

Setting up a business in England

a guide for overseas companies.



1. Introduction

This guide explains briefly how an overseas company can establish a presence in England. It is only intended for the general information of overseas companies and of their professional advisers and is not a substitute for taking appropriate professional advice. The United Kingdom is comprised of three separate jurisdictions, Scotland, Northern Ireland and, finally England and Wales. While these three jurisdictions have many laws in common, this guide only deals with the law in England. The Channel Islands and the Isle of Man are not part of the United Kingdom and this guide does not cover them.

2 The Appointment of an Agent or a Distributor

2.1 Introduction

If an overseas company wishes to establish a presence in the English market without setting up its own branch or subsidiary, it can do so by appointing an agent or a distributor.

2.2 The Difference Between an Agent and a Distributor

An agent solicits sales for his principal. In contrast, a distributor buys goods or services which he then sells to the customer on his own account and at prices that he sets himself. Thus someone who buys through the agent of an overseas company contracts with the overseas company itself, while someone buying from a distributor contracts with the distributor, not the overseas producer of what he is buying.

An agent will be more appropriate than a distributor where the overseas company is selling products or services that demand a direct contact between it and its customers. If, however, the goods or services require no such direct contact and the overseas manufacturer is unfamiliar with the English market, it may prefer to appoint a distributor who knows the market well and who is thus better placed to take on the risks which operating in England entail.

2.3 Commercial Agents (Council Directive) Regulations 1993

These regulations translate into English law the EC Directive 86/653/EEC on the coordination of the laws of EC member states on self-employed commercial agents. Many terms in a commercial agency agreement are implied by the regulations and cannot be excluded including, in particular, a commercial agent's right to an indemnity or compensation on termination of his agency.

The 1993 regulations apply only to agents for goods. They do not apply to agreements for agents for services, distributors or marketing agents (that is to say to agents who have power neither to negotiate nor to conclude sales or purchases on behalf of their principal).

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2.4 Competition Law Implications

An agency is less likely than a distributorship to infringe European Union or United Kingdom competition laws. This is because an agency agreement does not ordinarily fall within Article 81(1) of the Treaty establishing the European Community or the equivalent provision in the United Kingdom's Competition Act 1998. These laws apply to agreements or arrangements between undertakings. As the act of an agent is regarded as that of its principal, for competition law purposes the agent is not usually regarded as an undertaking separate from its principal unless the agent accepts financial risks in respect of the transactions negotiated for the principal or works for a number of different principals or also on his own account.

To fall within the scope of Article 81(1) of the EC Treaty or its UK equivalent an agreement must have or be capable of having a sufficiently significant effect on trade. But the competition implications of an agency or distributorship agreement cannot be viewed in isolation when it forms an integral part of a distribution network, since that network may render anti-competitive an agreement that would have been unobjectionable had it not been a component of that network.

If the agreement between them has or is capable of having a sufficiently significant effect on trade to fall within the scope of competition law, the overseas company and its agent or distributor will have to take care to ensure that their agreement enjoys the benefit of the block exemption accorded by Commission Regulation (EC) No.2790/1999 or a block exemption applicable to the relevant industry sector, such as the exemptions that apply in the automobile and insurance sectors. Normally, an agreement that enjoys an exemption at the European level will be similarly exempt under the Competition Act 1998.

Even if at its inception an agreement is not capable of having a sufficiently significant effect on trade to fall within the scope of competition law, it would be wise to ensure that it falls within a relevant block exemption. A change in the circumstances of any of the parties or of their associated undertakings, for example as the result of a takeover or a merger, can swiftly render contrary to competition law an agreement that had hitherto fallen outside the scope of that law.

2.5 Taxation of Business Profits

Tax considerations may also influence the choice between the appointment of an agent or a distributor and, in the case of an agent, on the extent of his authority to contract on behalf of the overseas principal. Such considerations may also affect what stocks of goods (if any) should be held within the UK by the overseas company, since this can influence whether an overseas company has a sufficient presence within the UK to be liable to tax there on business profits.

If an agent for the sale of goods has no authority to enter into contracts on behalf of the overseas company, it may be that it will not be considered to be trading within the UK with the consequence that it will incur no liability to UK tax on business profits from its sales here.

Whether there is a liability to tax will turn on the facts of each particular case. But if the overseas company is based in a country with a double tax treaty with UK, it will generally only be liable to UK tax on business profits if it has a permanent establishment in the UK.

3 Establishing a Local Branch

3.1 The Nature of a Branch

In English law a branch has no separate legal personality from the overseas company that sets it up. The overseas company will therefore be responsible for the debts and liabilities of its branch and any judgment against the overseas company may be enforced against the property of the branch. If an overseas company considers its English venture to be particularly risky, it may prefer to carry on the venture through a separate limited liability company rather than through a branch.

3.2 Formalities

An overseas company may normally set up business in the United Kingdom without any prior authorisation from or notification to the United Kingdom authorities except in a sector in which this would be required of a local undertaking (for example, in the case of financial services or consumer credit).

Within one month of establishing its branch here the overseas company must file with the Registrar of Companies a certified copy of its constitutive documents (together with a certified translation of them if they are not in English) as well as sundry information concerning the company and its branch including the details of persons authorised to represent the branch. The headed paper used by the branch must show the name of the company, the fact that the liability of its members is limited if it is, the place where the branch is registered and the branch's registered number. Additional obligations apply where the overseas company is not incorporated in the European Community.

Any change to the details filed with the Registrar of Companies following the opening of the branch must be notified to the Registrar within 3 weeks of its occurrence. An overseas company with a branch in the United Kingdom must in each year file a copy of the overseas company's accounts with the Registrar of Companies (accompanied by a certified translation of them if they are not in English). A copy of the accounts will also have to be supplied to the Inland Revenue.

3.3 United Kingdom Tax

Where an overseas company carries on a trade through a branch in the United Kingdom it is chargeable to United Kingdom corporation tax on the profits of that trade and on chargeable gains arising from the disposal of capital assets situated in the United Kingdom which are held for the purposes of the trade.

If the overseas company is from a country which has a double tax treaty with the United Kingdom, then the terms of that treaty will prevail over the rules just described. Many of the United Kingdom's double tax treaties provide that business profits of a non-resident company will be taxable in the United Kingdom only to the extent that the company carries on business through a permanent establishment there.

4 Incorporating a Local Subsidiary

4.1 The Choice of Vehicle

There are four types of company available to an overseas company wishing to create an English wholly owned subsidiary, namely (1) a private company limited by shares ("private limited company" or "private company"), (2) a public company limited by shares ("public limited company" or "public company"), (3) a company limited by guarantee or (4) an unlimited company. A company limited by guarantee is not commonly used for trading purposes and an unlimited company does not offer the advantage of limited liability, so no further mention is made of either in this guide.

4.2 Private Companies and Public Companies

A private company and a public company both offer the benefit of limited liability so that, in the absence of exceptional circumstances, the liability of their shareholders is limited to the amount (if any) remaining unpaid on their shares.

Private companies cannot offer their shares or debentures to the public, but have the advantage of being subject to less onerous requirements under company law than public companies. For example, a private company is not subject to the minimum capital requirements that apply to public companies and has ten months from the end of its financial year to deliver its accounts to the Registrar of Companies while public companies have only seven months to do so.

4.3 The Single Member Private Company

Formerly a company limited by shares had to have at least two members, but that requirement no longer applies to a private company. Nevertheless, even a single member private company must have at least one director and a company secretary. A company's sole director may not also be its company secretary.

4.4 Formalities

Normally, an overseas company may incorporate a wholly owned subsidiary in the United Kingdom and such subsidiary may commence trading there without any prior authorisation from or notification to the United Kingdom authorities except in a sector in

which this would be required of a wholly local undertaking.

4.5 Incorporating a Private Company

The following formalities have to be complied with in order to incorporate a private company:

4.5.1 A name which is not already in use must be chosen for the company. The name must not be offensive. Certain words are absolutely prohibited or require prior consent from the Secretary of State before they can be adopted. To reduce the risk of a trademark or a passing off claim, it is prudent to check that the proposed name will not infringe a trade mark or imply some connection with an existing business.

4.5.2 The first member or members of the company must sign its constitution, namely its memorandum of association and, unless the statutory form of articles of association is to apply without amendment, the first member or members must also sign the company's articles of association. The memorandum sets out the company's name, the country in which its registered office is to be, its objects, the fact that the liability of the members is limited and its authorised share capital. The articles set out the rules governing internal affairs of the company, such as those regarding the powers, appointment, disqualification and meetings of directors and the rights and meetings of members.

4.5.3 A signed original of the company's memorandum and, where appropriate, its articles must be filed with the Registrar of Companies accompanied by the incorporation fee (currently £20) and two prescribed forms one of which identifies the company's first directors and secretary and the address of its first registered office and the second of which is a statutory declaration that the formalities leading up to incorporation have been complied with.

If the Companies Registry is satisfied that the documents filed with them comply with company law, they will issue the company's certificate of incorporation and the company will exist from the date of that certificate.

4.6 Ongoing Formalities

Once a company is incorporated, company law requires detailed ongoing formalities to be observed of which the following are but examples.

4.6.1 Statutory Books and Registers: A company has to maintain certain statutory books and registers including, in particular, registers of members, a register of charges, a register of directors and secretaries, a register of directors' interests in the company's shares or debentures, a register of debenture holders, the company's accounting records and minute books of general and directors' meetings. In principle, these books and registers normally have to be kept at the registered office of the company.

4.6.2 Annual Return: An annual return must be filed with Companies Registry each year within 28 days of the anniversary of the date of the company's incorporation together with the required fee, which is currently £30. The annual return states, among other things, the address of the registered office, the names and addresses of the company's directors and secretary, its issued share capital and the names and addresses of its shareholders and their holdings or, changes in those shareholder details.

4.6.3 Other Filings with the Registrar: Other documents will have to be filed with Companies Registry from time to time including, for example, notice of any change in the directors or the secretary of the company or in their particulars or of any proposed change in the situation of the company's registered office. Certain members' resolutions, including in particular, special, extraordinary and elective resolutions have to be filed with the Companies Registry and where changes are made to a company's memorandum or articles, a copy of that document as amended must normally be filed with the Companies Registry.

4.6.4 Accounts: There is a statutory duty on a company to keep sufficient accounting records to show and explain the company's transactions and to disclose its financial position. The directors of a company must prepare for each financial year (which cannot be longer than 18 months) a balance sheet as at the last day of that year and a profit and loss account. Members and debenture holders are entitled to copies of the accounts without payment of a fee. The accounts must be laid before the company in general meeting and be delivered to the Registrar of Companies not later than ten months of the end of the financial year to which they relate (the time limit for a public company is seven months).

4.6.5 A company's accounts must comply with the detailed requirements as to their contents and form laid down in Companies Act 1985, but these requirements vary according to the size of the company. Furthermore, the members of a private company can pass an elective resolution to dispense altogether with the laying of accounts before the company in general meeting.

4.6.6 Annual General Meetings: A company must hold an annual general meeting in every calendar year not more than 15 months after the last such meeting except that the first annual general meeting can be held at any time within 18 months of a company's incorporation.

4.7 Elective Resolutions

A private company can dispense with the holding of annual general meetings by the passing of an elective resolution to that effect. An elective resolution must be passed unanimously by all those entitled to attend and vote at the meeting at which it is passed. The

meeting requires 21 days' notice in writing unless all the members agree to shorter notice. Among the other formalities with which a private company may dispense by passing an elective resolution are the laying of accounts and reports before the company in general meeting and the annual appointment of auditors.

4.8 Closing a Solvent Subsidiary

The simplest and cheapest way to close down a private company registered in England and Wales is for it to cease trading, to discharge all its debts and liabilities and then, having first cleared this with the Inland Revenue, to distribute any remaining surplus to its members and for its directors to apply on the prescribed form (accompanied by the appropriate fee, currently £10) to the Registrar of Companies for the company to be struck off the register of companies.

A more expensive way of closing a solvent subsidiary (since, among other things, it involves the calling and holding of shareholders' and creditors' meetings and the appointing of a liquidator) is by way of members' voluntary liquidation. This requires the majority of the company's directors to make a statutory declaration that the company is in a position to pay all its debts within 12 months.

4.9 Winding up an Insolvent Subsidiary

If the company is insolvent, it can be wound up either compulsorily by order of the court normally upon the application of an unpaid creditor or, typically, at the initiative of the directors, by creditors' voluntary liquidation. Directors of a company in financial difficulties should take early professional advice for there are circumstances in which directors or former directors of a company in insolvent liquidation could find themselves liable to contribute to its assets when it is wound up.

4.10 Taxation

A company incorporated in the UK is treated as resident there and is therefore subject to UK corporation tax on its worldwide profits, which include the total amount of income earned from all sources including capital gains but excluding dividends from other UK companies.

5 Joint Ventures

5.1 Introduction

If an overseas company wants to carry on business in England in association with one or more other companies it can choose to do so through the medium of a joint venture. The expression joint venture has no precise legal meaning and it can take a variety of forms:

5.1.1 a partnership in which the parties agree to carry on business in common with a view to profit;

5.1.2 a contractual joint venture in which the parties agree to carry on business together under the terms which do not form a partnership between them; and

5.1.3 an incorporated joint venture in which the parties agree to carry on business through a limited company, usually a private company, although if they wish they can now do so through a limited liability partnership instead since such a partnership has a separate legal personality and offers its members the benefits of limited liability.

5.2 Competition Law Implications

Before entering into a joint venture the overseas company should take advice on whether the creation of the joint venture could infringe European or United Kingdom competition law, including Article 81(1) or 82 of the EC Treaty or the equivalent provisions in the United Kingdom's Competition Act 1998.

Article 81 is discussed above in connection with agency and distribution agreements. Article 82 prohibits any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it as incompatible with the common market in so far as it may affect trade between Member States and the Competition Act 1998 prohibits such behaviour in so far as it may affect trade within the United Kingdom or any part of it.

Thought should also be given to whether the proposed joint venture might bring European or United Kingdom merger control laws into play.

5.3 Partnership

No particular formalities are required to form a partnership, it is enough that the parties have agreed to carry on business in common with a view to profit. Most partnership agreements are in writing and, although this is not necessary, it is preferable to ensure certainty over what has been agreed by the parties. If a partnership agreement is silent on a particular point, the Partnership Act 1890 will apply.

Under English law a partnership has no separate legal personality, each partner is the agent of the others and each partner has unlimited liability for the debts and obligations of the partnership incurred while he is a partner. There is joint liability with the other partners. For this reason an overseas company may wish to shield itself from such liability by incorporating a separate limited company to be a partner in a proposed partnership. Another consequence of partnership is that the partners owe each other a duty of utmost good faith, which may not always be appropriate in the context of a joint venture.

5.4 Taxation of Partnerships

The profits of a partnership are usually calculated as if the partnership was an individual and each partner's share is determined according to the interests of the partners during the period concerned. Each partner is deemed to have his own trade carried on by him alone which started when he became a partner and will end when he ceases to be a partner or, where he later continues the partnership's trade on his own or

when he discontinues that trade permanently. In consequence, partners are individually liable for tax on their own share of the profits. But where a partnership includes a company, the profits of the partnership's trade are calculated broadly speaking as if the partnership were a company and the member company's share subjected to corporation tax.

5.5 Contractual Joint Venture

If the parties to a joint venture do not wish to form a partnership, they can instead enter into a contractual joint venture on terms which exclude a partnership between them and its undesirable consequences. In English law this is done by ensuring that the contract terms do not contemplate a division of profits and losses amongst the parties, but provide instead how gross receipts are to be shared and on whom particular costs are to fall.

5.6 Incorporated Joint Venture - A Company Limited by Shares

The parties could agree to carry on business through a limited company, usually a private company, incorporated specially for the joint venture. Each party will typically be a shareholder in the limited company and, in addition to a specially drawn constitution for the limited company, there will usually be a separate shareholders' agreement spelling out in detail the rights and duties of each of the joint venturers amongst themselves and in relation to the limited company.

5.7 Incorporated Joint Venture - A Limited Liability Partnership

As a possible alternative to a limited company, the joint venturers might instead incorporate a limited liability partnership under the Limited Liability Partnership Act 2000 by filing the prescribed forms with and paying the appropriate fee to the Registrar of Companies. In this case a written agreement would usually set out in detail the relationship of the parties among themselves and in relation to the limited liability partnership.

Although called a limited liability partnership, with very few exceptions the law relating to partnerships does not apply to limited liability partnerships. In particular:

- i) the members of a limited liability partnership are not partners;
- ii) while each member of a limited liability partnership is an agent for the partnership, members are not agents of each other;
- iii) unless they agree otherwise the members of the limited liability partnership do not owe each other a duty of utmost good faith;
- iv) the members of the limited liability partnership are not responsible for its debts except to the extent to which they have agreed to contribute to them.

Although a limited liability partnership has a separate legal personality, for taxation purposes it is treated in the same way as a partnership.

5.8 Incorporated Joint Venture - European Economic Interest Grouping

Another possible, although very rarely used, alternative to a limited company as a joint venture vehicle is the European economic interest grouping. The purpose of such a vehicle is to facilitate or develop the economic activities of its members and to improve or increase the results of those activities. As it may not have the purpose of making profits in its own right, any profits which it does make being treated as the profits of its members, there will be cases in which a European economic interest grouping will not be the appropriate vehicle for a joint venture.

A European economic interest grouping has a separate legal personality. Nevertheless, although there are exceptions, a European economic interest grouping is generally treated as transparent for tax purposes as it is normally regarded as an agent for its members. Any profits of the grouping are normally chargeable in the hands of its members. In practice, this means that if it carries on a trade or profession it is treated for tax purposes in much the same way as a partnership.

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Important: The purpose of this guide is to give an overview of some of the ways in which an overseas company can establish a presence in England. No decision should be made in reliance on the contents of this guide as it is not intended to replace the need to seek expert legal and tax advice.

If you would like advice, please do not hesitate to get in touch with William Sturges & Co.

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