law, that underpin the Takeover Code and govern its interpretation. These relate to:

- equality of treatment of shareholders
- adequacy of information
- directors' duties
- maintenance of the integrity of markets
- the ability of bidders to fulfil any bid they might make and
- minimising disruption to the target company.

Breaches of the Takeover Code may attract sanctions, which the Takeover Panel has statutory power to enforce.

If the target company's board of directors chooses to recommend a takeover bid to the shareholders, the bid is known as a 'recommended bid'. If the board declines to recommend a takeover bid, the bid is known as a 'hostile bid'. In most cases, the shareholders will follow the board's

recommendation. Consequently, an offeror will usually seek to proceed by way of a recommended bid, by obtaining the board's approval of the terms of the offer in advance.

It is very common practice to acquire a significant stake in the target company before beginning the formal offer process. However, you should take care not to exceed the thresholds triggering a mandatory offer until:

- it is your firm intention to make an offer and
- you are certain that you have in place the resources to enable you to satisfy the offer in full.

As well as direct equity interests, economic interests in target shares held via contracts for differences (derivatives) are taken into account when looking at the thresholds.

Summary of some key rules of the Takeover Code

- A person who acquires (together with others acting in concert with him, and whether over a series of transactions or otherwise) interests in shares carrying 30% of the voting rights of a company, or who holds between 30% and 50% of such shares, must make an offer for the remaining shares in the company
- A person making an offer must be unconditionally able to implement the offer in full (and the offeror's financial adviser has responsibilities in this area)
- If, during the offer period for a company, the offeror (or any person acting in concert with him) acquires shares for cash, he must make an equivalent cash offer (or cash alternative) available to all other shareholders
- An offer must be on no less favourable terms than the best terms on which any shares have been acquired in the three-month period prior to the offer being made, or during the offer period
- An offer must be open for at least 21 days following the date on which the offer document is posted and, if the offer is revised, it must be open for a further 14 days from the date on which the revised offer document is posted
- Shareholders must be given sufficient information to enable them to reach a decision
- The offeree company must appoint a competent independent adviser whose views on the offer must be made known to all shareholders.

Takeover timetable

The Takeover Code imposes a strict timetable on a takeover bid. This timetable not only seeks to give shareholders sufficient time to consider the bid, but also looks to limit the period during which the offeree company is distracted by the bid.

The timetable for a recommended bid is summarised in the table below:

Before announcing offer	Appoint advisers. Approach the board of the target company for recommendation. Secrecy prior to 'A Day' is strictly required and if this appears to have been breached, an earlier announcement may be required.
'A Day'	The date on which the announcement of the offer is made, which starts the bid process.
'D Day' ('A Day' plus 28 days)	The offer document must be posted no more than 28 days after the bid announcement. In practice, this tends to be done well in advance of this deadline.
'D Day' + 14 days	The last day on which the target company's board must advise shareholders of its views on the offer, by means of a circular to shareholders.
'D Day' + 21 days	The earliest date the offer becomes unconditional as to acceptances.
'D Day' + 35 days	The earliest date the offer can close.
'D Day' + 46 days	The last day for posting a revision of the offer.
'D Day' + 60 days	The last day on which the offer can become unconditional as to acceptances. If the offer does not become unconditional by this date, it lapses. The Takeover Panel can extend this deadline in certain circumstances, including where a competing bid has been announced.

The consideration for the shares must be settled no later than 14 days after the final condition to the offer is satisfied, which may not be later than ‘D Day’ + 95 days but is usually considerably earlier than this.

‘Squeeze out rights’

If a minority of the target company’s shareholders have not accepted the offer, it may be possible for the bidder to compel the minority shareholders to sell their shares to him. This will apply if the bidder:

- has successfully acquired at least 90% of the shares to which the bid applied and
- now holds shares conferring at least 90% of the voting rights in the target company.

If these conditions are satisfied, the bidder must exercise its right to acquire the remaining shares within three months of the last date for acceptance of the bid.

The minority shareholders have a parallel right to require the bidder to acquire their shares.

Takeovers by way of a scheme of arrangement

It is increasingly common in the UK for recommended bids to proceed by way of a scheme of arrangement, which is a statutory process involving the law courts, and is therefore driven by a strict court timetable. Under this process, the approval of a majority of 75% of the target company’s shareholders will be sufficient to enable the scheme to proceed. The Takeover Code applies to takeovers under this process, with certain necessary modifications. There are advantages and disadvantages to this approach that your professional advisers will be able to explain in detail.

Acquiring a private company or business

Overview

The acquisition of a private company or the assets of a business is less regulated than the acquisition of a public company. There are certain regulations protecting buyers of shares from misrepresentations as well as rules on financial promotions to be considered. Otherwise, however, English law allows the parties considerable freedom to agree the terms of the acquisition in the associated contractual documentation. It is common for UK documents relating to private company/business acquisitions to exclude all rights and remedies that are not set out in the contract, save as required by law (for example, certain mandatory rules such as public policy considerations).

There are many conventions and market practices – all of which will be familiar to your advisers. For the most part, however, these have no basis in law.

There are many similarities between acquiring the shares in a private company and acquiring the assets of a business, and for this reason they are dealt with together here. However, there are also several differences:

- When you acquire a company, it is acquired together with all of its assets and all of its liabilities, including any liabilities unknown to the seller or the buyer
- When you acquire business assets, you acquire only those assets and liabilities you agree to buy – though the contract may specify that you acquire 'all the assets and liabilities of the business', which may include assets and liabilities of which you are unaware
- When you acquire a company, you take on most of its tax liabilities; when you acquire a business, most tax liabilities remain with the seller
- When you acquire shares, stamp duty will be payable at 0.5% on the total price; when you acquire the assets of a business, stamp duty will only be payable on some of its assets, though at a higher rate
- When you acquire a company, its contracts usually continue without interruption (subject to change of control wording that may appear in the underlying contracts); in most business acquisitions, contracts will remain with the seller unless they are novated

- When you acquire a company, the existing relationships with employees continue without interruption; when you acquire a business, the employees will transfer to the purchaser under the Transfer of Undertakings (Protection of Employment) Regulations ('TUPE') and any dismissals associated with the acquisition may be deemed in law to be unfair dismissals that entitle the employee to bring a claim for compensation (This is a complex area of law and legal advice will be necessary.)
- When you acquire a company, the employees will continue to enjoy any pension rights they had prior to the acquisition (and arrangements, which may be subject to governmental review, will have to be made to ensure that the company's participation in any relevant pension scheme is addressed); on a business acquisition, the TUPE rules may apply so that the employees do not retain their pension rights. (Again, this is a highly regulated area and expert advice will be essential.)

Principles of the deal

There are several fundamental questions that a buyer must consider before embarking on the deal process:

- Do you wish to acquire shares or assets?
- Do you want key management members (possibly including the seller if he is a key member of the management team) to remain with the business for a period after completion?
- How do you propose to determine the price you are willing to pay?
  - Net asset value?
  - A multiple of past year or projected profits?
  - Should the price include a contingent, deferred or variable element?
- How do you propose to pay the consideration?
  - Cash?
  - Loan notes?
  - Shares?
  - A combination of these?

- Will there be a mechanism to adjust the deal consideration after completion occurs, based on a set of completion accounts agreed between the parties?
- Is it appropriate to place some of the consideration into an escrow account to protect against claims or changes to the value of the target?
- Do you wish to restrict the seller from competing with the target for a period after completion?

Before the deal

Many private acquisitions begin with the prospective buyer, or his advisers, contacting the directors or the owners of the target company or business to discuss his proposal.

Some acquisitions begin when an owner decides to sell and initiates an auction process. This is usually managed and co-ordinated by the owner's corporate finance advisers, who will contact a range of prospective buyers with a brief information memorandum (or 'teaser') setting out important information about the target.

In an auction, several interested buyers may be invited, with their advisers, to review information placed in a data room (which is increasingly made available online), and may be asked to submit secret bids. It is common for the seller's advisers to prepare a sale and purchase contract and invite bidders to submit their formal mark-up of that document, indicating the terms on which they are prepared to engage with the seller, together with their bid. The seller will then review these bids and proposed terms and will decide which buyer has submitted the most attractive offer. Depending on the process followed by the seller, these transactions often proceed very quickly from this point onwards (the seller will typically have invested considerable time and effort in the earlier stages).

If there is no auction or data room, there are usually several distinct phases to the process:

- The seller and buyer agree the main terms of the proposed deal and sign a document summarising these terms (that is often not legally binding), and may also agree an exclusivity period and commit the buyer to confidentiality obligations (that will be binding)

- The buyer conducts due diligence on the target company or business
- The buyer arranges his finance, if necessary
- The buyer and seller negotiate and agree the contractual documentation in readiness for completion of the transaction.

Due diligence is a vital part of pre-acquisition planning. It is much better to enter into a purchase fully informed than to place reliance on the warranty and indemnity protection that may be included in the contract. Professional advisers can assist with due diligence, which normally includes several strands:

- Financial due diligence, including an examination of the statutory accounts, cash flow and profit and loss forecasts and, sometimes, a valuation or assessment of the major assets
- Legal due diligence, including a review of the business contracts, title to the assets, employment arrangements and compliance with all relevant laws and regulations
- Commercial due diligence, including an analysis of the sector in which the business operates, its prospects and major competitors.

It is absolutely essential that due diligence addresses the matter of any pension scheme in which the company or its employees participate. Changes to pensions regulation in recent years have had a significant impact on the viability of transactions. Many deals now abort because, on analysis, the target company's pension liabilities are found to be disproportionately large relative to the size of the target company or because the requirements of the Pensions Regulator are considered by the buyer to be unacceptably onerous.

Deal documentation

There are a number of legal documents that are usually prepared and negotiated for a private share or business acquisition. These include:

- a share or asset purchase agreement
- a disclosure letter
- a tax indemnity deed or covenant (for share acquisitions only)
- service agreements for senior management
- finance agreements, where the buyer is seeking external funding for the acquisition.

Other documents may also be prepared depending on the precise terms of the transaction. These may include:

- a loan note instrument, where the consideration is wholly or partly satisfied in loan notes
- an environmental indemnity where the target business is one that may have an environmental impact
- asset transfers, in a business sale where some of the assets require formal transfer, such as land and intellectual property
- consents or novations, in a business sale where some of the business contracts or assets can only be transferred subject to the consent of another party.

The purchase agreement

Although there are differences between an agreement for the sale and purchase of the shares in a private company and an agreement for the sale and purchase of the assets of a business, there are many similarities between these two types of agreement. Consequently, their key features are summarised together here.

A typical agreement comprises several distinct parts:

- the operative clauses, which deal with the sale and purchase itself and the payment of the consideration
- where completion is not to happen at the same time as the signing of the agreement, any conditions to which completion of the agreement is subject, and any other provisions dealing with the conduct of the business between signing and completion
- warranties and indemnities, by means of which the seller assumes liability for certain problems or risks in the business and agrees to pay back some of the purchase price if these risks materialise
- limitations on the application of the warranties and indemnities, which may include financial and time limitations, and may also limit claims for matters disclosed to or known by the buyer
- restrictions on the seller's future business activities, particularly where they might compete with the target business
- provisions dealing with confidentiality, announcements, and other general issues.

The warranties and indemnities, and the limitations on their application, are usually the most controversial part of the agreement and negotiating them can take a long time. The warranties usually cover such matters as the operation of the business, the ownership of the target company's assets, claims and disputes in relation to the business, and tax. They take the form of statements of fact, and the purchaser can bring a claim against the seller if any of these facts is found to be untrue.

Although there are no hard and fast rules, generally speaking, the seller's lawyers will draft the purchase agreement in an auction sale, while a buyer's lawyers will draft the purchase agreement for sales outside that context.

Disclosure letter

In almost every deal, the warranties are limited by the information provided to the buyer in a disclosure letter. This document sets out details of matters known to the seller that could constitute a breach of a warranty. By setting out these matters in the disclosure letter, the seller ensures that the buyer cannot bring a claim under the warranties in relation to them. The warranties in the purchase agreement must therefore be read alongside the qualifications set out in the disclosure letter. For example, a warranty may state the target business has no external debt, while the disclosure letter may refer to that warranty and state that, in fact, the business has a term loan facility with a specified bank amounting to a specified sum.

Tax indemnity

In an acquisition of the shares of a company, rather than a business, there will usually be a tax indemnity. This document will set out the way in which the buyer and the seller will apportion any taxes that may be due from the company. Usually, the seller will indemnify the buyer for the amount of any taxes payable by the company that relate to the period before the purchase, but no claim will be possible for taxes that relate to the period after the purchase. There are many detailed provisions that may elaborate on or deviate from this position and which will be negotiated between the parties. The tax indemnity may be a separate document or appear as a schedule to the main purchase agreement.

How do I list on a UK stock exchange?

Royal Courts of Justice, London

Listing on a UK Stock Exchange

Overview

London is probably the most influential financial centre in the world. It owes much of its continuing appeal to its cosmopolitan status, the liquidity of the London markets and the regulatory and political framework that supports those markets. Currently, there are more than 3,000 companies from over 60 countries admitted to trading in London. That number includes approximately 1,500 companies listed on the London Main Market with a total market capitalisation of approximately £2,900,000 million and approximately 1,500 companies quoted on AIM (the London market for small and emerging companies) with a market capitalisation of approximately £40 billion. In total, London hosted nearly 100 initial public offerings, or 'flotations' in 2008 with an offering value of approximately £7 billion.

Initial public offers

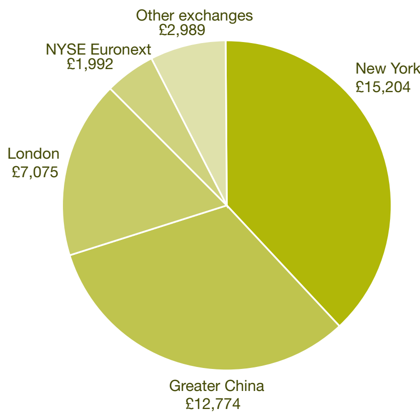
A private company may choose to raise new capital by:

- issuing or selling shares or other securities and, at the same time,
- establishing a facility for trading those shares or other securities.

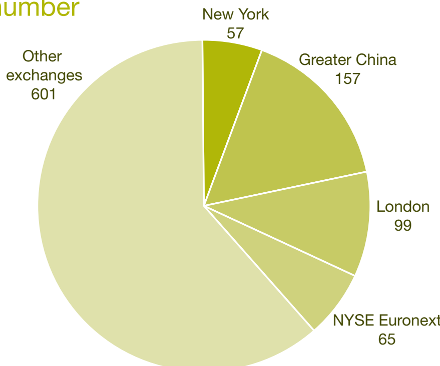
In the UK, this process is known as an initial public offer (IPO), listing, flotation or quotation.

Fig 1: 2008 IPOs by market (by value and number)

IPO's by offering value (£m)[1]



IPOs by number



1 Data has been sourced from World Federation of Exchanges (WFE).

Different types of listing

There are four principal ways that a company can seek a listing in London:

Fig 2: London listing options

Primary listing on the UKLA's Official List	Secondary listing on the UKLA's Official List	Listing of Global Depositary Receipts (GDRs) on the UKLA's Official List	Admission to trading on AIM or other 'Exchange-Regulated' markets, such as the Professional Securities Market (PSM) or the PLUS-quoted market
• The UK's 'premium brand' of listing, available to both UK and non-UK companies • A Primary listing imposes more stringent requirements and standards than other forms of London listings • Primary listed securities are eligible for admission to trading on the London Stock Exchange's Main Market	• The standards that apply to a Secondary Listing are based on the minimum standards required under EU directives • Secondary listed securities are traded on the International Bulletin Board of the London Stock Exchange • Only overseas companies that are listed overseas are eligible to apply for a Secondary Listing in London	• GDRs are negotiable certificates that represent ownership of a company's shares; they can be listed and traded independently of the underlying shares • The standards that apply to a listing of GDRs are based on the minimum standards required under EU directives • GDRs are quoted and traded in US dollars on the International Order Book of the London Stock Exchange	• These are markets that operate outside the scope of many of the provisions of the EU directives and are not 'EU-Regulated' markets • AIM is the London market for small and emerging companies; its success is built on a simplified regulatory environment designed for their needs • Securities quoted on these markets are not 'listed' securities in that they are not included on the UKLA's Official List
Official List/EU-Regulated			Exchange-Regulated

During 2008 the FSA reviewed the structure of the listing regime in the UK. As a result, it is proposing some changes to the regime to provide further clarity. These changes include the labelling of EU-regulated listings as either Premium or Standard listings. The Premium segment will be for companies complying with the super-equivalent UK Primary listing requirements (that are higher than EU minimum requirements). Secondary listings and listings of GDRs (based on the EU minimum requirements) will fall into the Standard segment.

What are the rules of the game?

The UK Listing Authority (UKLA), which is a part of the UK Financial Services Authority (FSA) maintains the Official List of UK listed securities (Official List). The FSA rules and guidance for companies listed or seeking to list on an EU-Regulated market in London are set out in three separate books:

- The Listing Rules, which focus on eligibility, the sponsor regime and certain continuing obligations
- The Prospectus Rules, which include the rules, regulations and guidance as to when a prospectus is required and its contents
- The Disclosure and Transparency Rules, which include the rules and guidance in relation to the publication and control of inside information, the disclosure of information by management and connected persons, access to information and adequate transparency of information in the UK financial markets.

What about AIM?

Since the launch of the market in 1995, AIM has emerged as the most successful market of its type in the world. It has developed rapidly in terms of the number and diversity of companies admitted to the market, as well as the range of institutional and retail investors involved.

Its success is built on a simplified regulatory environment that has been specifically designed for the needs of small and emerging companies.

AIM is not an EU-Regulated market and AIM Companies are not governed by the FSA's rules. Instead, AIM companies are governed by the AIM Rules for Companies published by the London Stock Exchange. The AIM Rules are based on the FSA Prospectus Rules and Disclosure and Transparency Rules, but are less onerous in certain areas.

Fig 3: Main differences in the admission criteria between the Official List and AIM

Official List (Main Market)	AIM
A minimum of 25% of the shares must be in public hands	No minimum number of shares must be in public hands
Normally, three years of audited accounts are required (consolidated accounts independently audited in accordance with IFRS or an equivalent standard)	No trading record required
Pre-vetting of admission documents by the UKLA	Admission documents are only pre-vetted by the UKLA if a prospectus is required
Sponsors are needed for certain transactions	A nominated adviser is required at all times
The expected aggregate market value for shares is £700,000	No minimum market capitalisation requirement save as regards cash shells, where a minimum capital raising of £3m is stipulated
Shares must be eligible for electronic settlement (including settlement in CREST)	Appropriate arrangements must be in place to enable trades in shares to be settled

What is the process?

During the offering process you will need to convince investment banks, nominated advisors, investors and stock exchange regulators that your company has a coherent strategy with well developed reasons for considering an offering. At an early stage, you should identify:

- those aspects of your company's operations that will be attractive to investors
- the reasons why an offering will benefit the business.

It is crucial that you select the right market – the one on which you will achieve maximum investor interest. Your choice could profoundly affect the amount of funds your company is able to raise and the type of investors to whom it will have access for future needs.

Refer to Fig 4 overleaf.

Fig 4: The flotation process

Key factors that weigh in favour of a flotation include:

- Raising cash/long-term capital: a successful flotation can generate substantial cash. The funds raised will enable your company to grow by reducing existing debt, increasing working and investment capital, providing funds for research and development, and allowing the diversification and expansion of its operations
- Marketability of shares: a listing provides access to a market in which shares can be easily traded, enabling shareholders to convert their investment into cash or to use existing stock as collateral to secure personal loans
- Raising the profile/reputation of your company: your company's profile will be raised both during and after the flotation process, resulting in press comment and analysis of your results, and higher public profile for your management team. Your company's standing can be enhanced with the public, investors, customers, suppliers and your employees. Commercial benefits should arise from this publicity for your company and its products or services
- Raising shareholder value through demerger of a subsidiary: the listing of a subsidiary entity forces the market to assess the value of that particular business in isolation from the rest of the group. This increased level of focus on a company can often result in a much higher value being placed on the business than when it was valued as part of the group
- Debt-free finance: equity, although initially expensive, represents debt-free financing. It does not need to be repaid, can increase your company's net worth and may permit additional borrowing on more favourable terms (because of an improved debt-to-equity ratio – 'gearing')
- Market for further capital: once you are a successful applicant for a listing, you will enjoy all the privileges of being a member of the market. Since you have already overcome all the barriers to entry, raising additional capital through further share issues should be easier
- Realising your investment: a successful flotation provides substantial personal wealth creation opportunities for the company's management, allowing them to realise a portion of their stake. It can also give family shareholders an attractive way to realise their investment in a family business.

Key factors that weigh against a flotation include:

- Loss of privacy: your company will be subjected to close public scrutiny at the time of the flotation. As a listed company, you will have to comply with the significant additional regulatory and disclosure requirements contained in the relevant Prospectus Rules, Listing Rules or AIM Rules, Disclosure and Transparency Rules, Companies Act and related regulations and Accounting Standards
- Loss of control: your existing shareholders will have their control diluted by any initial share issue on flotation and by any subsequent issues. In day-to-day matters, management may in effect have reduced control. Decisions that may previously have been made by just one or two people will now need approval by an enlarged board of directors (including non-executive directors)
- Greater focus on short-term dividend performance: investors will expect a good return on their investment in the form of dividends and capital growth. This may result in a greater emphasis on achieving short-term results rather than concentrating on overall long-term growth
- Share price volatility: downward share price movements can have an adverse impact on your business. Customers, suppliers, bankers and investors can view a decrease in share price adversely and employees may be demotivated, especially if they have an interest in the company. Managing the volatility of your share price, especially for smaller capital companies, can be extremely difficult.
- Time loss: a large amount of senior management time will be taken up with the flotation. After the flotation, you will be spending more time as well as money on the additional reporting obligations and publicity
- Flotation costs: the cost of underwriting or placing your shares is typically the largest element of the flotation costs. There are costs of professional advisers as well as other costs, some of which will be incurred regardless of whether the flotation is successful or not. Overall, the cost of going public may amount to approximately 6-8% of the funds raised from the flotation, although, on a very large flotation, these costs may be lower in percentage terms

- Ongoing costs and reporting: there will be ongoing costs in respect of more detailed reporting regulations and further publicity. A listed company is required to produce an interim report of its half-year results in addition to an annual financial statement
- Restrictions on share dealings: management may be unable to sell their shares freely because they are subject to strict rules concerning share dealing.

What are the major challenges?

Going public by listing, or 'flotation', is a major challenge for all companies. Planning and good preparation are crucial. This is not simply a question of appointing advisors but about ensuring the company is fit to be listed on a public market.

A successful public offering or flotation can not only provide the funds to satisfy the plans of a company's management team but also greatly enhance the company's prestige. However, a flotation:

- represents a considerable challenge for any company
- may not be suitable for all companies.

Consequently, a flotation demands careful thought and planning before the detailed work begins. Issues that are highlighted at this early stage can then be tackled before the offering, saving both time and money. Some of the key issues are:

Track record

- Potential investors will look at the historical record of your company's business to make an assessment of how the business might develop. They will be most encouraged by a trend over several years of rising profits and cash inflows, with good reasons for any acquisitions and disposals. If the business does not have such a history, it may still be suitable for a public offering, but the choice of markets and the range of investors may be more limited. You should, therefore, think carefully about how you will explain any problems in your track record.

Management team

- The investment community will also be interested in the reputation and experience of the senior management team. They will want to see a certain level of continuity of management. In addition, the management team must be able to survive the rigours of the offering process, while not neglecting the running of the business. Investors will also wish to see the management advised by independent and experienced non-executive directors.

Financial prospects

- The present financial position of your company should be satisfactory and its ability to keep pace with future working capital requirements should be understood. Shortfalls in working capital after the offering are likely to cause considerable adverse publicity, as well as operational problems. Any such future shortfalls can be avoided through a careful review of the business requirements and by considering the need for banking facilities before the offering.

Building the financial reporting system

- Once the offering has occurred, your company is likely to be under much greater public scrutiny than before, with demands to produce more detailed information on a regular basis. This could strain your company's present reporting systems. Weaknesses in the business reporting systems could cause public embarrassment as well as headaches for management.

Financial information

- Compliance with International Financial Reporting Standards (IFRS) is mandatory for both Main Market and AIM-listed companies. Potential investors will review your company's accounting policies, contrasting them with other public companies in your company's industry sector. A public offering provides an ideal opportunity to review accounting policies, to compare them with industry 'best practice' and to change them where necessary.

Tax aspects

- A certain amount of 'housekeeping' – transferring assets between businesses – is often undertaken prior to an offering. This may have a substantial impact on the tax position of your company. The offering could also have a significant impact on the tax position of the current owners of the business, who may, for example, crystallise substantial gains on selling a slice of their holdings or lose the tax breaks available for holdings in private companies.

Managing the timetable

- Any public offering needs careful planning and will take up significant management time. Most sponsors will require that a due diligence review be completed before the public documentation is prepared. A strong team of advisers with sufficient knowledge and experience will help the process run smoothly; they should have your company's best interests in mind and make its public offering a priority.

All these areas involve a significant amount of time and resource and need to be undertaken in addition to the day job of running the business itself. The challenge does not end once the flotation is complete. Once the company is in the public domain, it will need to fulfil its ongoing reporting requirements.

Flotation timeline

A typical timeline for the flotation period of an IPO is illustrated on the opposite page. A timetable from initial enquiry to impact day of less than six months is a challenge and an expectation of between 6-12 months is more realistic. This is dependent on the complexity of the business, the sophistication of a company's internal and external reporting and other factors around the general state of readiness. For Secondary Listings, listing of GDRs and AIM admissions, a shorter timetable may be possible.

Fig 5: Indicative flotation timeline

What about FTSE Index inclusion?

The FTSE indices are used extensively by investors world-wide. FTSE is an independent company owned by The Financial Times and the London Stock Exchange. Under FTSE's index calculation rules, companies are allocated to a single country determined by FTSE based on the company's country of incorporation, where it is listed, where its shareholders reside and other factors.

For inclusion in the FTSE UK Index series, which includes the FTSE 100, FTSE 250 and FTSE All Share indices, a company must have a Primary listing. FTSE also requires that, for inclusion in the FTSE UK Index series, an overseas company must publicly acknowledge its adherence, as far as practicable, to the principles of the UK Combined Code on Corporate Governance, Pre-emption rights to existing shareholders and the UK Takeover Code. (These principles are discussed in more detail elsewhere in this guide.)

What are the requirements for listing?

All companies seeking a listing on the Official List (whether Primary, Secondary or GDRs) must comply with certain key requirements of the Listing Rules. These relate to incorporation, validity of the company, transferability of the relevant securities, and market capitalisation. The following table provides a high-level analysis of the significant requirements and differences of the four main options for listing in London:

Fig 6: Significant requirements for listing

	Primary listing	Secondary listing	GDR	AIM
Conditions for shares/ underlying securities	Freely transferable, fully paid, free from liens and any restriction on transfer[1] Eligible for electronic settlement	Freely transferable, fully paid, free from liens and any restriction on transfer[1]	Freely transferable, fully paid, free from liens and any restriction on transfer[1] Underlying shares must also be freely transferable	Freely transferable (except where statutory restrictions apply) Eligible for electronic settlement
Shares in public hands	Not less than 25% of class of shares listed to be in public hands	Not less than 25% of class of shares listed to be in public hands	Not less than 25% of class of certificates listed to be in public hands	No requirement
Market capitalisation	Not less than £700,000	Not less than £700,000	Not less than £700,000	No minimum
Nature and duration of business activities	Must have a three-year revenue earning record for not less than 75% of the business and have controlled the majority of its assets Main activity must be an independent business	EU minimum: financial information required for three years (or such shorter period as the issuer has been in operation)	EU minimum: financial information required for three years (or such shorter period as the issuer has been in operation)	EU minimum: financial information required for three years (or such shorter period as the issuer has been in operation)
Age of audited financial information	Not less than six months old Audit opinion must be unqualified	EU minimum: not less than 15 months old Unaudited interim information also required if audited information is more than nine months old	EU minimum: not less than 15 months old Unaudited interim information also required if audited information is more than nine months old	EU minimum: not less than 15 months old Unaudited interim information also required if audited information is more than nine months old
IFRS or equivalent financial information	Required	Required	Required[2]	Required
Sponsor/Nomad regime	Required	Not required	Not required	Not required
Compliance with the UKLA's Listing Principles	Required	Not required	Not required	Not required
Index eligibility	A pre-requisite for inclusion in the FTSE UK series[3]	Ineligible for inclusion in the FTSE UK series	Ineligible for inclusion in the FTSE UK series	Eligible for inclusion in the FTSE AIM series(3)
Investor profile	Retail and professional	Retail and professional	Professional	Retail and professional
Timetable	Minimum of 4-6 months	3-6 months	3-6 months	3-6 months
Shareholder approval of significant transactions	Required for large transactions, transactions with related parties and share buybacks. A sponsor will need to be appointed to advise on such transactions	Not required	Not required	Required only for reverse takeovers

[1] The FSA may in certain circumstances relax these requirements.

[2] Local GAAP may be used for GDRs with a denomination of €50,000 or more.

[3] There are a number of additional factors that are considered by FTSE in determining index inclusion.

What is IFRS or 'equivalent' financial information?

IFRS or 'equivalent' information is required for all London flotations except high denomination GDRs. 'Equivalent' financial information can be used by overseas companies and may be prepared in US GAAP or Japanese GAAP. In addition, Canadian GAAP, South Korean GAAP, Indian GAAP and Chinese GAAP may be used by overseas companies on a temporary basis for periods commencing before 1 January 2012, by which time these GAAPs are scheduled to have converged with IFRS. It is expected that other local GAAPs will also be deemed acceptable by European securities regulators as more countries converge their local GAAPs to IFRS.

The financial information required for a listing must be presented on the basis to be applied in the company's first annual financial statements as a listed company. In the majority of cases, this requires the restatement of a company's historical financial information.

What is a sponsor?

A company seeking a Primary listing in the UK is required to appoint a sponsor. A sponsor is an advisory firm, typically an investment bank, which will advise the company on the application of the UK Listing Rules and provide key confirmations to the UKLA. The level of due diligence undertaken in connection with a Primary listing is more extensive than for a Secondary or a GDR listing in order to enable the sponsor to support its confirmations. These include confirmation on working capital, financial reporting procedures and compliance with the UKLA's Listing Principles. To act as sponsor, a firm must be accredited as such by the UKLA.

A company seeking admission to AIM is required to appoint a Nominated Advisor (Nomad). The role of the Nomad is similar to that of a sponsor.

What level of due diligence is required?

The level of due diligence undertaken for a Primary listing or for an AIM admission is more extensive than for a Secondary listing or GDR. This additional level of due diligence is market practice in the UK and supports the confirmations that the sponsor makes to the UKLA or, in the case of an AIM admission, that the Nomad makes to AIM. The reporting accountants will typically be engaged by the sponsor or Nomad to produce a number of private reports and opinions in connection with the listing or admission. The main private reports prepared by the reporting accountants are as follows:

Fig 7: Significant Reporting Accountant reporting requirements

	Primary Listing	Secondary Listing	GDR	AIM (AIM Rules)
A long-form report: a detailed report to support the disclosure of historical financial information in the prospectus or admission document	Required – by market practice	Not required – by market practice	Not required – by market practice	Required – by market practice
A working capital report on the company's cash flow projections and the company's 'working capital' statement	Required – by market practice	Not required – by market practice	Not required – by market practice	Required – by market practice
A report on the company's financial reporting procedures	Required – by market practice	Not required – by market practice	Not required – by market practice	Required – by market practice

What is the UK Combined Code on Corporate Governance?

The UK's Combined Code on Corporate Governance (Combined Code) sets out standards of good practice in relation to such issues as board composition and development, remuneration, accountability and audit, and relations with shareholders. UK-incorporated and -listed companies are required to include a statement in their annual reports detailing how they apply the principles, and comply with the provisions of the Combined Code.

Overseas companies with a Primary listing must disclose whether or not they comply with the corporate governance regime in their country of incorporation, and also disclose the significant ways in which their actual corporate governance practices differ from those set out in the Combined Code. Overseas companies with a Secondary listing or listed GDRs are not required to make any corporate governance disclosures.

During 2008 the FSA reviewed the structure of the listing regime in the UK. As a result, it is proposing that all companies with an EU-regulated listing (which includes overseas companies with a Primary or Secondary listing or listed GDRs) will be required to make a corporate governance statement in their annual report and accounts. This statement will refer to the corporate governance code applied by the company and will explain whether, and to what extent, the company complies with that code. The statement will also include a description of the main features of the company's internal control and risk management systems in relation to the financial reporting process.

Some of the main provisions of the Combined Code are set out below.

Main provisions of the UK Combined Code on Corporate Governance

- Clear division of responsibilities between the running of the board and the company's business
- Balance of executive and independent non-executive directors on the board such that no individual(s) can dominate the board's decision taking
- Formal, rigorous and transparent procedure for appointment of new directors to the board
- Information in a form and of a quality appropriate to enable the board to discharge its duties should be supplied in a timely manner
- Submission for re-election of all directors at regular intervals, subject to continued satisfactory performance
- Formal and transparent procedures for developing policy on executive remuneration and for fixing remuneration packages
- In financial reporting, a balanced and understandable assessment of the company's position and prospects should be presented by the board
- A sound system of internal control to safeguard shareholders' investments and the company's assets should be maintained.

Continuing obligations

The FSA Disclosure and Transparency Rules set out the continuing obligations for companies listed on the UKLA's Official List. These include rules on the:

- disclosure and control of inside information
- disclosure of transactions by persons discharging managerial responsibilities
- periodic reporting requirements of listed companies
- notification of transactions by major shareholders (more than 3%)
- process used for the dissemination of information to shareholders.

A summary of the key periodic financial reporting requirements for UK listed companies is set out below:

Fig 8: Periodic reporting requirements

	Primary Listing	Secondary Listing	GDR	AIM (AIM Rules)
Annual financial reports	Must be published within four months	Must be published within four months	Must be published within four months	Must be published within six months
Half-yearly reports	Must be published within two months	Must be published within two months	Not required	Must be published within three months
Interim management statements: a narrative statement giving a general description of financial position and performance	Required	Required	Not required	Not required

As stated earlier, shareholder approval is required for large transactions, transactions with related parties and share buybacks by companies with a Primary listing. Such companies are therefore required to prepare and issue a circular to shareholders in respect of such transactions.

The key challenges to listing in the UK

In our experience, some of the key challenges for those considering listing in London are:

- Planning and good preparation. For many companies there is a significant amount of work needed up front to get into shape for the flotation
- Understanding the financial track record issues, such as complex financial histories, the need to transition to IFRS and sourcing additional disclosure information
- The flotation process is very time consuming for key executives, leaving less time for them to carry out their day jobs, thereby increasing the risk of business issues not being addressed or not enough time being dedicated to the flotation
- Many flotations take longer than initially envisaged. This is often due to issues uncovered during due diligence; changing market conditions; unrealistic timetables; and the complexity of preparing the historical financial track record.

Appendices

- **Appendix A**
  Checklist for purchase of a 'new' company
- **Appendix B**
  UK grant incentives
- **Appendix C**
  UK tax datacard 2008/09

Saint Pancras Station, London

Appendix A – Checklist for purchase of a ‘new’ company

To put a new company in a position to commence business, you will require the following information:

Directors

In respect of each new director of the company:

- full name (ie, first names, surname and former name – if any) or, in the case of a corporation, its corporate name
- nationality
- residential address (or, in the case of a corporation, its registered office or principal place of business)
- business occupation
- the name of any other company incorporated in the UK of which he or she is a director or has been a director at any time during the preceding five years
- date of birth.

Each director must sign a consent to act as a director or provide his or her electronic pin details.

Secretary

- Full name
- residential address.

There is no requirement to have a secretary. If a company chooses to appoint a secretary, that person must also sign a consent to act or provide his or her electronic pin details. (The secretary is an administrative officer and does not have the same responsibilities or liabilities as a director.)

Registered office

The full postal address of the proposed registered office. The registered office determines the tax district that will deal with the company’s affairs. It must be in England or Wales (or Scotland or Northern Ireland, depending on where the company is incorporated).

Share capital

The amount of the authorised share capital of the company and any requirement for any special new class of shares.

Shareholders

In respect of each shareholder:

- residential address (or in the case of a corporation, its registered office or principal place of business)
- the number of shares he or she will be allotted.

Private limited companies need have only one shareholder. Public companies must have a minimum of two shareholders.

Name

The proposed name of the company.

Main objects (Memorandum of Association)

Details of the business activities to be carried on by the company.

Articles of Association

Whether any special provisions are required (eg, special rights attached to different classes of shares or pre-emption rights on allotment or transfer of shares).

Auditors

The name and address of the firm that will be appointed.

Accounting Reference Date

The date to which the company's annual accounts are to be prepared. (This would generally be the same as the date to which the parent's accounts are prepared.)

Bankers

The name and branch of the bank that will act as banker to the company and instructions as to the proposed signing arrangements (eg, names of signatories and how they will sign).

Appendix B – UK grant incentives

There is a wide range of grants available in the UK to support private sector investment.

These grants can cover capital investment, job creation/safeguarding, R&D, property development, training, energy and infrastructure investment. All grants are discretionary and businesses looking to obtain grants should not make an irrevocable commitment to an investment project prior to receiving a grant offer.

Set out below are just some examples of the available grant schemes.

Grant for Business Investment (GBI)

GBI is a national business support scheme designed to assist the development of selective areas of regions in England by supporting sustainable investment and job creation. Under this scheme expansion, rationalisation, modernisation and diversification of the investment activities of private sector businesses located in Assisted Areas can be promoted. It is delivered by BERR and the RDAs in England. Scotland and Wales have similar schemes, Regional Selective Assistance and Single Investment Fund in Wales. BERR and the devolved administrations recognise they have common guidelines on financial assistance to industry. Separate but comparable arrangements apply to Northern Ireland.

GBI and its associated schemes across the UK can support capital investment projects for investors that create new, or

safeguard threatened jobs in certain areas of the UK. GBI is paid as a capital grant. Alternatively, where a project has little capital investment but creates jobs, the grant can be paid as a jobs grant. GBI is discretionary and can be available to businesses of any size with eligible investment projects.

GBI is only available in areas of the UK that have been designated as 'Assisted Areas'. Assisted Areas in the UK are either 'Tier 1' or 'Tier 2' regions, 'Tier 3' regions in England are outside the Assisted Areas but support may be given to small and medium sized companies. The grant ceilings are set by the European Commission. For investment projects in Tier 1 areas the ceiling is 30% of eligible project costs. The ceiling in Tier 2 areas is 10-25%, depending on location. There are higher grant ceilings for small and medium sized enterprises (SMEs).

There is no fixed rate of award. The responsible authorities will seek to determine the minimum level of assistance necessary for the project to proceed. Such assistance must fall within the grant ceilings and will take into consideration a wide range of criteria.

Almost all manufacturing and service businesses (except retailing) are eligible, although the European Commission restricts assistance in certain sectors. This can vary, but currently, man-made fibre and yarn, shipbuilding and repair, iron and steel, coal and some fishery and agricultural products are all subject to restrictions.

Research and Development (R&D)

The UK Government and European Commission place a high priority in encouraging R&D and have a range of grant schemes and support measures for businesses.

Many of these schemes are to encourage collaborative R&D and can be made available to businesses of any size. Some schemes however are restricted to small and medium-sized enterprises (SMEs). On such scheme is the Grant for Research and Development managed by the RDAs in England. There are similar schemes, with variations, in Wales, Scotland, and Northern Ireland.

There are usually four main components:

- Micro projects – low-cost development programmes lasting less than one year. Up to £20,000 available to companies with fewer than 10 employees
- Research projects – involves planned research lasting 6-18 months. Up to £100,000 available to companies with fewer than 50 employees
- Development projects – involves the shaping of industrial research into a pre-production prototype. Up to £200,000 available for SMEs
- Exceptional development projects – between £250,000-£500,000 potentially available up to 35% of costs for projects which can demonstrate a significant technical advance for UK industry.

European Union Seventh Framework programme for research and technological development

The Seventh Framework programme is Europe's main funding investment for research and technological development (FP7). The total budget of FP7 amounts to some €50 billion between 2007 and 2013. FP7 is structured into four blocks:

- co-operation
- ideas
- people
- capacities.

A work programme is published annually, outlining the scientific areas for which European consortia can apply for funding. Applying for funding is only possible in response to a 'call for proposals' published by the European Commission in the official journal of the European Union. In such a call, the specific submission details are given (deadline of receipt, which scientific areas, what kind of projects, any additional eligibility criteria, etc). The application process involves competitive tendering, where only the highest-ranking proposals are invited to enter contract negotiations with the European Commission.

Within the UK, the Technology Strategy Board provides support for businesses participating in the Framework Programme and other EU research and development activities.

Appendix C – UK tax datacard 2008/09

Income tax

Bands	2008/09
£0 - £36,000	20%
Over: £36,000	40%

Notes

Dividends are taxed at 10% or 32.5%, with a non-repayable tax credit, and are treated as the top slice of total income.

Other savings income, primarily bank and building society interest, is taxed at 10% up to a limit of £2,320. This 10% rate is not available if non-savings income exceeds £2,320.

These rates do not apply to income taxable on a remittance basis (income and foreign dividends).

For 2007/08, capital gains were taxed as the top slice of income, but for 2008/09 capital gains are taxed at 18%.

There are special rules for trusts.

Personal allowances	2008/09
Personal allowance	£5,435

National insurance contributions

Class 1 employees:

Weekly earnings	Contracted in	Contracted out
First £105	Nil	Nil
On balance up to £770	11%	9.4%
Over £770	1%	1%

Class 1 employers:

Weekly earnings	Contracted in	Contracted out	
		Salary related	Money purchase
First £105	Nil	Nil	Nil
On balance up to £770	12.8% (12.8%)	9.1% (9.1%)	11.4% (11.4%)
On balance over £770	12.8%	12.8%	12.8%

Other:

Class 1A (employers only): 12.8% based on the amounts of taxable benefits.

Class 1B (employers only): 12.8% in respect of amounts in a PAYE settlement agreement and the income tax thereon.

Class 2 (flat rate for self-employed): £2.30 per week. Small earning exemption £4,825.

Class 3 (voluntary): £8.10 per week.

Class 4 (self-employed): 8% of profits between £5,435 and £40,040 per annum and 1% on profits above £40,040.

Inheritance tax

Aggregate chargeable value (nil rate band):
up to £312,000 – nil% (nil%); over £312,000 – 40%.

Reduced charge on lifetime gifts within seven years of death apply.

From 9 October 2007, a surviving spouse or civil partner may claim the unused proportion of a deceased spouse's or civil partner's nil rate band up to the current nil rate band.

Capital gains tax

Annual exemption

Individuals	£9,600
Trusts	£4,800

From 6 April 2008, net gains are taxed at 18% irrespective of the length of ownership of the asset with no distinction between business and non-business assets and regardless of other income or personal allowances.

For 2007-08 net gains were treated as the top slice of taxable income. Gains were calculated after indexation allowance (for assets held prior to April 1998) and subject to taper relief (with differing rates for business and non-business assets). Taper relief and indexation are abolished from 6 April 2008.

Entrepreneurs' relief: from 6 April 2008 the first £1m of lifetime gains on the disposal of certain assets (broadly unincorporated trading businesses and shares in trading companies where 5% or more is held) will be taxed at 10%.

Corporation tax

Financial year (from 1 April 2008 to 31 March 2009)

	£	%
Small companies' rate	0 - 300,000	21
Marginal rate	300,001 - 1,500,000	29.75
Standard rate	Over 1,500,000	28

From 1 April 2009 the small companies' rate is expected to increase to 22%, and the marginal rate will be 29.5%.

Value added tax

Standard rate	15%
Lower rate	5%
Zero rate	0%

Registration threshold (changes from 1 April 2008): taxable supplies at the end of any month exceed £67,000 in the past 12 months or will at any time exceed £67,000 in the next 30 days. Different registration thresholds apply for supplies from other EU Member States.

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