

## Setting up and carrying on business in the United Kingdom



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## About Manches

Manches is a commercial law firm operating out of offices in London, Oxford and Reading. Founded in 1936, we have 49 partners, 111 other lawyers and around 312 people in all.

The firm has a strong corporate finance practice (including tax) and is “highly recommended” in the UK legal directories. In addition the firm has a leading practice in a number of other key areas: Real Estate, Technology and Media, Retail, Employment and Dispute Resolution. The firm also has one of the pre-eminent matrimonial and private client practices in the UK.

We work extensively on cross-border transactions with strong overseas connections worldwide.

Manches’ international client base represents a substantial part of the firm’s practice. International clients benefit from the various components of the firm’s international strategy:

- A worldwide reach
- An understanding of cultural differences
- An understanding of comparative law issues
- Extensive linguistic expertise
- Advice in specialist areas
- Strong international networks

One of the most important initial decisions a foreign business will have to make is to decide which type of trading vehicle will best suit the needs of the business in the UK. Will the objectives of the business be best achieved through the establishment of a branch or is it preferable to set up a separate vehicle? If the latter option is chosen, what form will the trading vehicle take?

## Branch

Creation of a permanent establishment by means of a "branch" of the overseas parent is straightforward. The parent acts in its own name and no separate legal entity is established. There are minor formalities to be attended to with the Registrar of Companies (which monitors and regulates all companies in England and Wales) within one month of establishment (no pre-notification or consent is required).

The main disadvantages of setting up a branch versus establishing a local entity are:

- the liabilities of the branch are not ring-fenced from the non-UK parent;
- many UK companies may prefer doing business with a UK company rather than with a branch;
- a branch is required to submit its parent company's accounts and other accounting documents to the Registrar of Companies within certain time limits. The accounts must comply with companies' legislation. A subsidiary company on the other hand would only be required to submit its own accounts;
- generally, the effective UK tax rate will be lower where profits are remitted from a UK subsidiary rather than from a branch (this will depend on whether a double taxation agreement is in place with the foreign country concerned).

The main advantage of setting up a branch over a local entity is that the branch will not have to comply with, what can sometimes be, onerous reporting and filing obligations which are imposed on local entities.

## UK business structures

The four principal forms of business structure in the UK are:

- The sole trader;
- The partnership;
- The limited liability partnership; and
- The limited liability company.

We attach in Appendix A, a table showing the key difference between these entities.

### The sole trader

A sole trader runs his business alone, making all decisions and owning all the assets of the business personally. He is liable for the debts and liabilities of the business but of course gets to keep all the profits for himself! There is no legal separation between the business and the affairs of the proprietor.

The sole trading structure is most suited to small businesses as there are limited formation requirements and minimal disclosure obligations.

As a sole trader is self-employed all profits will be taxed as income and each year the sole trader will need to make a self-assessment return to HMRC.

### The partnership

A partnership consists of two or more persons who share the decision-making in respect of the business and ownership of the assets. Each partner is self-employed and takes a share of the profits. Subject to any agreement to the contrary, each partner is also jointly and severally liable for the debts and liabilities of the business without limits. If one partner fails to meet his liabilities, any of the others may be held wholly responsible for all of the liabilities.

As with a sole trader, a partnership has no distinct legal personality. When a partner carries out an act within the scope of the firm's business, that act will bind the other partners.



There are no specific registration requirements for a partnership and only minimal disclosure requirements. Although there is no legal requirement for partners to enter into a partnership agreement to regulate their relationship, this is advisable.

### **The Limited Liability Partnership**

The limited liability partnership is similar to the ordinary partnership. A number of individuals take a full role in the management of the partnership and share in the risks, responsibilities and profits of the business. The main difference between the two types of partnership is that with a limited liability partnership, a partner's liability is limited to the amount of money he has contributed to the business (and additionally to any personal guarantees he may have given).

Like a partnership, a limited liability partnership is tax transparent (i.e. each partner is taxed on his share of the profits of the business). However, the LLP is treated as a separate legal entity and a third party will contract with the LLP itself and not with individual partners.

The LLP therefore combines the benefit of a limited liability company with the organisational flexibility and taxation status of an ordinary partnership.

The formation and disclosure requirements are similar to those for a limited liability company. An LLP has therefore to be registered at Companies House and must file an annual return and annual accounts each year (both of which will, once registered, be publicly available).

### **The Private Limited Company**

Other than establishment of a branch, the most widely used vehicle for inward investment is the private limited company.

The objective of this section is to explain a few of the details of formation of a company and its subsequent operation. This section is written on the assumption that the company will be a wholly owned subsidiary without any minority shareholding and will be operated under sole control rather than as part of any joint venture.

We do not discuss the legal implications of carrying on any particular trade as these need separate, specific advice.

There are two main types of limited liability company, namely the "limited" and the "public limited company" ("PLC"). Save in exceptional circumstances, both of these protect the managers and shareholders from liability to the company's creditors. The liability for such company's debts and obligations remains with the company itself. The only exposure for the shareholders is to contribute the amount, if any, remaining unpaid on their shares. For most practical purposes, a "limited" company is sufficient for normal investment.

Establishment and operation of a PLC has greater legal requirements, particularly in relation to minimum capital. Its principal advantage over a limited company is the ability to issue shares to the public.

#### **(a) Formation of a limited company**

Formation is straightforward. In most circumstances, a ready formed company is acquired "off the shelf" from a formation agent for a few hundred pounds. The company will have a standard set of statutes governing its operation ("Articles of Association") which can be changed quickly and simply at a later stage, meaning the company will be ready to conduct business with immediate effect.

Unless the company is intended to trade in areas where specific regulations apply, such as banking or insurance, no consent is needed to start trading. Nor is there any consent requirement or other restriction on nationality or residence in respect of shareholders or managers of the company which could delay commencement of business.

“An extremely professional firm, with an innate ability to get straight to the heart of a matter”

**Client feedback on the Corporate Team from  
The Legal 500 2009**

**(b) Name**

Frequently, the purchaser of an “off the shelf” company will want to change the name of the company.

The Registrar of Companies keeps a central register (“Companies Register”) of names and provided the name chosen is not the same as a name already on the Companies Register, there are unlikely to be problems in swiftly changing the company’s name. Certain names (usually those implying some particular status or a specific function, e.g. British, European or Royal) can only be used with the consent of the relevant authorities. In addition, the Registrar of Companies may need supporting evidence for the use of certain words implying a particular status, e.g. group or holdings.

A change of name can be easily effected and it only takes a short period of time before the new name is registered and can be used. A same day name change service is available for an increased fee.

In addition to the Companies Register, a search for the proposed name on the internet, in trade directories and in trade mark registries should be carried out to ensure that the proposed name is not the same or similar to someone else’s. If it is, this may lead to an action for passing off or trade mark infringement.

It is also possible for any person to object to the use of a company name if it is the same as a name associated with the objector or which is sufficiently similar that it would be likely to mislead.

Every company incorporated in England and Wales is required to show on its letterheads, order forms and other correspondence, e.g. invoices, and on all of its websites its full name (including the fact that it is a limited company), its place of registration, its registered number and the address of its registered office.

**(c) Share capital and shareholders**

Unlike a PLC, there is no minimum capital required for a private limited company and in practice, the vast majority of private limited companies have a share capital of £100 or less. If shareholders wish to restrict the number of shares that can be issued, suitable provisions will need to be included in the company’s Articles of Association.

Fresh capital can easily be injected with a minimum of formality. There is no capital duty payable.

There is a wide discretion as to the type and denomination of share capital, e.g. ordinary, preference, convertible, non-voting shares etc. and shares can be denominated in a foreign currency – sometimes an advantage in drawing up the accounts of the company.

Transfers of shares are generally straightforward and unless specific restrictions are inserted in the Articles of Association of the company or in another agreement, merely require the approval of the board of directors.

Stamp duty of 0.5% is payable by the buyer on the transfer price of shares unless one of a number of specific exemptions applies. Transfers of shares within the same group of companies are generally exempt from stamp duty although certain formalities must be followed in order to claim this relief. Transfers between nominees of the same owner are also exempt.

Shareholders may be individuals or other companies and there only needs to be one shareholder.

Shares are sometimes held in the names of nominees, who then execute a declaration of trust in favour of the true owner, undertaking to deal with the shares in accordance with the owner’s instructions. Although this device may be used to disguise the identity of the true shareholders, it should be borne in mind that the annual accounts of the company, which are public documents, will usually require disclosure of the ultimate parent company.



A shareholder may nominate another person to enjoy or exercise all or any specified rights of that shareholder, provided the company's Articles of Association permit this. This enables nominee shareholders to grant various rights to another, such as the right to be sent annual reports and accounts and to attend and vote at shareholders meetings.

#### (d) Statutes

The governing statutes of a limited company are the Articles of Association. The Articles of Association contain the operative rules governing how the company is managed and will, for example, set out:

- details of the share capital and rights attaching to shares;
- procedures for shareholders' meetings;
- procedures for meetings of the board of directors;
- how dividends are paid;
- restrictions on the authority of the directors (if any).

An "off the shelf" company will normally have standard form Articles ("Model Articles" laid down by companies' legislation) and these provide a good starting point for operation, although it is frequent practice to make slight changes in order to disapply certain formalities and requirements and simplify operation of the company even further.

The holding of the shareholders' meetings which are needed to give effect to changes to the Articles of Association of the company can usually be held "on paper", by passing written resolutions, dispensing with formal notice periods and formal meetings.

#### (e) Ongoing requirements

There are a number of ongoing requirements which a company will need to fulfil and, in practical terms, this will require the appointment of representatives or agents in the UK.

If the company itself does not have a permanent trading presence, professionals such as lawyers or accountants will usually be willing to undertake the work involved:

- Registered office, where official documents can be notified to the company. Solicitors and accountants will frequently provide accommodation addresses for this, usually subject to the condition that the company does not actively trade from those premises.
- Preparation and filing of annual accounts which in certain limited circumstances will require audit by a firm of accountants in the UK.
- Preparation and filing of an "Annual Return" providing certain basic information about the company, its management and its share capital.
- An "Annual General Meeting" ("AGM") of the shareholders, to be held in each year, primarily to consider the annual accounts (although private companies are not obliged to hold an AGM unless their Articles of Association require them to do so).

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**Client feedback on the Corporate Team from Chambers and Partners Legal Guide 2008**

**(f) Management**

A company is managed and administered by its directors. There must always be at least one director who is a natural person, but there is no maximum number of directors of a company unless the Articles provide otherwise. PLCs must have at least two directors and must also have a “secretary”.

The secretary is the company's main administrative officer and is responsible for organising minutes of meetings, keeping the statutory books of the company up to date, filing accounts and returns to the Registrar of Companies etc. As an officer of the company, the secretary often has authority to enter into contracts on behalf of the company. Private companies are not required to have a company secretary, although they may still choose to have one and in practice many companies continue to need someone to fulfil company secretarial functions.

There is no separate legal status given to a “manager”, as such. No particular qualification is required in order to be a director, nor does a director have to be a British citizen or UK resident. Unless the Articles provide otherwise, there is no requirement that a director holds shares in the company.

Directors generally have sole authority to represent the company and (unless this is specifically provided for, e.g. in bank mandates) there is no “dual signatory” or similar concept.

UK subsidiaries of an overseas parent frequently have a board containing a mixture of UK based managers and representatives of the parent (who are based overseas), e.g. two US directors and one UK director. This tries to ensure full control of the board by the parent company, while allowing the company to operate effectively on a day to day basis. This will normally be backed up by internal reporting procedures to monitor the actions of the UK based director.

It should be noted that there is no requirement in practice for a manager of a company also to be a director, although there will frequently be good practical reasons for this to be the case.

**(g) Liabilities**

The company has limited liability. This means, in effect, that in most circumstances neither the shareholders nor the directors can be held liable for its debts or other obligations, provided that the company has been properly administered in accordance with legal requirements. For a prudent businessman it is unlikely that any personal liability will arise.

The main area where personal liability might arise is in circumstances where the company has traded or continued to trade in circumstances where it is insolvent (i.e. unable to pay its debts as they fall due) without reasonable prospect of being able to pay off creditors at a later stage. If the company should become insolvent, the directors must take steps to minimise the potential loss to creditors and, in normal circumstances, this will involve ceasing to trade.

The liability (which can include the obligation to make good a financial shortfall) falls on directors rather than shareholders. However, if the shareholders have actively been involved in managing the company so that they are in effect “shadow directors” then they may be held to have the same liability.

Directors of a company also owe the company certain duties which are enshrined both in companies' legislation (e.g. a duty to disclose potential conflicts of interest) and in extensive case law decided through the courts. Certain directors' duties are codified in a statutory statement of directors' duties. These include the duty to promote the success of the company, to exercise reasonable care, skill and diligence and not to allow their personal interests to conflict with those of the company. If a conflict arises, the best interests of the company must prevail.

A director may also be personally liable in circumstances where:

- a) he purportedly enters into a contract on behalf of the company without due authority; or
- b) he is in breach of obligations imposed on directors under specific legislation, covering such areas as tax, health and safety and the environment.



It should therefore be noted that although, during normal and prudent administration of the affairs of a company, it is unlikely that any personal liability will attach to a director, there are circumstances in which a director can be liable under civil or criminal law either personally or collectively with other directors. Criminal sanctions can include fines and, in some cases, imprisonment. Appointment as a director should therefore be accepted only after due consideration by the individual concerned that he will be able to monitor and discharge his responsibilities.

#### **(h) Publicity**

The file held by the Registrar of Companies is available for public inspection. The usual manner of inspection is to carry out an online search against the company. This will include details of the current and previous directors/secretary of the company, its Articles of Association, its annual returns (which comprise a snapshot of general information about a company's directors, secretary, registered office address, shareholders and share capital) and its accounts.

### **Other practical and legal matters to consider**

#### **(a) Employment**

If the business is to take on employees the vast area of employment legislation will need to be considered. For example, employees must be recruited fairly and must not be prejudiced by reason of their sex, race, age, religion or beliefs, sexual orientation or any disability. Part time workers also enjoy certain rights. Every employee must be provided with a written statement of their employment terms and employees must be treated fairly and not be discriminated against. The company will need to pay income tax and national insurance on behalf of its employees and health and safety procedures must be put in place. If an employee is to be made redundant or is to be dismissed certain procedures must be followed and the process must be fair. If any employees are to be seconded from the non-UK parent, they may require work permits.

#### **(b) Tax**

Tax will often be an important consideration when deciding which business vehicle to establish and advice on tax aspects of setting up and running a business should be obtained early. If the turnover of the business exceeds a specified threshold (currently £70,000), the business will need to be registered for VAT.

#### **(c) Property**

The location of premises and the legal aspects of acquiring property in the UK will also need to be considered. For example, will the premises be acquired on a leasehold or freehold basis? If leasehold, the terms of the lease will need to be fully understood. For example, can the landlord increase the rent and if so, how often and by how much? Are there any restrictions on operating the chosen business from the premises?

#### **(d) Intellectual Property**

IP rights can be very valuable assets and should be protected. Any patents, trade marks or registered designs should be registered as soon as possible and any idea should be kept confidential until registration. Taking advice early on IP protection is advisable.

#### **(e) Licences and consents**

The type of business which is intended to be carried out will determine whether any licences or authorizations are required. If they are, applications should be made as soon as possible so that commencement of trading is not delayed.

#### **(f) Data Protection**

Businesses that store personal information, such as names, addresses and bank details must comply with applicable UK data protection legislation. Most businesses will store personal information, e.g. customer or employee records.

Essentially, there are 8 principles of good information handling and unless a business is exempt, it will need to notify the Information Commissioner's Office ("ICO") what it uses the information for. There is an annual fee of £35 with an increased fee of £500 for large organisations with a turnover of £25.9m and who employ 250 or



more members of staff) for the notification and failure to notify the ICO when required to do so is a criminal offence.

A business will generally be exempt from the need to notify the ICO if the personal information consists of manual (cf. automated) records, if the personal information is processed only for the following purposes:

- Staff administration, including pay roll
- Advertising, marketing and public relations for the business
- Accounts and records,

or if the personal information is processed by organisations which are not set up or conducted for profit.

### **(g) Insurance**

Depending on the type of business to be undertaken a wide variety of insurance may be advisable, for example, product liability insurance and insurance for premises. Some insurance will be legally required, including employer's liability insurance, motor insurance and public liability insurance.

### **(h) Finance**

If external funding for the business operation is required, any provider of finance will need to be satisfied with the chosen business structure. If funding is to be obtained through loans, the lender may require security. Companies can create charges over their assets which may assist with raising external finance.

Care needs to be taken when seeking finance from investors. Documentation which is produced relating to a required investment in the business may need to be approved by a person authorised under The Financial Services and Markets Act 2000.

### **Further information**

We would be happy to discuss the contents of this guide with you should you require.

You may also wish to refer to our briefings, a series of guidance notes on various topics. A full set of our briefings can be obtained from our website: [www.manches.com](http://www.manches.com)

*Note: It should be noted that we have paraphrased the relevant legal provisions, for reasons of brevity, and have only sought to explain the main points of practical importance. This brochure only provides a brief summary of some of the legal issues which need to be considered and should not be relied on. Detailed advice should therefore be sought.*

Spring 2011

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## The Legal 500

### Appendix A

	Sole Trader	Partnership	Limited Liability Partnership	Private Limited Company
<b>Minimum number of owner/managers</b>	1 (max)	2	2	1
<b>Minimum investments needed by law</b>	Nil	Nil	Nil	1p
<b>Trading Risk</b>	Sole Trader takes all the risk.	Partners take the risk in whatever proportions they have agreed.	LLP takes the risk. Members' liability is limited to their investment in LLP unless they have been fraudulent / negligent or given personal guarantees.	Company takes the risk. Shareholders' liability is limited to their investment in the Company. Directors are only liable if they have breached their duties to the Company or given personal guarantees.
<b>Tax</b>	Taxed under trading income rules on profit (whether profits are drawn or not).	Taxed under trading income rules on profit (whether profits are drawn or not).	Taxed under trading income rules on profit (whether profits are drawn or not).	Shareholders' dividends are taxed. Directors' remuneration is taxed as employment income. Company profits are charged to Corporation Tax.
<b>Management Structure</b>	Sole Trader has total authority and can delegate to whoever he wants.	Partners must be involved in the management of the business although they can also delegate.	Members can establish management structure. "Designated" members have extra statutory duties.	Shareholders have ultimate control but the day to day running of the business is for the board of directors.
<b>Administrative Requirements</b>	Accounting requirements. Tax returns.	Accounting requirements. Tax returns.	Accounting requirements. Tax returns. Companies House requirements.	Accounting requirements. Tax returns. Companies House requirements.
<b>Legal Documents</b>	None.	Partnership Agreement recommended.	LLP Incorporation forms. Members' Agreement recommended. Minutes of formal meetings.	Company Incorporation forms. Memorandum and Articles of Association. Shareholders' Agreement (in some cases). Minutes of formal meetings.
<b>Termination</b>	No formality. Cease trading. Sort out third party arrangements.	Little formality. Terminate partnership arrangement/ agreement. Sort out third party arrangements.	Formal procedure must be followed.	Formal procedure must be followed.
<b>Costs</b>	No specific formalities so no special set up costs.	If Partnership Agreement, legal and tax advice.	Set-up: £14-£40* fee + legal and tax advice. Annual fees for Companies House: £14-£40 pa	Set-up: £14-£40* fee + legal and tax advice. Annual fees for Companies House: £14-£40 pa

\* With an increased fee for a same day registration service

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