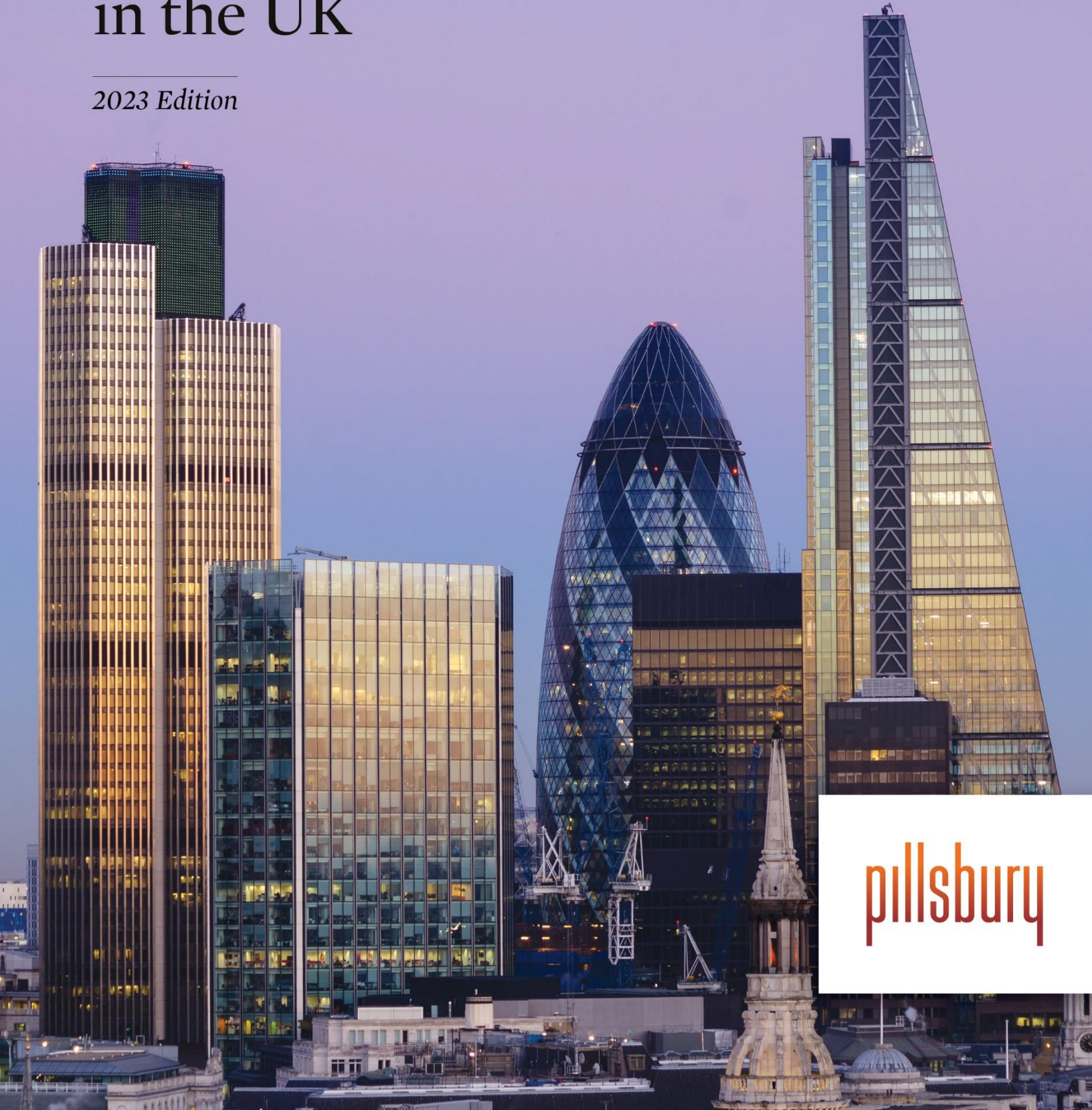


# Establishing and Managing a Business in the UK

*2023 Edition*



pillsbury

# Establishing and Managing a Business in the UK

## Foreword

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Welcome to our guide on Establishing and Managing a Business in the UK. According to the World Bank's most recent "Doing Business" report, the UK is ranked as the 8th easiest country in the world to do business, ahead of all other European countries other than Denmark, based on a variety of factors, including the ease of starting a business, accessing credit, protecting minority investors, paying taxes and enforcing contracts.

This contributes to the success of the UK as a leading investment destination for companies to develop their global businesses, with several other factors also being named:

- Strong economy: The UK has a stable and developed economy with a skilled workforce and a business-friendly environment, making it an attractive location for companies looking to establish or expand their operations.
- Legal system: The UK has a strong legal system and a transparent regulatory environment, providing companies with the necessary protections and security to conduct business.
- Access to international markets: The UK's exit from the European Union has been the impetus for new trade deals with countries around the world, providing companies with access to new markets and opportunities for growth.
- Talent pool: The UK has a highly skilled workforce and is home to many of the world's top universities, which makes it a great place for companies to find the talent they need to grow their business.
- Innovation and technology: The UK is a hub for innovation and technology, particularly in the fields of artificial intelligence, fintech and biotech, which makes it an attractive location for companies in these sectors.
- Financial hub: London is one of the most important financial centres in the world, and it is home to many of the world's leading banks and financial institutions. Companies that are looking to access global financial markets often find it beneficial to locate their headquarters in the UK.
- Business-friendly environment: The UK government has a track record of supporting business and investment through policies such as low corporate taxes, R&D tax credits and flexible immigration policies.
- Strong reputation: The UK has a long-standing reputation as a leading business and financial centre, which can help companies establish credibility and trust with customers and partners around the world.

This guide has been compiled to give an overview of the rudimentary legal aspects that should be considered by anyone thinking of establishing a business in the UK. It is aimed at businesses that may already be established in other countries and includes references to the regulatory and government bodies that shape and govern the business sector in the UK.

Each section has been prepared by the respective specialist attorney from our Pillsbury London office. Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their unsurpassed commercial awareness.

Our attorneys will endeavour to update this publication on an ongoing basis, and we recommend that our readers visit the Pillsbury website to download the most current version of this guide.

We hope this guide will encourage you to consider the opportunities that the UK offers businesses and to reach out to your appropriate Pillsbury partner for an introduction to our services.

If we can be of assistance, please contact us directly - [London Law Firm | Pillsbury Law](#)



[James Campbell](#), Partner

**Contributors:**

[James Campbell](#), Partner – Corporate & Securities

[Steven Farmer](#), Partner – Technology/Intellectual Property, Data Privacy, International Trade

[Victoria Judd](#), Counsel – Finance

[Eleanor Furlong](#), Associate – Corporate & Securities

[Amanda Solomon](#), Consultant – Tax

[Robert Davies](#), Consultant – Employment

[Sukhi Walia](#), Consultant – Real Estate

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**[London office](#)**

Tower 42, Level 21

25 Old Broad Street

London, EC2N 1HQ UK

T: +44.207.847.9500

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# 1. Introduction to Establishing and Managing a Business in the UK

The UK welcomes international investors. Other than the requirements set out in the National Security and Investment Act 2021 (“**NSI Act**”) as discussed below, there are no laws directly prohibiting foreign investment in the UK, nor are there any business requirements for UK participation in the ownership or management of any business established by foreign investors. Bank accounts may be held in pounds sterling (£) or any foreign currency.

## **National Security and Investment Act 2021**

The NSI Act came into force on 4 January 2022. Under the NSI Act, the UK government has powers to scrutinise and intervene in investments in UK assets in the interests of national security. It is intended for the act to also provide certainty and transparency to businesses and investors considering conducting business in the UK. The new rules introduced a mandatory notification regime for transactions in 17 sensitive sectors (including technology, innovation, communications, energy and defence), a voluntary notification regime for all other sectors, and a call-in mechanism under which the UK government can review transactions up to five years post-completion.

On 19 July 2022, the Department for Business Energy and Industrial Strategy (“**BEIS**”) released guidance notes produced from an analysis of the notifications received in the first six months of the NSI Act being in force. This guidance was subsequently incorporated into the official NSI Act Guidance on 9 January 2023 and covers various matters, including: (i) clarification over sectors of interest, (ii) the submission of a single notification form for multiple acquisitions, (iii) changes to guidance for the higher education and research-intensive sectors, (iv) indirect acquisitions of control, and (v) when the appointment of liquidators or administrators may constitute a notifiable event. Since coming into force, three transactions have been prohibited and the government has shown creativity in imposing conditions on other transactions, such as ringfencing sensitive materials, requiring R&D and manufacturing capabilities to stay in the UK, and mandating additional cybersecurity measures.

## **Establishing Business Operations**

A person residing outside the UK who wishes to establish a business operation in the UK must first decide the structure that such operation should take. The next section will consider some of the legal factors involved when establishing the two most common forms of UK businesses, which are:

1. UK Registered Company – Companies incorporated in the UK have a separate legal identity from its shareholder(s) or members and can be wholly owned or partly owned. There are a variety of corporate vehicles available, such as private limited companies (limited by guarantee or shares), limited partnerships, limited liability partnerships and public limited companies. Please note this publication only covers private companies limited by shares.
2. UK Establishment – An establishment is considered an extension of a non-UK company and does not have a separate legal personality. The ability to register a UK establishment does not extend to overseas partnerships or other unincorporated bodies.

Alternatively, it may be appropriate to do business “with” the UK rather than to establish a business “in” the UK. This may involve one or more of the following agreements:

- Franchise agreement to appoint a franchisee in the UK;
- Agency or distribution agreement;
- Contract of employment to appoint employees in the UK; or
- License of intellectual property rights to a UK licensee.

## 2. Factors in Making the Choice between a UK Company and a UK Establishment

UK Companies	UK Establishments
<p><b>Corporation Tax</b>            Charged on the worldwide profits of a UK company at a main rate of 19% (increasing to 25% from 1 April 2023 with a small profits rate of 19% applying from that date to most companies with profits not exceeding £50,000, and with marginal relief for companies with profits between £50,000 and £250,000).</p> <p>The calculation of taxable profits is based upon a company's trading profits and as adjusted for tax purposes.</p> <p>Trading losses made by a UK company can be set off against a company's total profits.</p> <p>A diverted profits tax charge of 25% (31% from 1 April 2023) can apply where HMRC considers that profits have been artificially diverted from the UK.</p>	<p><b>Corporation Tax</b>            Taxed in the UK only on profits which are attributable to the UK establishment.</p> <p>Rules on calculation of profits, use of losses, filing of returns and transfer pricing apply in the same way as UK companies.</p> <p>A diverted profits tax charge of 25% (31% from 1 April 2023) can apply where HMRC considers that profits have been artificially diverted from the UK.</p>
<p><b>Financing</b>            Interest paid on loan financing may be deductible from a UK company's taxable profits calculation to the extent that it does not exceed the higher of £2 million and 30% of UK taxable profits before interest, taxes, capital allowances and some other tax reliefs.</p>	<p><b>Financing</b>            Interest paid on a loan from the head office is not tax deductible unless the funds derive from a third-party lender advanced for the purposes of the UK business.</p>
<p><b>Startup Costs</b>            Startup losses can generally be carried forward and deducted from future profits for the purposes of calculating Capital Gains Tax.</p>	<p><b>Startup Costs</b>            Not applicable.</p>
<p><b>Repatriation of Profit</b>            Repatriates profits by declaring a dividend. Dividends paid will not reduce the company's taxable profits.</p> <p>No withholding tax on dividends.</p> <p>Interest or royalty payments are other ways a UK company's profits may be made available to a parent. Withholding tax may apply but may be reduced or eliminated by a double tax treaty.</p>	<p><b>Repatriation of Profit</b>            No profits tax for establishments of overseas companies, other than the corporation tax.</p>
<p><b>Filing Obligations</b>            Filings for the following matters must be provided to the Registrar of Companies and kept up to date:</p> <ul style="list-style-type: none"> <li>- Company name;</li> <li>- Directors;</li> <li>- Company secretary (if any);</li> <li>- Registered office address;</li> <li>- Allotments of shares and statement of capital;</li> <li>- Mortgage or charge on the company's property;</li> <li>- Accounting reference date;</li> </ul>	<p><b>Filing Obligations</b>            Within a month of being operational, filings must be made to register the UK establishment. Registration requirements include:</p> <ul style="list-style-type: none"> <li>- The name of the overseas company and any alternative name used in the UK;</li> <li>- The legal form, country of incorporation, registration number, governing law, company officers and accounting requirements of the overseas company;</li> <li>- The name, address, nature of business of the UK establishment, details of authorised permanent representatives and the extent of their authority, and the names and addresses of any UK resident</li> </ul>

<ul style="list-style-type: none"> <li>- Person(s) with significant control over the company; and</li> <li>- Articles of association (the document governing how the company is run)</li> </ul> <p>Any special or extraordinary shareholder resolutions (requiring a majority vote of at least 75% or 95% respectively) must also be filed with the registrar of companies within 15 days of being passed.</p> <p>A confirmation statement must be filed annually confirming that publicly held information is up to date and correct.</p> <p>Traditionally, filings were submitted as hard copies-however, most filings can now be made online through the WebFiling service or software filings. It should be noted that companies can elect to be part of the Protected Online Filings Scheme (“PROOF”) to protect against false filings. If a company is part of PROOF, paper filings for forms covered by the scheme will be rejected.</p> <p>All minutes of meetings of shareholders, directors and statutory registers must also be retained by the company (although not publicly).</p> <p>Accounting records must be kept, and annual accounts prepared. Annual accounts must also be submitted to the Registrar of Companies annually, meaning they are available for public inspection.</p>	<p>person authorised to receive documents on behalf of the overseas company; and</p> <ul style="list-style-type: none"> <li>- Certified copies of the overseas company's constitutional documents as well as its latest set of accounts. Where an overseas company already has a registered UK establishment, it does not need to resubmit these documents).</li> </ul> <p>Please note, all details (other than directors’ residential addresses) are available for public inspection.</p> <p>Establishments are not required to file a confirmation statement each year, but they must notify the Registrar of Companies of any changes to its details on the public record.</p> <p>Accounting and reporting requirements for a UK establishment depend upon the company’s filing requirements in its country or state of origin.</p>
<p><b>Liability of Shareholders and Directors</b></p> <p>Companies are recognised as having a separate legal personality from the person(s) who form the company, the directors and shareholders.</p> <p>Shareholder liability in a company limited by shares is restricted to paying in full the agreed price for their shares in that company, although there are some exceptions. Directors owe statutory and fiduciary duties to the company and can be found personally liable in certain circumstances, including but not limited to:</p> <ul style="list-style-type: none"> <li>- Failure to meet filing obligations or for filing a misleading statement;</li> <li>- Breach of director duties under the Companies Act 2006;</li> <li>- Wrongful trading in the event the company has gone insolvent (it should be noted that the wrongful trading rules were suspended due to the COVID-19 pandemic for the periods: 1 March 2020 – 30 September 2020, and 26 November 2020 – 30 June 2021);</li> <li>- Environmental breaches; and</li> <li>- Serious data protection breaches.</li> </ul>	<p><b>Liability of Shareholders and Directors</b></p> <p>The UK establishment is not a separate legal entity but rather the same legal entity as the overseas company it is derived from. The liability of directors and shareholders is therefore determined by the constitution and jurisdiction of the non-UK company personality.</p>

<p><b>Persons of Significant Control Register</b></p> <p>All companies are required to keep its register of persons with significant control (“<b>PSC Register</b>”) up to date.</p> <p>Legal entities may be noted on another company’s PSC Register if they are both relevant and registrable in relation to the company in operation. This will generally be where they are a UK company or their shares are trading on regulated markets (such as the LSE, AIM, the NYSE and NASDAQ, etc).</p>	<p><b>Persons with Significant Control Register</b></p> <p>Non-UK companies operating in the UK might be subject to similar requirements in their home country but are not subject to the requirements to hold and maintain a PSC Register.</p> <p>On 1 August 2022, the UK’s Economic Crime (Transparency and Enforcement) Act 2022 (<b>ECA 2022</b>) came into effect. The ECA 2022 requires overseas companies to declare the beneficial owners of property or land held by overseas individuals or companies. Failure to comply with this requirement may result in criminal penalties. In addition, from 5 September 2022, overseas entities must demonstrate they are registered on the register of overseas entities to register the land title at the UK Land Registry.</p>
	<p><b>Requirement to Follow UK law</b></p> <p>Although the UK Establishment will not be subject to UK company law, it will still need to ensure it complies with various other laws, including (for example) in relation to anti-bribery and anti-money laundering, data protection, modern slavery and health and safety laws.</p>



## Tax

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UK tax is levied on income and capital gains—with income tax and capital gains tax payable by individuals and corporation tax by companies. The potential exposure of both UK registered companies and UK establishments to taxation upon profits is summarised below.

Taxes that equally apply to UK companies and UK establishments:

**Capital Gains** – Tax must be paid at a company’s or establishment’s corporation tax rate on any capital gains made on the disposal of chargeable assets.

**VAT** – The standard rate of VAT in the UK is currently 20% and is chargeable on the supply of most goods and services. UK businesses register and charge VAT when the value of their chargeable supplies reaches a threshold, currently £85,000. It is possible to voluntarily register before the threshold is reached in order to reclaim VAT paid on purchases.

VAT is largely neutral for most businesses. VAT charged to customers and collected by the business is paid to HMRC. Businesses that have registered for VAT can reclaim or set off any VAT that they themselves are charged on purchases of goods and services. Where VAT incurred on purchases exceeds VAT charged on supplies, the business will receive a repayment from HMRC.

**Import Duties** – Import duties will be applied to any goods imported into the UK from countries outside the UK unless, (i) the country being imported from has a trade agreement with the UK, (ii) an exception applies, such as a relief or tariff suspension, or (iii) the goods come from developing countries covered by the Generalised Scheme of Preferences (to be replaced by the Developing Countries Trading Scheme). The rate at which duty is charged varies according to how HMRC classifies the goods concerned. Different rules may apply for Northern Ireland.

**Excise Duties** – Excise duties will be imposed on the supply of certain products (e.g. tobacco, liquor and petroleum products).

**Stamp Duty Land Tax** – This is a tax on transactions relating to the transfer of real estate or interests in real estate, details of which are set out in Chapter VI: Acquiring or Leasing Business and Residential Premises.

### 3. Formalities Required to Set Up a Company and Register a UK Establishment

There are two main types of UK limited company: private limited companies (“LTD”) and public limited companies (“PLC”).

Public limited companies may, but need not, effect a listing of their shares for trading on an exchange, such as the London Stock Exchange or AIM. There are strict regulatory standards that apply to public companies relating to matters such as disclosure of information and prohibiting certain transactions. Private limited companies are not allowed to make such listings. This guide concentrates on issues relating to UK private limited companies.

**Share Capital** – At least one share must be issued in a private limited company on its incorporation to one “subscriber.” This can be increased after incorporation as the company requires in accordance with the company’s articles of association. Shares may be denominated in any currency and different classes of shares in a company may be denominated in different currencies.

**Certificate of Incorporation** – A company is not deemed to exist until the Registrar of Companies has issued it a certificate of incorporation. The Registrar will issue this when it has received the company’s articles of association, together with certain forms and a fee.

**Memorandum of Association** – The memorandum is provided by the Registrar of Companies on incorporation and sets out the names of the subscribing shareholders and their shareholdings in the company; simply put, it is a snapshot of information about the company on incorporation. The memorandum cannot be amended and is not generally required after incorporation. A copy of the memorandum must be kept with the statutory registers of the company.

**Articles of Association** – This is the constitution of the company. It forms a contract between the company and all of the shareholders (also known as members) and details certain rights and entitlements which the company binds itself to grant its shareholders. These entitlements might include the right to vote, the right to attend general meetings and the right to a dividend if one is declared. The articles of association may be updated, or new ones adopted, with shareholder approval.

**Statutory Forms** – In order to incorporate a new company, certain documents must be completed and lodged with the Registrar of Companies. Incorporation occurs when the Registrar of Companies issues the certificate of incorporation, which usually takes about one week. Standard incorporation by online filing costs £12, and the same-day service online costs £30. Alternatively, hard copy forms can be filed at a cost of £40. Various company incorporation agents will have “off-the-shelf” companies that are already incorporated. Filings can then be made and paid for to change the company’s shareholders, directors, registered address and other corporate details when the off-the-shelf company is transferred to the new shareholder. There are also small charges for other filings the company may have to make during the course of its existence.

**Shareholder** – Any individual, firm or corporation may be appointed as a shareholder (or “member”) whether they are a resident in the UK or otherwise. Every UK company must have at least one shareholder. A register of the names, addresses and the number of shares held by each of the company’s shareholders must be maintained by the company (but not publicly, although it must be available for inspection on request). UK company law reserves certain company decisions for shareholders, e.g. amending the articles of association of the company and, in certain circumstances, removing a director. Shareholders exercise their powers by passing resolutions in general meetings or, in some circumstances, passing a written resolution signed by the requisite shareholder majority.

**Director** – The company must have one or more directors, and at least one director must be an individual. The company’s articles of association will set out details of the maximum and minimum number of directors and will also vest the power to run the company in the directors. The directors will generally make the day-to-day decisions of the company.

**Company Secretary** – Either an individual or a company may act as the company secretary, although it is not mandatory for a private company to appoint a company secretary. The secretary may also be a director of the company. If a secretary is appointed, they are responsible for the administrative requirements to which the company is subject and should therefore ideally be present in the UK.

**PSC Register** – Since 6 April 2016, UK companies have been required to keep a register of individuals or legal entities that have control over them (which is publicly available at Companies House). The PSC Register is part of a wider movement to increase transparency around

the ultimate ownership and control of companies incorporated in the UK. The UK provisions are similar to those introduced by the EU and its respective member states.

## Choice of Company Name

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The Registrar of Companies will not incorporate a new company which proposes to use the same or a materially similar name to one which is already in use by an existing company. It is necessary to search the index of names at Companies House to establish whether a desired name is available for use. A private company limited by shares must have “Ltd” or “Limited” at the end of its name.

Before selecting a name, it is also sensible to conduct a trade mark search and domain name search against the desired name.

The Registrar will not accept applications for incorporation if a company name is offensive, or suggests a criminal activity or attempts to use certain restricted words. Furthermore, if a company wishes to include a “sensitive” word in the name, it must obtain prior approval. The grant of a certificate of incorporation registering a particular name does not guarantee that there will be no issues in the future, e.g. if a company’s name is deemed to provide a misleading indication of its business activities, then the Registrar can order the company to change its name.

Although a company must always have a registered name, it may decide to trade under a different business name. The directors of a company have the power to decide on the use of a business name. The business name need not contain the word “limited”. If a different business name is used, then the company’s incorporated name must also appear on all its stationery.

After incorporation, a company can change its name (subject to the above) at any time if 75% of the shareholders approve the name change by a special resolution. A fee between £8 and £30 is payable to the Registrar, depending on the speed of the service and whether the application is made by paper or electronically. Please note that there are continuing obligations, with regards to how and when the company’s name must be displayed (see below).

## Immediate Actions of the Company upon Incorporation

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Any or all of the following may be necessary:

- The company must write up and update as appropriate its statutory books;
- Where appropriate, the company should be registered for VAT and Corporation Tax with HMRC;
- The directors must ensure that all company stationery, publicity and the company’s website bears the following information:
  - The company name and business trading name, if different to the company name;
  - Its place of registration (England and Wales, Scotland or Northern Ireland);
  - Its registered number (which is granted on incorporation);
  - The address of the registered office;
  - The names of either all the directors or none of them; and
  - The fact that the company is a limited company. This is normally shown by spelling out the company’s full name including “Limited” or “Ltd.”

If the company is to have employees working for it, the local tax inspector should be contacted to arrange for the necessary income tax and national insurance provisions to be set up for those employees.

All UK employees must be provided with a written statement of their terms and conditions of employment within two months of the commencement of their employment.

The company may wish to open a bank account and arrange for appropriate bank mandates to be established.

The company may have to change its financial year and date (known as the “accounting reference date”) to fit with the wider corporate group. Newly formed companies are automatically given an accounting reference date of the last day of the month of incorporation.

Standard terms and conditions of trade or other contracts to be used by the company which are enforceable under English law will be required.

**Continuing Obligations for UK companies** – Continuing obligations for UK companies include filing annual confirmation statements (confirming any changes to the share capital, PSCs or directors), filing annual accounts, maintaining the public PSC Register and making event-driven filings, e.g. to reflect changes in share capital, registered office details or directors.

## Formalities Required to Establish a UK Establishment

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To register a UK establishment, a detailed form must be completed and filed with the Registrar of Companies, along with a filing fee of £20 (£100 for the same-day paper filing service, though this service has been suspended since the COVID-19 pandemic). In the form, the applicant overseas company must set out the following details:

- The overseas entity’s name;
- A certified copy of the overseas company’s constitution or, if it is written in any language other than English, a certified translation thereof;
- The country of incorporation, the name of the register on which it is registered within the country of incorporation, the legal form of the overseas company and its registration number;
- The governing law and accounting requirements;
- If it is required to prepare, disclose and deliver accounts under parent/local law, a copy of the company’s latest set of accounts; and if it is not required to prepare accounts under local law, the company will be allocated an accounting reference date and must prepare and deliver signed accounts. Please note there are different accounting rules for credit or financial institutions;
- A list of officers and the secretary and certain information about each of them (including name, address, date of birth and the extent of their powers to represent the overseas company, along with a statement as to whether they may act alone or must act jointly);
- Any persons authorised to represent the company and/or, persons authorised to receive documents on behalf of the company and whether particulars have been delivered previously in respect of another UK establishment, together with the registration number;
- Regarding the UK establishment, any alternative name which it proposes to carry on business under in the UK must be provided. Please note the same restrictions apply to overseas companies registering in the UK (see “Choice of Company Name”); and
- The following particulars of the UK establishment must be stated on all business letters, order forms and websites used in the United States:
  - Where the establishment is registered;
  - Registered number of the establishment;
  - Country of incorporation, identity of registry if applicable, company number, legal form, whether liability of members is limited; and
  - The location of head office.

## 4. Finance

Once a company has been established and is operational there will generally be a need for some form of outside finance for working capital or to acquire assets. In the initial stages of a company's life, funds for activities such as these will often be provided by the shareholders in the form of equity. As the business developed bank finance often becomes necessary.

### Types of Finance

Typical forms of finance provided by banks include overdrafts and loans. Any bank that is approached for any form of finance will undertake credit checks and "know your customer" ("KYC") checks. Depending upon the amount of finance required and the financial standing of the company, a bank may require personal guarantees and security from the company's shareholders or parent company.

**Overdrafts:** These provide a short-term form of revolving finance for companies for general working capital purposes and are made available via the company's current account. An arrangement fee will usually be charged by the bank offering the overdraft, and interest on the overdraft will generally be linked to the bank's base rate (a margin in addition to the base rate will be charged by the bank). As this is short-term finance, the company will be able to borrow up to the agreed overdraft limit, and any receipts in the company's current account will reduce the overdraft outstanding automatically. At the end of the agreed overdraft period, unless the overdraft is extended, the company will be required to repay any outstanding borrowing. Typically, overdrafts are repayable on demand.

**Loans – Term and Revolving Credit Facilities:** Longer-term finance is required by companies not only to fund working capital but also so that the company can fund expansion and the acquisition of assets, such as premises, plant and machinery and other fixed assets. Banks are willing, subject to the usual credit and KYC checks, to provide loans pursuant to which an agreed amount will be lent to the companies. These loans typically have a longer repayment period than would be available under an overdraft. Loans can be made available either on a term or revolving credit basis.

Term loans, where the loan is made for a given period, may have an amortised repayment profile whereby a certain amount of the loan principal is repaid at regular intervals (monthly, quarterly, etc.), or where the whole principal amount advanced is repayable at the end of the term of the loan in one amount (a bullet repayment). These two mechanisms can also be combined to allow for a repayment profile that suits all parties. Interest at a fixed rate, which will comprise either a floating or fixed base rate and a margin (as agreed with the bank), will be paid at regular intervals (monthly, quarterly, etc.) throughout the term of the loan. The bank will charge an arrangement fee for setting up the loan for the company and may charge a commitment or ticking fee until the loan is drawn down by the company.

Revolving credit facilities provide the company with a committed finance line for a given period as the need arises for items such as working capital. The company can access funds (within the agreed amount of the loan) as and when required (subject to minimum drawdowns and drawdown periods), but, unlike a term loan, the company is able to repay the loan whenever it wants and redraw the loan again later (hence the revolving nature of the loan). Interest will accrue on the loan in the same way as a term loan but will only be charged when the revolving loan facility is being utilised; a commitment fee will be charged by the bank to the extent that the loan is available to be drawn but is not utilised. The bank will also charge an arrangement fee for setting up the loan for the company.

**More Complex Financing Solutions:** Banks can provide more complex financing solutions to companies depending on the needs of the company. For example, the company may need to import goods from overseas and thereby set up documentary letters of credit with the foreign exporter. In order to do this, the company's bank (the issuing bank) will require proof that the company has adequate funding in place to make payment to the exporter; this may be undertaken by a loan provided by the bank, which will enable the importing company to settle any liabilities which arise under the documentary letter of credit (the issuing bank will require a counter indemnity from the company in order to issue the documentary letter of credit) which can be repaid by the company upon the subsequent sale of the goods by the company.

In larger loan transactions, banks will often use market standard documentation drafted by the Loan Market Association ("LMA"). This will aid a syndicate or club of lenders and administrative mechanics in managing the loan as between such lenders, including, for instance by the appointment of an agent who will act on instructions of the lenders or a majority of the lenders.

## Common Documentary Requirements

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- **Constitutional Documents** – The lender will require copies of all constitutional documents (articles, certificates of incorporation and change of name) to check that the company is properly established and to ensure that the internal regulations of the company are complied with when the loan is made.
- **Board Minutes** – It is important from a lender’s perspective to ensure that the company has properly approved the loan in accordance with the company’s constitutional documents, to ensure that the company is empowered to enter into the loan agreement (and other related documents such as guarantees and security) and is therefore fully liable for the obligations created thereunder.
- **Parent Company Board Minutes** – These will sometimes be required (especially in the case of a loan being made to a special purpose vehicle that has been established solely for the purposes of the transaction) to ensure that the company’s parent is fully aware of the terms of the transaction and supportive of the transaction as the shareholder of the borrowing company.
- **Officers’ Certificates** – These will provide the lender with specimen signatures of the officers of the company that are signing the loan documentation, and will certify any board minutes, constitutional documents and other documents that are delivered to the lender as being complete and up to date. They may also contain certain market standard declarations to provide additional comfort to the lender.
- **Legal Opinions** – These will be required by lenders in larger value loans in order for the lender’s legal counsel to confirm that the company (and any other obligor companies) is properly empowered to enter into the loan documentation and that the loan documentation (such as the loan agreement and any guarantees and security) is legally binding and enforceable. Other matters such as registrations, filings and tax may also be covered by legal opinions, giving the lender confirmation of the legal position regarding the status of the loan and reducing the legal risk.
- **Financial Statements** – These will be required by the lenders prior to the start of the loan facility (where historic audited profit and loss accounts, balance sheets, etc. will be required) and throughout the term of the loan (these may include audited accounts and monthly, quarterly and semi-annual financial statements and management accounts). Forming the basis of the credit analysis undertaken by the bank to make the loan available to the company may prove a vital tool in the monitoring of the company’s financial performance both on a historic basis and looking forward. During the term of the loan, a compliance certificate may also be required, by which the directors of the company will certify compliance with any financial covenants set by the lenders.
- **KYC** – In order to combat fraud and money laundering issues, all lenders are required to seek information on the owners of the company with whom they are seeking to do business.

## Security and Guarantees

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**Guarantees:** Guarantees are required by lenders to support overdrafts and loans which they provide, particularly where the company has a limited history, assets or track record, or where the company is part of a larger corporate group. In the case of a startup business, where the sole owner shareholder or director is often the main person running the business, the financial standing of the company is significantly dependent upon that individual. It is common in such circumstances for the lender to require the owner of the company (which itself may be supported by other security also provided by the owner) to provide a guarantee.

A guarantee is a third-party obligation which provides the lender with recourse against the guarantor when the overdraft or loan goes into default or in other words, where the company fails to pay or perform other obligations. Where multiple facilities (such as overdrafts and loans) are granted to the company, the lender may require the owner to provide an all monies guarantee in respect of all the liabilities of the company.

In cases where the company forms subsidiaries or is part of a corporate group of companies, guarantees are also helpful in that they allow one company to provide financial support to other members of the group. Where one member of the group seeks finance, the lender will often seek a guarantee from other members of the group. In all cases where guarantees are provided by parent companies, sister companies or subsidiary companies, it is important that each guarantor company receives a corporate benefit for doing so. This may take

the form of a monetary payment. More usually, it is evidenced by the board of the guaranteeing company acknowledging, in the board minutes approving the guarantee, the benefit of such guarantee to the company and the group.

Where a guarantee is provided by a company, the lender will undertake a thorough credit analysis of the guarantor company in the same way as if it were a borrower. Similarly, the lender will require many of the deliverables it would require if the guarantor company was the borrower (i.e. board minutes, financial statements, etc.) and may require additional security to be provided by the guarantor to support the guarantee obligations.

**Security:** Lenders will often require security to be provided not only by the borrower company, but often in the case of small companies, by the shareholders/owners. The type of security taken will depend upon what assets the company or guarantor is able to provide, and the lender will need to assess the value of such security. Common types of security include:

- **Mortgages of Land** – A form of security which will allow the lender to foreclose over the land in the event of a default. This form of security must be registered at the Land Registry and elsewhere.
- **Assignment of Rights** – A form of security over contractual rights, e.g. over receivables (financial benefits under contracts including monies owing to the security provider) or bank accounts. To perfect the assignment, it will be necessary for notice to be given to the counterparty of the debtor under the contract.
- **Charges** – Charges can be taken in respect of a wide variety of assets including, land, bank accounts, company shares, etc. Charges may be fixed or floating.

**Documentation:** A share charge would usually be a document that only includes a charge over shares, while a debenture is a document that would ordinarily include fixed and floating charges over all or several classes of assets of a company. A debenture may also include mortgages and assignments. Where a debenture contains a floating charge, such floating charge creates a security interest over those assets which, until a crystallisation event occurs, will allow the company to deal and dispose of those assets. Once a crystallisation event does occur (such as the insolvency of the company, or receipt of notice from the lender that it wants to take action to protect the assets), the floating charge is converted into a fixed charge thereby freezing the assets and preventing the company from dealing with or disposing of the assets thereafter.

**Registration:** Under the Companies Act 2006, security created by a UK-registered company is generally registrable at Companies House within 21 days of creation. Failure to deliver particulars to the Registrar will mean that the security will be void against a liquidator, administrator or creditor of the company and the money secured by the charge will become immediately payable.

## LIBOR

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In many credit facility agreements entered into before 2021, interest is calculated by reference to LIBOR (the London Interbank Offered Rate). However, since the end of 2021, the Financial Conduct Authority (FCA) no longer supports 24 out of the 35 LIBOR settings. Six sterling and yen LIBOR settings continued for the duration of 2022 on a “synthetic” basis. Five U.S. dollar LIBOR settings will continue to be calculated using panel bank submissions until mid-2023, although LIBOR’s use for new business has been restricted from year end 2021, with limited exceptions.

Alternative risk-free rates (“RFRs”) are available for the loan market to transition to and for new loans entered into. The Sterling Overnight Index Average (“SONIA”) is the RFR of reference in the UK and the Secured Overnight Funding Rate (“SOFR”) is the RFR of reference in the United States.

## 5. Employment

Business leaders, in-house counsel and HR professionals rightly expect risk-based analysis and practical and proportionate employment law solutions. That is what we aim to provide by maximising our cross-disciplinary approach.

The UK economy continues to emerge from the COVID-19 pandemic with the practices of employers and employees having been influenced by the challenges of prolonged remote working. Many individuals have heightened expectations for a more flexible working environment within a more competitive, and potentially more litigious, labour market. Strikes and other forms of industrial action directed at above-inflation pay settlements are much more prevalent in the public sector where trade union membership is concentrated—but this influences remuneration expectations within the market. Flexible working requests and formal workplace grievances are on the rise. Discrimination and whistleblowing claims can lead to uncapped compensation.

We continue to help businesses adapt and manage operational risk effectively and efficiently, drawing on our long experience of supporting US based businesses making their first hires in the UK, often with home-office structures. We help clients anticipate and manage their risks pro-actively.

Where a business employs staff who work in or are based out of the UK, the employer will have obligations under the law applicable in the relevant part of the UK. It will need to consider employment law, immigration issues and tax issues.

These issues arise irrespective of whether the employer is a UK entity or not—the key issue is where the employee actually works. Specific advice should be sought as to the applicability of the UK employment and tax laws where the employee is peripatetic, an expatriate or otherwise works out of a number of jurisdictions. These factors are relevant to the mandatory local law rights as well as the potential to enforce post-termination restrictions.

All employees have an employment contract with their employer, even if it is not set out in writing. It is always preferable to set out terms expressly in writing to avoid ambiguity and the possible relevance of more beneficial implied arrangements.

Employees and workers in the UK have a number of protections set out in the applicable legislation covering, amongst other things, working time and paid leave, minimum wage, pension contributions, discrimination, “whistleblowing” and protection against unfair dismissal. Key points include:

- Paid holiday entitlement is 28 days per annum (pro-rated for part-time workers). However, care needs to be taken if overtime, commission or bonus arrangements might apply and the particular arrangements assessed to determine whether holiday pay needs to expressly include such elements;
- Under the auto-enrolment regime, employers may need to make provision for, and contribute to, a pension benefit for their employees. Although opt-out arrangements can be applicable, employers should seek specific advice as to their obligations in this respect;
- There is no employment-at-will in the UK. All employees are entitled to be given, and are required to give, notice of termination of employment of at least the statutory minimum (basically, one week per year of service from an employer and a minimum of one week from an employee). Market arrangements will commonly involve negotiation of longer periods.

**Employer’s Liability Insurance:** Employers must take out insurance against disease or injury sustained by an employee during his or her employment and against damage caused by its employees to third parties.

**Immigration Issues:** If an employer wishes to employ a worker in the UK who comes from outside the UK, including from 1 January 2021 those from the EEA or Switzerland, permission for that individual to work in the UK is likely to be required and specific advice should be sought.

UK legislation requires all employers to check whether all employees who start work with them in the UK are entitled to work in the UK. Employers need to check the appropriate original documents of each employee and keep a record to show that they have carried out the appropriate “right to work” checks. Where an employer employs an illegal migrant worker, it could face a civil penalty of up to £20,000, unless it can establish that it carried out the appropriate “right to work” checks. Employing an illegal migrant knowingly, or where an employer reasonably believes that the migrant does not have the right to work, are criminal offences which could render an employer liable



for an unlimited fine and/or a prison sentence of up to five years. We have strong relationships with UK immigration experts to help you get this right.

**Employment Tax:**

- Taxation and Social Security Contributions (National Insurance) – Employers are likely to need to withhold income tax from their employees’ pay in accordance with the PAYE system. Employers must also pay National Insurance contributions in respect of every employee, dependent on the employee’s earnings and National Insurance category.
- PEOs – We are seeing an increasing interest in the potential use of Professional Employer Organisation (“PEO”) structures and have experience in advising on the pros and cons of direct employment versus PEO arrangements. This is a particular issue to bear in mind if share options are to feature as part of a remuneration package.
- IR35 – Employers must be alert to the risks and practical impact of contracting with individuals who utilise their own Personal Service Companies.

Post-termination restrictive covenants are more prevalent in the UK than in many U.S. states. We can help you assess your needs and tailor your protections.

Brexit remains a live employment law issue through the mechanism of EU Retained Law. The UK government anticipates completing its exercise of determining what legislation (and related case law) will be applicable by the end of 2023. The task is ambitious, the timescale is tight and the challenges to be faced and managed by HR professionals and general counsels, in transactional and advisory contexts alike, are significant. We are contributing to this exercise via our involvement with the Employment Lawyers’ Association’s Legislative and Policy Committee.

## 6. Property—Acquiring or Leasing Business and Residential Premises

### Finding Suitable Business Premises

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This is normally undertaken by commercial property agents, usually chartered surveyors whose knowledge of the market for the area you wish to locate to will be important. In England and Wales, chartered surveyors deal with the buying, selling and leasing of property together with connected professional matters, such as building surveying, planning issues and business rating. In advising on buying, selling or leasing property they will:

- Give advice on levels of purchase price and rent;
- Negotiate the main terms of the deal to ensure it reflects the local market at the time;
- If asked to do so, advise on the state and condition of the building. In this regard, we recommend your commercial property agent takes on board UK Government policy on reducing emissions, achieving energy efficiency and its aim to achieve carbon net zero by 2050 and likely required capital investment. Where a lease is being taken, then if the term of the lease is short, care should be taken to avoid contributing via the service charge regime towards significant capital expenditure associated with energy efficiency improvement works. An energy performance certificate (“EPC”) should be requested from (and must be provided by) the landlord’s representatives which will confirm the existing energy efficiency rating for the premises, which, as from 1st April 2023, should have an energy efficiency rating of not less than “E” albeit, given proposed legislative changes on minimum energy efficiency standards by 2027 the minimum rating is anticipated to be at least “C”. An indication of likely energy supply costs may also be sought given significant increases in the cost of such utilities. If a lease of a longer duration is being taken, you should perhaps expect to take a more collaborative approach with the landlord. The aim of establishing the “green building” credentials of any proposed business premises may also tie in with your ESG-driven business strategy;
- Although not presently considered market standard when taking a lease, the appointed commercial property agent could seek to negotiate the inclusion of a “pandemic” rent suspension clause;
- Where your commercial property agent can negotiate a break clause, we advise that the break clause pre-conditions should not be so onerous as to risk frustrating the effective operation of the break clause. The inclusion of a break clause may be a valuable tool as the concept of hybrid-working continues to evolve and a longer term understanding of space requirements has yet to be established;
- We further advise that where a lease is being taken, the lease rent suspension clause applies equally to cases where there is damage or destruction to the premises whether caused by an insured or uninsured risk; and
- For retail premises, it is anticipated that in the aftermath of the COVID-19 pandemic, we will see a greater move in retail leases towards a lower base rent plus further rent linked to turnover. Your commercial property agent will likely advise.

Once the main terms are agreed, the parties’ lawyers will discuss the legal documentation to give effect to the agreement. Any issues arising from the documentation and the legal due diligence exercise in respect of the property, including land use restrictions, planning issues, the terms of an existing lease (that is being acquired) that affect whether or not the company can lawfully use the premises for its business, and any other questions will be discussed and dealt with. Information about the property generally will be sought from the relevant authorities and the seller or landlord. Environmental (as well as sometimes structural) surveys are also a wise precaution.

### Structuring the Investment in UK Business Premises

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There are no legal restrictions in the UK on overseas investors owning, selling or leasing property in England and Wales. When considering the investment vehicle, there is considerable flexibility with such investment permissible via a domestic or foreign vehicle. As tax considerations will determine the most appropriate investment vehicle to use, advice should be sought under UK tax laws and the laws of the investor’s own jurisdiction. There is also available to investors a new tax efficient property holding vehicle known as a qualifying asset holding company “**OAHC**”.

The Economic Crime (Transparency and Enforcement) Act, enacted on 15 March 2022, requires overseas entities that became registered proprietor of a “qualifying estate” on or after 1 January 1999 to register at Companies House and provide certain information about the entity and its beneficial owner(s) and/or managing officer(s), known as the Register of Overseas Entities. A qualifying estate is a freehold estate or a leasehold estate for a term of more than seven years from the date of the grant. Furthermore, if an overseas entity disposes (i.e., transfers) of a qualifying estate between 28 February 2022 and 31 January 2023, information regarding that disposal must be provided to Companies House. The information provided must be independently verified prior to registration, and overseas entities have until 31 January 2023 to register. Failure to comply with the Act will expose the overseas entity and its officers to criminal sanctions and could potentially impact banks who have lent monies secured on the UK property. The Act also made changes to Unexplained Wealth Orders and the law surrounding sanctions.

The UK Government has extended the scope of property trust arrangements that must be registered with the Trust Registration Service (“TRS”) as part of its implementation of the most recent Anti-Money Laundering Directive.

## Likely Costs When Obtaining Business Premises

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In addition to the purchase price or rent payable for the premises, the chartered surveyor’s fees, fees of any building surveyor and legal costs, the following costs also should be anticipated when acquiring new premises:

**Stamp Duty Land Tax (“SDLT”)** – SDLT will be payable to HMRC where a commercial property (freehold or leasehold) is being purchased. SDLT is payable on the consideration paid for the property at the following rates.

Property or lease premium or transfer value SDLT rate:

- Up to £150,000— 0%;
- The next £100,000 (the portion from £150,001 to £250,000) - 2%;
- The remaining amount (the portion above £250,000) - 5%.

SDLT is also payable on the net present value (“NPV”) of the rental element on the grant of new leases. If VAT is payable on the rent, then this should be included in the rent in the NPV calculation at a rate of 20%. As a “rule of thumb”, the longer the lease and the higher the rent, the greater the SDLT liability will be. It should be noted that there will be no SDLT partial refund should a tenant exercise a break option, for example, halfway through the contractual term of the new lease.

Specific rules deal with further issues, such as any premium paid, rent reviews (in the first five years of the lease term) and surrender and re-grants of the same or enhanced premises.

**Value Added Tax (VAT)** – VAT may in certain circumstances be charged by the landlord on rent payable under a lease. It may also be charged on the purchase price of freehold property, or the premium paid on the purchase of a lease. It may be possible to recover the VAT if the company is registered for VAT purposes.

**Land Registry Fees** – Fees range from £20 up to £1105 and are payable (i) on any purchase consideration, (ii) on the registration of leased land where the lease granted for a term of seven years or more, or (iii) where an existing unregistered lease is acquired with more than seven years still left to run.

**Rent** – Rent is usually payable quarterly in advance on leasehold property, exclusive of utilities such as electricity, telephone and gas charges. Services provided by the landlord to the property, rates payable to the relevant authorities, and insurance fees are likely additional costs.

**Service Charges** – Charges may be payable on leasehold property for facilities provided by the landlord, such as repairing and maintaining the building, the decoration and repair of common parts (including external areas), and provision of security and reception services where the property is part of an office block, or an industrial or retail estate. When negotiating the terms for a new lease, consider whether a capped service charge can be obtained. This is especially important on shorter-term leases, especially if unusual or capital expenditure is contemplated by the landlord, which would cause the service charge to increase dramatically.

**Business Rates** – Where commercial property is occupied, the property user will be required to pay local area and government taxes to the local business rating authority.

**Other Cost Considerations** – For freehold, leasehold and (possibly) serviced offices, consider the cost of equipping and fitting out to the required standard and specification for business, in addition to the purchase price or rent payable for the premises, chartered surveyor's fees, fees of any building surveyor and legal costs referred to above. The following additional costs should also be anticipated when acquiring new premises:

- Cost of insurance for tenants' own fixtures, fittings and equipment and third-party liability and public liability insurances.
- Consideration should also be given to ensuring that premises have sufficient IT capability to meet modern business requirements, and, in relation to leased premises or serviced offices, that requisite rights have been granted to allow data communication equipment and cabling to be installed to facilitate such IT capability.

## Serviced Office Accommodation

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When initially setting up a business, a company may not have a large staff and may not wish to spend time looking for offices. A suitable alternative may be serviced office accommodation, which is widely available.

## Leasehold Premises

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The acquisition of leasehold premises, usually takes longer to finalise than the acquisition of a freehold, due to the relative complexity of the transaction. Prospective tenants will be required to furnish references, which will include the provision of annual reports and company accounts.

Once in new premises there are a number of considerations that tenants should be aware of:

**Rent Review** – Commercial leases that are for longer than five years will almost always contain provisions allowing the landlord to increase the rent in line with current market rates at different intervals in the life of the lease (or alternatively may specify pre-agreed stepped increases which may provide the tenant with greater budgeting certainty). The rent review cycles are usually at the end of every fifth year of the lease. If the parties are unable to agree on a reviewed rent in line with the open market at any stage, they can refer the matter to an independent third party to decide on the reviewed rent. The rent may also be increased by reference to increases in inflation using the RPI or CPI indices. It should also be noted that a rent review will be "upwards only".

**Subletting and Selling** – A commercial lease will usually allow a tenant to rent out the whole (and sometimes a part) of its space to another company, subject to obtaining the landlord's prior consent. Sharing of the space with "group companies" is often permitted without the need for the landlord's consent. If a move to alternative premises is subsequently required during the term of an existing lease, the lease will also usually allow the tenant to transfer (assign) its lease to a third party. The landlord's consent will usually be required before an assignment can take place. A tenant may remain liable for payment of rent and other sums under the lease if the new tenant defaults on payments, but this will depend on the provisions in the commercial lease.

**Repairs** – Most commercial leases will require the tenant to keep the premises in a good and substantial state of repair, condition and decoration. This applies regardless of the state of the premises when acquired. Prior to committing to the lease, it would be prudent to perform a survey of the premises if the tenant wishes to limit its repairing obligation in the lease, as the surveyor will produce the "baseline" schedule of condition, and the tenant can seek to incorporate qualified repairing, decorating and "handback" provisions by reference to the schedule of condition in a new lease. Tenant repairing obligations often extend to any equipment exclusively serving the premises (e.g. air-conditioning) and it is advisable to carry out and keep, or procure from the landlord, specialist surveys and maintenance records.

**Alterations** – A tenant may wish to carry out alterations to the premises to suit its business needs. Most leases do not allow external or structural alterations but do allow internal non-structural alterations provided that the landlord's prior consent is obtained. A tenant is required to reinstate any alterations and/or additions it makes at the end of the term of the lease.

**Landlord's Professional Fees (Legal and Surveyors)** – These fees are invariably payable for the review and approval of the proposed works and formal documentation of consent to works, save where such approval (for initial fitting-out works) is obtained at the time the new lease is entered into, in which case, landlords will generally bear their own professional costs.

**Use** – The lease will specify how the property may be used, which must also accord with the permitted use under planning law. If a change of use is required there may be a need to obtain both the landlord's consent as well as any required, planning permission from the planning authorities. There have recently been material changes to planning laws in England and Wales. The introduction of new wide-ranging planning use class E (commercial, business and service) may allow a tenant under a lease that contains a user clause consistent with planning use class E to potentially change use (for example, between retail and office use) without the need for further planning consent or even landlord consent.

## Residential Premises

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If a company is moving staff to England and Wales to start up the UK company, residential accommodation may be taken by the company for the staff members rather than the staff buying freehold houses or purchasing long leases of flats. If a company proposes to enter into a short-term lease arrangement in its name for a staff member, the company should be aware it has no rights of occupation in the property at the end of the tenancy and no right to renew the tenancy. With the aim of enhancing the rights of renters in the private residential sector, including the end of "no-fault" evictions, the UK government is proposing to put the "Renters Reform Bill" before Parliament later this year. We may even see the abolition of the Assured Shorthold Tenancy ("AST").

## 7. Intellectual Property Rights

The term Intellectual Property Rights (“IPRs”) may cover a wide range of registered and unregistered proprietary rights, such as patents, trade marks, service marks, design rights, topography rights, semi-conductor rights, moral rights, rights of confidentiality, utility models, copyrights, database rights or rights in domain names, and includes any rights granted by any existing registrations of or applications for the above.

Most IPRs are territorial, and whilst international treaties can provide some cross-border protection, not all rights and protection afforded in one country will necessarily extend to other countries. Many aspects of the UK intellectual property regime will be familiar to non-UK businesses, particularly those with experience in jurisdictions which are co-signatories to relevant international conventions on IPRs.

After establishing a UK operation, the non-UK entity (whether parent company or head office) should ensure that it has protected its own IPRs in respect of use in the UK and that it is not infringing or about to infringe a third party’s IPRs. All licences needed to use any IPRs which the company does not exclusively own should also be obtained.

It is advisable for the non-UK company to carry out an audit of the IPRs it uses in its home territory. It should establish whether it owns or licences the rights it uses and whether these rights are transferable to the UK business without additional licences.

### Registration of IPRs

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The non-UK company should ensure that all necessary steps are taken to obtain or establish its ownership of its IPRs in the UK. Some IPRs (e.g. patents) must be registered to be enforceable, some (e.g. copyright) subsist without any registration and some (e.g. trade marks, design rights) can be registered or unregistered, although registration makes enforcement easier. The company should therefore assess whether it is able to register such protection and, if it is, make the relevant application(s) at the earliest opportunity.

The registers applicable to a company’s IPRs should be searched prior to use/registration in the UK to establish (i) whether the company’s IPRs are likely to infringe those of a third party, and/or (ii) the likelihood of obtaining registration. In relation to patent and registered design rights, an application should be made before the subject matter of the application becomes available to the public anywhere in the world.

The UK is a member of the Madrid Protocol, which means it can be designated for the purposes of an application to register an international trade mark. Under the Madrid Protocol, the “international registration” is not a unified registration, however. Instead, it provides for a series of national registrations in the countries designated. This is in contrast to an EU-wide trade mark (“EUTM”), which is a single unitary right covering the 27 member states of the European Union. Following the UK’s exit from the European Union, an EUTM will no longer cover the UK. Companies looking to protect their trade marks in the UK and EU must therefore file both a UK trade mark and an EUTM (or individual trade mark registrations in the national registers of those EU countries where it operates, e.g. Germany, Italy, France, etc.).

### Unregistered IPRs

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With regard to unregistered IPRs (which includes IPRs that cannot be registered in the UK, such as copyright and confidential information and IPRs that can be registered or unregistered, such as design rights and trade marks) steps should be taken with regard to each IPR to strengthen the company’s evidence that it owns that right (and, where applicable, the company should consider registering any unregistered IPR).

### Licence Limitations

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The terms of the licences which grant the company use of IPRs should be inspected to ensure that they do not contain any restrictions that will prevent the UK company’s use of those IPRs. It may also be necessary to establish whether the licensor has granted or is able to grant licences to third parties for use in the UK of the IPR in question.

## IPRs and Employees/Consultants

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Contracts entered into with the UK operation's employees or consultants should make specific provision for the retention of the ownership of IPRs in creations, developments and copyright material or software made by the new UK operation. The default position in the UK is that if an employee generates IPRs in the ordinary course of their employment, their employer will own that IPR. However, it is prudent to make sure that this is the case through employment contracts. Also, in the UK, generally a company would not automatically own IPR created by contractors while providing their services—this must therefore be specifically dealt with by contract.

## Domain Names

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If the company wishes to have a UK website, it might want to register and use the company name as its domain name. The company cannot register a domain name if that name has already been registered by a third party. It can find out if the relevant domain name is available by performing a "whois" search (e.g. at <http://www.whois.net>). This search reveals whether anyone owns the name rather than whether there is a website at the domain name address.

A domain name must be registered with the relevant domain name registrar (in the UK this is Nominet UK at <http://www.nominet.org.uk/>). There are various restrictions regarding the length and format of the domain name. The company should register a domain name online through an accredited registration agent who will deal with the registrar and the registration requirements on behalf of the company.

Traditionally domain names are registered on a "first come, first served" basis. However, this has meant that some companies have discovered that they have been too late to register their own name as a domain name. While there are 45 classes for use of trade marks, there is no such restriction over domain names. Therefore, where a domain name has been registered and is being used in good faith, a business is generally unlikely to be able to force a transfer of that name. The company may be able to buy the name from the prior registrant. Alternatively, if the company has enforceable trade mark rights which pre-date the registration of a domain name similar or identical to the company's trade mark, it may be able to compel the prior registrant to transfer the domain.

## UK Patent Box

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The UK Patent Box allows companies to elect to apply a 10% rate of corporation tax to profits attributable to qualifying patents whether received as a royalty or embedded in the sales price of products. The regime also applies to other qualifying intellectual property rights such as regulatory data protection (also called "data exclusivity"), supplementary protection certificates and plant variety rights. Other non-qualifying profits in these companies will continue to be taxed at the main rate.

The aim of the Patent Box is to provide an additional incentive for companies to retain and commercialise existing patents and to develop new innovative patented products. It encourages companies to locate the high-value jobs associated with the development, manufacture and exploitation of patents in the UK and maintain the UK's position as a world leader in patented technologies.

## 8. Data Protection

The law governing the collection and use of personal data in the UK was significantly updated by the EU General Data Protection Regulation (“**EU GDPR**”), which came into force on 25 May 2018. Although the UK left the EU on 31 January 2020 (and the transition period ended on 31 December 2020), the EU GDPR continues to apply in the UK (the “**UK GDPR**”), subject to amendments made by The Data Protection, Privacy and Electronic Communications (Amendments etc.) (EU Exit) Regulations 2019 (“**DP Brexit Regulations**”). With the aim of ensuring that the UK data protection legal framework functions correctly following the end of the transition period, at this point, the DP Brexit Regulations introduce only minor edits to the EU GDPR.

Although the UK Government has signaled its intention to reform the UK data protection regime to make it “pro-growth and innovation friendly”<sup>1</sup> and introduced a Data Protection and Digital Information Bill which is currently being considered by parliament, the legal principles and obligations contained in the UK GDPR do not materially diverge from those contained in the EU GDPR at this point. The UK GDPR is supplemented by the Data Protection Act.

### The Information Commissioner’s Office (ICO)

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The ICO is the UK’s supervisory authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals.

Under the Data Protection (Charges and Information) Regulations 2018, any business which processes personal data as a “data controller”, meaning they own the data and can decide how it is processed, must pay a “data protection fee” to the ICO. The fee will vary depending on the size of the company and turnover. Failure to pay the fee is a criminal offence.

### The UK GDPR

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The UK GDPR applies to the processing of personal data by organisations established in the UK. It also applies to non-UK organisations that offer goods and services to the UK market or who monitor activities of individuals based in the UK, as far as their behaviour takes place within the UK.

Those conducting business in the UK and/or the EU should look closely at the requirements of the UK GDPR and EU GDPR to ensure their systems, policies and contractual arrangements are compliant. UK data protection law sets out principles that govern the processing of personal data as follows:

- Personal data shall be processed fairly and lawfully;
- Personal data shall be obtained only for a specified and lawful purpose and shall not be further processed in a manner that is incompatible with the original purpose;
- Personal data shall be adequate, relevant and not excessive in relation to the purpose for which it is being processed;
- Personal data shall be accurate and, where necessary, kept up to date;
- Personal data processed for any purpose shall not be kept for longer than is necessary for that particular purpose;
- Personal data shall be processed in accordance with the rights of data subjects;
- Appropriate technical and organisational measures shall be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of the personal data; and

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<sup>1</sup> Cabinet Office policy paper, “The Benefits of Brexit: how the UK is taking advantage of leaving the EU”, Published 31 January 2022, link: <https://www.gov.uk/government/publications/the-benefits-of-brexit>



- Personal data shall not be transferred to a country or territory outside the UK unless an adequate level of protection for the rights and freedoms of the data subject is in place in relation to the processing of that personal data.

## What Are the Obligations of the UK GDPR

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Key requirements under the UK GDPR include the following:

- **Data Protection Officers (“DPOs”)** - In many circumstances, those caught by the UK GDPR will need to appoint a DPO, and so thought will need to be given as to whether this applies and, if so, who that person or persons might be.
- **Appointment of Representatives** – Where UK data protection law applies to a business established outside the UK, it may need to appoint a representative in the UK. This does not apply in certain circumstances. Also, where the EU GDPR applies to a business established outside of the EU (including in the UK), it may need to appoint a representative in the EU.
- **Accountability** – Those caught by the UK GDPR are required to demonstrate compliance through certain internal documents, maintaining written records of all data-handling activities and by carrying out data protection impact assessments, where required.
- **Legal Basis for Processing** - Personal data can only be processed where the data controller has a legal basis for that processing (e.g., consent, legitimate interests, contract necessity, etc.).
- **Privacy Policies** – Businesses are required to provide certain information to data subjects where personal data is received from the data subjects or a third party, which often contained in a privacy notice (i.e. the identity of “data controller”, how the personal data is used, etc.). Policies will therefore need.
- **New and Extended Data Subject Rights** – Businesses must comply (in most circumstances) with new and extended data subject rights (e.g. right of access, right of rectification, right to be forgotten, right to restrict processing, right to data portability, right to object and right not to be subject to automated processing, etc.). The UK GDPR gives data subjects control over their personal data and how it is handled.
- **Data Protection “By Design” and “By Default”** – Businesses must ensure that, in the planning phase of processing activities and implementation phase of any new product or service, data protection principles and appropriate safeguards are addressed/implemented.
- **Breach Notification** – Businesses must report a data breach to the ICO within 72 hours of their becoming aware of that breach, except where the data breach is unlikely to result in any harm to data subjects. Where there is a high degree of risk to data subjects, the business must notify the affected data subjects without undue delay.

## Appointment of Data Processors

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Where a business that is acting as a data controller appoints a vendor to provide services which will require that vendor to process or otherwise have access to UK personal data, the vendor must be appointed under a binding written agreement, which states that the vendor must:

- Only act on the data controller’s documented instructions;
- Impose confidentiality obligations on all personnel who process the relevant data;
- Ensure the security of the personal data that it processes;
- Abide by the rules regarding appointment of sub-processors;
- Implement measures to assist the data controller in complying with the rights of data subjects;
- Assist the data controller in obtaining approval from data protection authorities, where required;
- At the data controller’s election either return or destroy the personal data at the end of the relationship; and
- Provide the data controller with all information necessary to demonstrate compliance with the UK GDPR.

## Compliance Checklists

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The following checklists will be helpful for assessing your compliance with UK/EU data protection law.

### Lawfulness, Fairness and Transparency

- Your business has conducted an information audit to map data flows.
- Your business has documented what personal data you hold, where it came from, who you share it with and what you do with it.
- Your business has identified your lawful bases for processing personal data and documented them.
- Your business has reviewed how you ask for and record consent.
- Your business has systems to record and manage ongoing consent.
- If your business relies on consent to offer online services directly to children, you have systems in place to manage it.
- Your business is currently registered with the ICO.

### Individual Rights

- Your business has provided privacy notices to individuals.
- If your business offers online services directly to children, you communicate privacy information in a way that a child will understand.
- Your business has a process to recognise and respond to individuals' requests to access their personal data.
- Your business has processes to ensure that the personal data you hold remains accurate and up to date.
- Your business has a process to securely dispose of personal data that is no longer required or where an individual has asked you to erase it.
- Your business has procedures to respond to an individual's request to restrict the processing of their personal data.
- Your business has processes to allow individuals to move, copy or transfer their personal data from one IT environment to another in a safe and secure way, without hindrance to usability.
- Your business has procedures to handle an individual's objection to the processing of their personal data.
- Your business has identified whether any of your processing operations constitute automated decision making and have procedures in place to deal with the requirements.

### Accountability and Governance

- Your business has an appropriate data protection policy.
- Your business monitors your own compliance with data protection policies and regularly reviews the effectiveness of data handling and security controls.
- Your business provides data protection awareness training for all staff.

- Your business has a written contract with any data processors you use.
- Your business manages information risks in a structured way so that management understands the business impact of personal data-related risks and manages them effectively.
- Your business has implemented appropriate technical and organisational measures to integrate data protection into your processing activities.
- Your business understands when you must conduct a data protection impact assessment "DPIA" and has processes in place to action this.
- Your business has a DPIA framework which links to your existing risk management and project management processes.
- Your business has nominated a data protection lead or Data Protection Officer ("DPO").
- Decision makers and key people in your business demonstrate support for data protection legislation and promote a positive culture of data protection compliance across the business.

### Data Security, International Transfers and Breaches

- Your business has an information security policy supported by appropriate security measures.
- Your business ensures an adequate level of protection for any personal data processed by others on your behalf that is transferred outside the UK.
- Your business has effective processes to identify, report, manage and resolve any personal data breaches.

### Processing Checklist

- Your business has reviewed the purposes of its processing activities and selected the most appropriate lawful basis (or bases) for each activity.
- Your business has checked that the processing is necessary for the relevant purpose and is satisfied that there is no other reasonable way to achieve that purpose.
- Your business has documented its decision on which lawful basis applies to help you demonstrate compliance.
- Your business has included information about both the purposes of the processing and the lawful basis for the processing in your privacy notice.
- Where your business processes special category data, you have also identified a condition for processing special category data and have documented this.
- Where your business processes criminal offence data, you have also identified a condition for processing this data and have documented this.

## Transfers of Personal Data from the UK to a Third Country

Transfers of personal data from the UK to other countries, including the EEA, are subject to transfer rules under the UK GDPR. These transfer rules broadly mirror the EU GDPR rules. In summary, care must be taken to ensure the transfer is “adequately safeguarded” and only done if necessary. Some countries are automatically deemed “adequate” (e.g. the EEA, Canada, Japan, etc.), however, if this is not the case (the U.S. is not currently deemed adequate), then data exporters in the UK need to consider other mechanisms to safeguard the transfer.

Many U.S. based organisations previously relied on self-certification under the Privacy Shield framework to safeguard the transfer of UK/EU data to the United States. However, on 16 July 2020, Europe’s highest court invalidated the Privacy Shield framework. New measures have been introduced in the United States which are being reviewed, and it is hoped that an adequacy decision might be issued by the EU and UK in 2023.

Data exporters in the UK can transfer personal data from the UK to a third country if the exporter and data importer in that third country have entered into a contract incorporating standard data protection clauses recognised or issued in accordance with the UK data protection regime. These are known as standard contractual clauses (“**SCCs**”).

The SCCs contain contractual obligations on the data exporter and the data importer, and rights for the individuals whose personal data is transferred. Individuals can directly enforce those rights against the data importer and the data exporter.

The European Commission issued new EU SCCs on 4 June 2021. These are not valid for restricted transfers under UK GDPR, however. Following a consultation, as a replacement to the old EU SCCs, the ICO has now issued new data protection clauses for transfers of personal data, which will replace the old EU SCCs. There is a new International Data Transfer Agreement (IDTA) and a new International Data Transfer Addendum to the new European Commission SCCs (“**Addendum**”). These documents came into force on 21 March 2022.

Data exporters in the UK may continue to enter into new contracts on the basis of the old EU SCCs until 21 September 2022, at which point they must use the new IDTA or Addendum in contracts relating to the transfer of personal data subject to the UK GDPR. All existing contracts that legitimise restricted transfers based on the old EU SCCs will continue to provide “appropriate safeguards” for the purpose of UK GDPR until 21 March 2024. From that date, if restricted transfers continue, UK exporters must enter into an updated contract on the basis of the IDTA or the Addendum or find another way to safeguard international transfer under the UK GDPR.

When entering into a contract on the basis of the IDTA or the Addendum, data exporters in the UK must still carry out a risk assessment. This is to make sure that the actual protection provided by the IDTA or Addendum, given the actual circumstances of the transfer, is sufficiently similar to the principles underpinning UK data protection laws.

## Transfers of Personal Data between the UK and EU

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On 28 June 2021, the European Commission adopted decisions on the UK’s adequacy under the EU GDPR, finding the UK to be adequate. This means that data can continue to flow from the EU and the EEA to the UK without the need for additional safeguards.

## Breaches of the GDPR

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The consequences of breaching data protection laws in the UK are serious. For example, UK GDPR fines are up to £17.5 million or 4% of a company’s total annual worldwide turnover, whichever is higher.

If a company experiences a security breach, it may also face additional costs associated with investigating, addressing and responding to the breach, including (i) the preparation and mailing or other transmission of notifications or other communications to consumers, employees or others as required by the UK GDPR, (ii) the establishment of a call center or other communications procedures, (iii) legal or consulting fees and expenses associated with the investigation of and response to the breach, and (iv) credit reporting and monitoring

services offered to individuals impacted by the breach. Also, there will, of course, be potential reputational damage associated with a regulatory breach of the UK GDPR and/or a security breach leading to the loss of personal data.

In summary, data protection is an important consideration for any business looking to establish itself in the UK (or Europe, for that matter), and those establishing themselves here should look to implement practices, processes and policies which are compliant with recent changes. If this area is not taken seriously then it could expose the company to fines comparable to those levied in antitrust cases.

## 9. Corporate Insolvency and Debt Collection

The UK insolvency regime has its origins in laws aimed at protecting creditors from defaulting debtors. While many of the principles of creditor protection remain, there have been substantial revisions to promote a rescue culture aimed at increasing rates of business rescue, saving jobs and improving returns to creditors. New insolvency legislation introduced in 2020 was aimed at assisting struggling businesses and avoiding insolvency.

In the UK, under section 123 of the Insolvency Act 1986, a company is deemed to be insolvent when it can no longer meet its financial obligations.

There are two tests for corporate insolvency:

- Is the company currently (or will it be in the future) unable to pay its debts?
- Is the value of the company's assets less than the amount of its liabilities, considering yet uncertain and future liabilities?

Furthermore, a company is deemed unable to pay its debts, and therefore insolvent, if:

- A creditor who is owed more than £750 has served a formal demand for an undisputed sum at the company's registered office and the debt has not been paid for three weeks; or
- A judgment or other court order has not yet been satisfied. Where a company is insolvent, the duties of its directors move from the interests of the shareholders to those of the creditors.

The UK regime includes a range of options when a company faces insolvency, including administration, administrative receivership, corporate voluntary arrangement (now rarely used), creditors' voluntary liquidation and compulsory liquidation. In June 2020, the UK enacted the Corporate Insolvency and Governance Act, which introduced a moratorium and a new "restructuring plan" as additional legislative tools.

The question of which of the procedures is the most appropriate depends upon all the circumstances; however, the following brief summaries are intended to provide an overview of the various procedures.

**Administration** – A key feature of an administration application is that it brings into force a statutory moratorium in relation to claims against the company. Either the directors of the company or the holder of a qualifying floating charge may apply for an administration order and the appointment of an administrator who is an accredited insolvency practitioner. An administrator can also be appointed by a court order, following an administration application, provided that the court is satisfied the company is deemed "unable to pay its debts", as above.

The focus of the administration procedure is to rescue the company itself as a going concern so as to achieve a better result for the creditors of the company as a whole than would be likely in an immediate winding up, and/or to return monies to secured or preferential creditors by way of realising the company's assets for their benefit.

**Corporate Voluntary Arrangement ("CVA")** – If a limited company is insolvent, it can use a CVA to pay creditors over a fixed period. The directors of a company can obtain a CVA by engaging and paying an accredited insolvency practitioner to administer it.

The insolvency practitioner will work out an "arrangement" covering the amount of reduced debt the company can manage and a payment schedule. They will write to creditors about the arrangement and invite them to vote on it. The arrangement must be approved by creditors who are owed at least 75% of the debt.

Scheduled payments are made to the creditors through the insolvency practitioner until the debt is paid off. If payments are late or missed, any of the creditors can apply to wind up the business.

**Creditors' Voluntary Liquidation ("CVL")** – A CVL is a terminal procedure, not a rescue option—a last resort where no other option is available, whereby the assets of the company that is in financial difficulties are realised and distributed to creditors in the order of priority under the Insolvency Act 1986. It is commenced by the members passing a special resolution to the effect that the company cannot continue its business by reason of its liabilities and therefore it is advisable to wind up the company.

Under a CVL, a liquidator is appointed to wind up the company's affairs. The liquidator does this by calling in all the company's assets and distributing them to its creditors. Any remaining assets will be distributed to the company's members. A CVL enables an insolvent company to be wound up without a court order, and the creditors are given more control over the liquidation process, including control over the choice of the liquidator.

**Compulsory Liquidation** – A creditor may petition the court on the grounds that the company is insolvent or unable to pay its debts for the compulsory winding up of a corporate debtor in certain specified circumstances. A judge then decides at a court hearing whether it is appropriate to make a winding up order. If granted, the procedure allows the assets of a company to be realised and distributed to the company's creditors. Though uncommon, a company's directors may present a winding up petition against their own company.

**Moratorium** – The new moratorium on enforcement actions gives a company breathing space to attempt a rescue or restructure. Companies seeking to rely on the moratorium must apply to the court. They will be able to continue trading whilst the moratorium is in place and creditors will be prevented from initiating insolvency proceedings for the duration of the moratorium.

**Restructuring Plan** – This is intended to provide an alternative to insolvency. Either the company or its creditors may apply to court to propose that a restructuring plan is put in place. A court will sanction a restructuring plan which has been approved by at least 75% of creditors.

The restructuring plan is largely similar to a scheme of arrangement, but with the important distinction that it can be imposed on dissenting creditors in certain circumstances (cross-class cram down). The cross-class cram down feature was used for the first time in 2021. It has been used against dissenting secured creditors and landlords, and also in respect of a non-European company. Courts have refused to sanction a restructuring plan where it failed to satisfy the condition that no member of the dissenting class would be worse off as a result of the restructuring plan than in the alternative.

**Debt Collection** – If a foreign company is owed a debt by an English company, the foreign company will usually have the option of suing for payment in England provided that the contract with the English party does not require that claims be brought in a different jurisdiction. Alternatively, the foreign company may have the option of pursuing proceedings in its home courts and then seeking to enforce a judgment through the English courts.

**English Court Proceedings** – The English courts provide litigants with a broad range of options for enforcing a debt. Fast track procedures are available, in particular for lower value claims, as are specialist courts for complex matters:

- County Courts (generally for claims under £100,000);
- High Court (generally for complex claims and those exceeding £100,000);
- Commercial Court;
- Technology and Construction Court;
- Banking Court; and
- Admiralty Court.

The English courts offer range of mechanisms for the enforcement of a judgment, including:

- Warrant for execution: for the seizure and sale of a judgment debtor's assets;
- Third-party debt order: requiring the debtor's bank to make payment from the debtor's bank account (known in some jurisdictions as a "garnishment order");
- Charging order: to protect against the disposal of a debtor's assets; and
- Attachment of earnings: requiring payment by a debtor's employer from their wages.

**Enforcement of Foreign Judgments in the UK** – In order to enforce a foreign judgment against assets of a debtor in England or Wales, the enforcing party must seek to have the foreign judgment recognised by the English courts. To be enforceable, a foreign money judgment must be final and conclusive, and must not be for the enforcement of taxes, fines or penalties. The English courts will apply their conflict of laws rules to be satisfied that the foreign court had jurisdiction to determine the subject matter of the dispute underlying the judgment. Once jurisdiction is established, the foreign judgment can be challenged only on limited grounds, e.g. that it was obtained by fraud, is contrary to public policy, or that the proceedings contravened principles of natural justice.

## About Pillsbury

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Pillsbury Winthrop Shaw Pittman LLP is an international law firm with a particular focus on the technology & life sciences, energy, financial, and real estate & construction sectors. Recognized as one of the most innovative law firms by Financial Times and one of the top firms for client service by BTI Consulting, Pillsbury and its lawyers are highly regarded for their forward-thinking approach, their enthusiasm for collaborating across disciplines and their authoritative commercial awareness.

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31 West 52nd Street | New York, NY 10019

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