

# Options for trading in the UK

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 Shulmans<sup>LLP</sup>



## Introduction

There are a number of ways that an overseas company can establish a trading route into the UK. The most common methods, alongside the legal advantages and disadvantages of each, are explored below. In relation to the tax and accounting advantages and disadvantages separate advice should be taken. We can help you with the best way to take that advice.

## UK establishment

One route for overseas companies wishing to trade in the UK is to register a UK establishment, otherwise known as a branch. A UK establishment is not a separate legal entity, but rather the same legal entity as the overseas company from which it is derived. It is a requirement of the Overseas Companies Regulations 2009 that if an overseas company has a regular presence in the UK it needs to be registered with the Registrar of Companies.

Whether or not the overseas company has a regular presence in the UK, and therefore registration is required, is a question of physical existence in the UK. So the occasional conduct of business in or business trips by overseas personnel to the UK is not going to qualify as a UK establishment triggering registration. A place from which there is the regular conduct of business in the UK or a location identified as a place to contact the overseas company in the UK is going to amount to a UK establishment.

## Registration

Within a month of an overseas company opening a UK establishment, it must register the details of the overseas company (using Form OS IN01) and the UK establishment with the Registrar of Companies. This process carries a standard registration fee of GBP£20.00.

The submission for registration requires:

- incorporation details of the overseas company;
- the company's name (e.g. if a different trading name from its incorporated title);
- details of the directors and secretary of the overseas company; and
- details of the UK establishment (name, address, nature of business, details of authorised permanent representatives and the extent of their authority and the names and addresses of any person authorised to accept service of documents on behalf of the overseas company).

If the company is registering its first UK establishment it must also deliver to the Registrar of Companies the following documents:

- a certified copy of the overseas company's constitutional documents (for example the certificate of incorporation); and
- a copy of its latest set of accounts.

Any company which has registered its UK establishment in this way must ensure that if it closes that registered UK establishment, it gives notice of this to the Registrar, as failure to do so is an offence in the UK.

In addition to the registration requirement, the Overseas Companies Regulations 2009 also regulate various other aspects. These include the accounting requirements in relation to a UK establishment (which vary depending on the law governing the accounting requirements of the overseas company itself) and the disclosure of specific trading information both at the business premises in the UK and in various forms of communication. These Regulations also govern how contracts are executed by overseas companies.

### Advantages

- the registration process is relatively straightforward and inexpensive;
- no separate legal entity is created;
- UK establishments can be registered either using the corporate name of the overseas company or, if desired, may register under a different trading name to the corporate name of the overseas company; and
- the overseas company retains complete ownership and control of the local business and can take decisions through its own board of directors.

### Disadvantages

- after initial registration, other continuing regulatory requirements include accounting, trading information disclosure and document execution requirements;
- the overseas company remains liable for the debts and obligations of the UK establishment;
- local businesses and lenders may be more hesitant to deal with the UK establishment due to the unfamiliar structure and the fact that there may be few assets in the UK to provide as security; and
- major decisions may have to be referred to overseas management, which can be time consuming.

## Incorporating a subsidiary

An overseas company could choose to set up a UK subsidiary. This may offer the best of both worlds in the sense that the UK business is essentially ring-fenced in a separate legal vehicle, whilst remaining connected to and under the ultimate control of the overseas parent company. This approach can allow for separate branding to suit the particular market, for example, with ownership of intellectual property rights being kept distinct in the subsidiary company.

The process of setting up a UK subsidiary is also relatively simple and fast. Whilst there are different forms of private company, those which are limited by shares are the most common form of business vehicle used in the UK. Unlike a UK establishment, the subsidiary is a separate legal entity from the overseas company.

### Registration

The registration fee for incorporating a UK subsidiary company (using Form IN01) is GBP£15.00 for electronic registration or GBP£40.00 for a paper submission. The Registrar of Companies requires the same details as listed above for a UK establishment.

#### Advantages

- shareholders have no liability for the company's debts above the amount payable to the company when the shares are issued;
- a transfer of ownership is effected by the sale of shares;
- investors may be more willing to invest in a UK subsidiary given the familiar capital structure and legal framework;
- the overseas company has complete ownership and ultimate control of the subsidiary business; and
- the overseas company will have no legal liability for the subsidiary's debts and obligations (unless it agrees specifically to be liable).

#### Disadvantages

- there are disclosure requirements, including ensuring that accounts and details of directors and shareholders, as well as details of persons with significant control over the company, are filed with the Registrar of Companies;
- there is a rigid capital structure and inability to return capital to shareholders without following set procedures;
- if the overseas company has other subsidiaries, it may trigger the requirement to produce group accounts; and
- decisions must be taken by the board of the subsidiary.

## Entering into a joint venture

An alternative to an overseas company taking an independent approach, if the UK is a new market, is to enter into a strategic co-operation with another party already based in the UK. Joint ventures can be created in a variety of ways, but the most common is for the two parties to either be shareholders in a newly-formed company created as a distinct legal entity (commonly referred to as a 'corporate joint venture') or for the parties to simply enter into a contractual joint venture without creating any separate specific business vehicle. Either of these approaches can be useful for large-scale, single-purpose projects as well as ongoing business ventures with cross-border settings.

This approach is likely to take more consideration and certainly a substantial degree of negotiation to implement, which is likely to add to the timescale and up-front investment needed to enter the new market. Balancing the two parties' differing interests as well as finding the most effective form for the particular venture will take some time and discussion at the outset. This up-front time and, potentially, cost is worth investing in for a longer-term or larger-scale project though, to ensure that the parties' interests are broadly aligned and addressed at the outset to avoid any issues arising later in the venture.

### Advantages

- the local partner is likely to have greater market knowledge as well as existing contacts with customers, suppliers and lenders, making a potentially easier transition into the UK market;
- depending on a corporate or contractual approach being taken, there may be the chance to ring-fence the joint venture from the rest of the overseas company's business;
- there is an opportunity to share the risk of a new venture with another party; and
- local businesses and investors are familiar with the capital structure and legal framework.

### Disadvantages

- the overseas company must hand over a potentially significant degree of control to the local partner;
- the ownership of key assets such as intellectual property rights in the new venture are going to be split;
- there are usually substantial up-front advisory costs to set up the joint venture; and
- negotiations in relation to the mechanics of the joint venture and of certain terms such as the exit provisions can lead to a lengthy implementation process.

## Appointing an agent, distributor or franchisee

There are various other routes into the UK market which an overseas company might consider and which do not involve establishing a physical presence or new company in the ways considered above. These involve appointing a third party to act or sell products or services on the overseas company's behalf.

### Agency

Appointing an agent involves a third party being given authority to either market or offer for sale the overseas party's products or services in the UK. However, the end users remain the customers of the overseas principal or supplier which appointed that agent. The agent doesn't enter into the contract with customers themselves and usually doesn't receive the revenue coming from that customer. This ensures that contractual control of the customer relationship is retained by the overseas company.

Depending on certain criteria being met, it will commonly be the case that agency appointments in the UK are heavily regulated by laws which grant mandatory protections to agents. These can involve additional financial liabilities for a principal both during and at the end of the agency appointment which should be clearly understood before pursuing this route.

### Distribution

Alternatively, a distributor or reseller appointed by an overseas company will purchase goods outright from the supplying party and then sell direct to their own customer base or can re-sell a supplier's services directly to their own end users. The overseas company supplying those products or services does not have a direct customer contract or relationship and so relinquishes a degree of control. The upside of this is that the risk of the onward sale rests more fully with the distributor or the reseller, presenting a less risky approach for an overseas supplier into the UK as a new market.

### Franchising

Franchises are commonly a network of arrangements whereby an overseas company acting as franchisor might licence its permission to a number of separate franchisees to adopt its method and brand for pursuing business in the market. Whilst there is a good deal of up-front time and cost in developing the business format which is being licenced in a franchise system, this can often be a powerful method of achieving consistency and a strong brand in new markets.

Whilst no registration at Companies House is required of any of the agency, distribution or franchise routes to market, other regulatory issues specific to these areas, including competition law, need to be considered and may govern how restrictive the contractual obligations can be in each situation.

## Advantages

- there is no requirement to set up a physical presence in the UK or to register and set up a separate legal entity;
- there is generally no requirement to publish accounts or other corporate details;
- there is an opportunity to share the risk of exploring a new market with another party; and
- the agent, distributor or franchisee is likely to have greater market knowledge as well as existing contacts with potential customers, making a potentially easier transition into the UK market.

## Disadvantages

- the relationship will be governed by contract, which might require a good deal of negotiation before being entered into;
- the overseas company may be heavily reliant on the local knowledge of the third party being appointed; and
- European and UK legislation needs to be considered in advance and includes such issues as mandatory protections for agents, which can be costly and unfamiliar to overseas companies, and also competition laws which can affect contractual restrictions.

## Shulmans can help you

If you need help and advice about the best approach for your business to trade in the UK please contact:

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