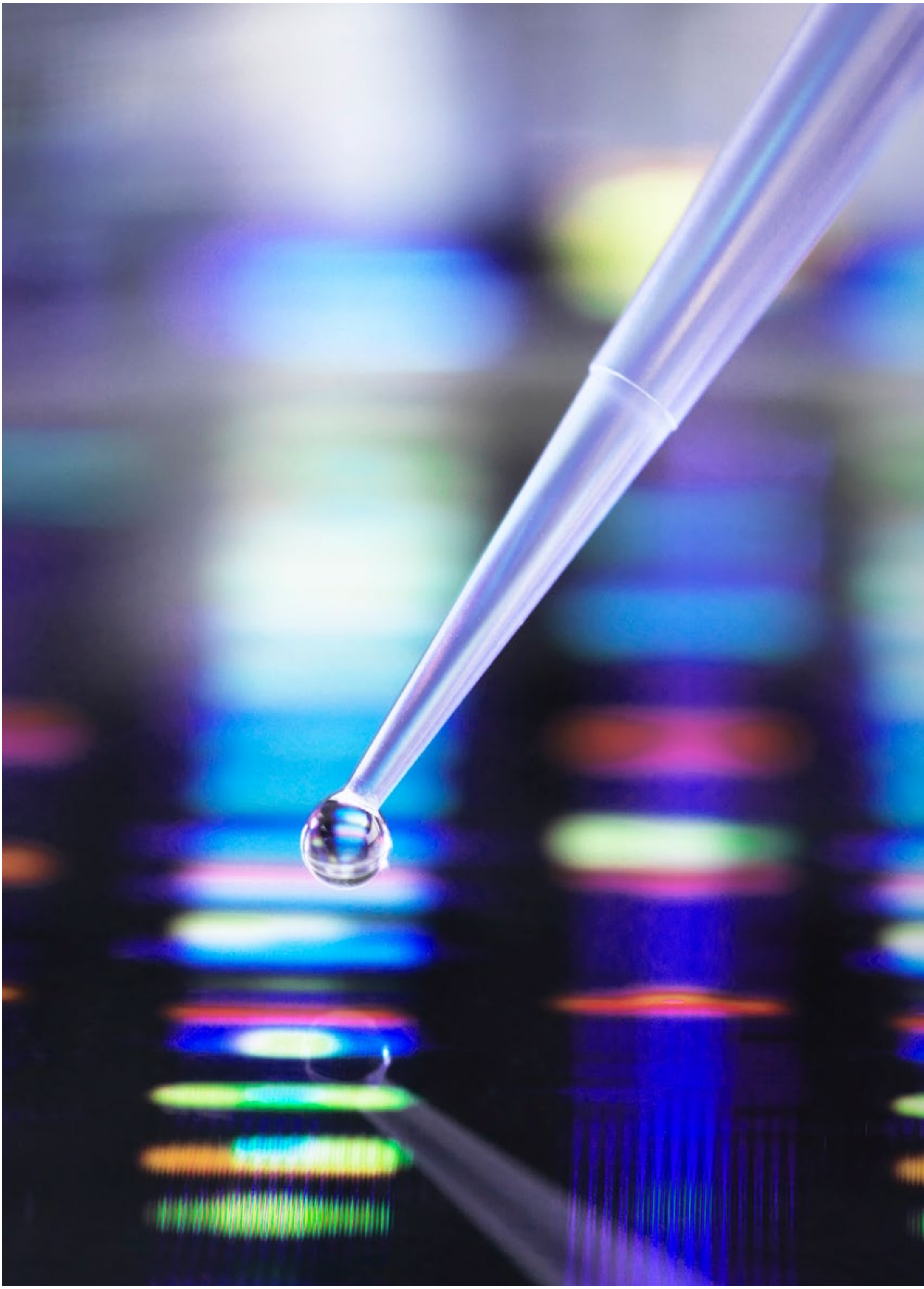
Check-in UK

A legal guide to setting up and doing business in the UK

TaylorWessing



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Introduction

Check-in UK is a guide to the key legal issues that businesses should consider when expanding into the UK.

With the right planning, including specialist, coordinated advice at an early stage, the bulk of the legal work required to get started in the UK can be done quickly and inexpensively.

The UK is a popular foreign direct investment destination in its own right, and has long been regarded as a springboard into the rest of Europe for businesses headquartered outside of Europe. It is also a natural market for other European businesses to expand into. Many businesses coming from outside Europe choose, at least in the early days, to service the rest of Europe (and often beyond) from the UK.

As well as its strength as a launch pad for further global expansion, the UK is a major market in its own right, with a diverse population and strength in a wide range of sectors. In the technology and life sciences sectors, the UK's attractiveness has been enhanced by the emergence of a wave of technology clusters across London, Cambridge and many other cities. UK companies have also raised record amounts of venture capital investment in recent years.

With UK offices in London, Liverpool, Cambridge and Shoreditch and our global presence, we have been helping businesses to enter the UK market and expand into other international markets for decades. We work with a wide range of businesses, from early high-growth companies and fashion brands to some of the biggest companies and brands in the world. We have a cross-practice team of lawyers focused on helping clients inbound to the UK and Europe.

We understand the needs and requirements of businesses looking to set up and expand both organically and by acquisition.

The team is passionate about helping businesses to launch in the UK successfully and cost effectively, using fixed fees and other innovative fee arrangements.

Our international offices mean that we are well placed to assist when our clients look to expand into the rest of Europe, the Middle East, Asia and beyond.

If you would like to discuss any of the issues raised in this guide our team would be happy to speak to you.

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Taylor Wessing has been helping businesses to enter the UK market and to expand into other international markets for decades.

If you do nothing else

There are many things to consider but if you do nothing else:

- Start preparing early. Make sure you are fully aware of all the key legal considerations early on in the planning stages.
- Obtain immigration advice, and decide on your strategy early on– visa lead times can affect your ability to operate.
- Ensure you understand the risks before using consultants or other alternative market entry strategies and understand the unique elements of UK employment and pensions law.
- Take specialist legal advice prior to granting stock options, RSUs, restricted stock or any other equity interests to employees in the UK.
- Protect your intellectual property by registering trade marks, domain names and other rights before you launch your business in the UK.
- Decide on the appropriate method of trading early on, taking appropriate tax and commercial advice first.
- Check whether there are particular compliance or regulatory requirements relevant to your business.
- Consider a review of contractual terms and conditions and your website. Obtain advice on applicable data protection and cybersecurity law.
- If considering an acquisition, carry out early and effective due diligence and ensure you understand the process, timetable, compliance requirements and market norms before signing a term sheet.

Immigration

When entering the UK market, you may want to send key personnel who will be vital in getting the business off to the best start. Obtaining early advice on the best immigration strategy can help avoid compromising the visa options available to you.

Before Brexit, citizens of the European Economic Area – the European Union countries plus Norway, Iceland and Liechtenstein and Switzerland through trade agreements (collectively the "EEA" countries) - were able to live and work in the UK without needing any type of visa or immigration permission. That position changed because of Brexit, except for Irish citizens who continue to have the unrestricted right to live, work and study in the UK without needing a visa or other UK immigration status because of longstanding Common Travel Area arrangements.

EEA citizens and their family members already living in the UK before 31 December 2020 secured their status and an ongoing right to live and work in the UK by applying to the EU Settlement Scheme by 30 June 2021.

Successful applicants received either a temporary 'pre- settled status' if they had less than five years' continuous residence, or 'settled status' (permanent residency) for applicants with at least five years' continuous UK residence.

From 1 January 2021, the UK introduced a revised immigration system that applies the same visa rules to European and non-European workers arriving in the UK for work. For example, while tourist travel or short business trips (to perform permitted business activity that is not treated as 'work') continues to be visa-free and largely unaffected, European citizens without a history of working in the UK that want to relocate to the UK or that need to perform productive work in the UK cannot use the EU Settlement Scheme.

They need to apply for an appropriate visa to be able to live, work or study in the UK and that application must be submitted outside the UK. Depending on the visa category used, those applicants may not have a right to remain in the UK permanently.

Unless an individual holds or qualifies for a British or Irish passport, or a UK visa on a personal basis (e.g. through the Global Talent scheme, the High Potential scheme, UK ancestry, the Youth Mobility scheme, or as a spouse/civil partner/unmarried partner of a British or settled person, or of a non-British national that already has their own immigration status), the UK entity will need to sponsor their work visa application.

Trends and hot topics

- **Changes in immigration law:** immigration rules are subject to change, often at short notice. It is critical to obtain up-to-date local advice at an early stage.
- **Timing for launch team:** using the UK Expansion Worker route, you can send over up to five skilled employees to launch the UK operation for one to two years. This requires the non-trading UK entity to apply for sponsorship before the workers can apply for visas, so the entire process will take several months.
- **Working without a visa:** workers need a UK visa to be able to work in the UK, but from a UK immigration perspective there are no restrictions on non-British/non-Irish employees working remotely for the UK entity or for UK clients from outside the UK, provided they have appropriate immigration status for the country they work in.

Business travel

Non-British/non-Irish citizens can visit the UK for business or as a tourist without needing a work visa. Citizens of certain non-EEA countries must apply for a visit visa from their country of residence before they travel (they are known as 'visa nationals').

Examples of permitted business travel for workers employed and paid outside the UK include attending meetings or conferences (other than as a paid speaker), training UK based colleagues in the same group, or negotiating or signing deals and contracts. Employees of foreign

manufacturers or suppliers may be able to send employees to the UK for up to one month to install, dismantle, repair, service or advise/train on equipment, computer software or hardware sold to a UK customer, where the overseas manufacturer or supplier has a contract of purchase or supply or lease with that UK company or organisation.

Outside of permitted activities, visitors cannot 'work' in the UK, for example by selling products to UK customers or by filling a gap in UK headcount even for short periods. An internship or work placement is also treated as 'work'. Nor should they appear to the UK authorities to be working or making the UK their main home.

Genuine business visitors can only visit the UK for short periods of time and can only carry out certain business activities when they do. The rules for non-EU (including British) citizens visiting the EU for business - which restrict business trips to a cumulative stay of 90 days in any 180-day period – do not apply to visitors entering the UK. In principle, visitors can stay up to six months on each entry, but only if they are complying with visitor rules. As the focus of the UK rules is on activities while in the UK, and because cumulative length of stay can lead to an inference of work and/or making the UK their main home, to reduce risk of refusal to enter the duration of business trips should be kept as short as possible.

Key legal considerations

Visa applications

Initial applications by workers resident outside the UK are made in the applicant's country of nationality or residency (if different) – visitors cannot apply for full visas in the UK. In most cases family members of the employee (spouse, civil partner, long- term cohabiting partner or children under 18) can apply for dependant visas, tagged to the main applicant's visa. The employee's spouse or partner can work in the UK without restriction on a dependant visa except as a professional sportsperson or coach.

Before the UK entity is trading: UK Expansion Worker (UKEW) visa

For many years, overseas businesses launching a UK operation used the sole representative visa route. This has now closed to new applicants, but it remains open for sole representatives that already have the visa to extend and apply for settlement (permanent residency).

It has been replaced by a new sponsored route - the Global Business Mobility: UK Expansion Worker visa.

One shortcoming of the sole rep route was that it only supported one visa, when companies investing into the UK often need a team to arrive together to launch the UK business. The sponsored UKEW route will enable up to five skilled workers to come to the UK to help launch and run the new UK

Obtain immigration advice, and decide on your strategy early on – visa lead times can affect your ability to operate.

office until it is fully trading. For some businesses the ability to have a team from HQ on the ground early on will be invaluable to their successful expansion.

When planning to launch in the UK, businesses should conduct a full immigration strategy review to assess what visa routes may be available to each non-British worker that needs to work in the UK. That review should assess whether a personal visa might be available through the applicant's attributes (e.g. the High Potential Individual mentioned below), ancestry or family connections. Where a different route is not available or suitable, international companies that have been trading for at least three years outside the UK and that plan to set up in the UK must now use the UKEW visa.

UK Expansion Worker is one of five visa routes covered by the Global Business Mobility (GBM) scheme. There are different rules for each GBM route, but there are common themes applying to all GBM routes:

- there must be a UK entity holding an appropriate sponsor licence to sponsor the visa. In the case of UKEW, this must be a non-trading UK entity.
- all GBM routes are temporary, so time spent on any GBM visa does not lead to settlement (permanent residency).
- time spent in GBM (across any of the routes) is capped at a maximum of five years in a six-year period, except for high earners with a salary of at least £73,900. High-earners can stay up to nine years in a 10 year period. The cap only applies to time spent in GBM - not to Skilled Worker or other visa routes that are uncapped.
- applicants for GBM visas are exempt from any English language requirement.

UKEW: visa duration

Once a UKEW licence is in place, the UKEW visa will be granted for 12 months initially, with the option of one 12-month extension (assuming the applicable GBM cap has not been reached). So, the maximum time that can be spent in UKEW is two years.

UKEW applicants wanting to stay in the UK beyond two years - or that want to start the clock running on settlement as early as possible - will need to switch into a different visa route leading to settlement. That could be a personal visa, or in many cases will be the sponsored Skilled Worker route once the UK entity is trading (with at least one employee on the ground, a bank account, payroll etc) and can apply for a Skilled Worker sponsor licence.

UKEW sponsor licence

Before an employee can apply for a UKEW visa, the non-trading UK entity must apply for a sponsor licence, to enable it to sponsor the visa. The UK entity - a wholly owned subsidiary company or registered branch (establishment) - must be in common ownership with the overseas HQ company employing the UKEW applicant. The planned UK operation must be in the same type of business as the overseas business, so can't be a completely new business venture. Unlike full sponsorship for trading UK employers, an entity applying for a UKEW licence does not need to have a UK bank account but must still provide extensive supporting evidence.

Non-trading' means that that there's no active UK presence or employees already on the ground in the UK, although the UK entity may already have UK clients/customers or taken provisional steps towards trading, like applying for VAT. UKEW licence applicants must have a 'UK footprint', so businesses will have to either set up an entity or lease UK premises or serviced office space before knowing whether the first UKEW visa will be approved. A wholly owned subsidiary company can be incorporated within a few days and that will enable the company to start registrations without trading, for example applying for PAYE (payroll registration).

A sponsor licence application is a formal application involving an online form with follow up submissions, including supporting documents about the overseas business and the UK footprint. Before granting a UKEW licence, the Home Office will assess the company's business plans and finances, based on the size of the international business, its previous activity and potential. This will be a case-by-case assessment, with an inevitable degree of subjectivity from case workers about whether a particular business applicant has sufficient funds or a credible business plan to support its expansion.

The exact supporting documents depend on the circumstances and type of business. Applicants are exempt from providing from some of the supporting evidence if some cases, such as where the overseas company is listed on London Stock Exchange or an international exchange considered to have equivalent levels of regulation to UK markets.

UKEW visa eligibility

As well as having a UK job offer for a genuine vacancy from an approved sponsor, applicants must meet all the strict visa requirements to qualify:

- employment with the overseas business outside the UK in a senior manager or specialist role for at least 12 months, unless they are a "high-earner" (as defined above) or a Japanese national doing work for a Japanese company that is expanding to the UK under the UK-Japan trade agreement, in which case even new hires of the overseas business will qualify.
- UK annual salary of at least £45,800, or the minimum for the specific job if higher.

- the UK role must have a skill level at or above graduate level. The list of eligible roles covers multiple graduate level roles, including technical, sales or technology-based roles, as well as more general management positions.
- although there's no English language requirement, there is a new finance (personal funds) requirement, which requires UKEW visa applicants outside the UK to have personal funds of at least £1,270 for every day of the 28-day period prior to the application (the threshold increases if there are accompanying family members). Unlike other sponsored routes, the sponsoring business cannot certify on the applicant's behalf.
- there's no explicit rule on the maximum shareholding that the applicant can hold in the overseas business. But for all UKEW applicants, there must be a genuine UK vacancy, which could be a factor for majority owners.

UKEW visa conditions

UKEW visa holders can live and work in the UK, and travel abroad as much as they need to, but their right to work is tied to employment with their sponsoring business. Other than voluntary work, they are not permitted to work for any other business, even outside the working hours of the main job.

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Once the sponsor licence has been obtained, the UK sponsor can arrange sponsorship for employees of international group offices to come to the UK on sponsored visas.

Sponsorship imposes strict HR related compliance duties on the sponsoring business. The first UKEW applicant will be the “Authorising Officer” (AO), which is a designated UK based appointed role on the licence. The AO has responsibility for those sponsor obligations, which include record keeping, employee monitoring and reporting duties. The same duties apply to Skilled Worker sponsor licences too. Failure to comply with sponsor duties can lead to revocation of the licence, which would cancel any visas sponsored under that licence, so the post-approval visa compliance is just as important as the process to grant the visa.

UKEW teams

The UKEW visa is available for up to five employees, including the first employee that will be the AO. This allows a team of workers to be sent to the UK to launch the UK business, but the same visa eligibility conditions must be met by each person. There will also be a short gap between the AO arriving and the other team members, as there’s a registration process the AO must go through after visa approval.
To qualify for the UKEW visa, each team member must meet the service requirement, be coming to the UK to perform a skilled graduate level role and be paid salary above the required level. This means that, for example, the UKEW visa could not be used for an Executive/Personal Assistant administrative type role supporting a senior executive on a UKEW visa, as that UK role would not meet the minimum skill condition.

UKEW timing

The requirement that the business first applies for a UKEW licence means there is a lead-in time to get the first employee to the UK. But if there’s a senior team that needs to work in the UK together from or shortly after launch, it should be a quicker route for the team to relocate to the UK than waiting for Skilled.

Worker sponsorship which requires UK bank account approval. The processing time for a UKEW licence is around the same as for Skilled Worker licences - eight weeks at the time of writing.

Visa processing time outside the UK depends on the country of application and circumstances applying at the rime, including whether there is an expedited processing option available.

Once the UK entity is trading: Skilled Worker sponsor licence

Once trading, the UK entity needs to apply for a four-year sponsor licence if it wants to sponsor work visas that lead to permanent residency, or if there are more than five employees from HQ to sponsor. Businesses can either apply to convert an existing UKEW licence or apply for a Skilled Worker without previously holding a UKEW licence. But in either case cannot apply for a Skilled Worker licence until the UK office is up and running with a UK bank account and at least one senior UK based employee to oversee and take responsibility for the licence. Timings will fluctuate, but bank account opening will sometimes take at least several months. Skilled Worker licence processing time is likely to be similar to UKEW licences: eight weeks or so, but it will depend on circumstances at the time and there may be an expedited processing option (subject to availability).

Once the sponsor licence has been obtained, the UK sponsor can arrange sponsorship for new hires or employees of international group offices to come to the UK on sponsored visas. There are two categories of sponsored work visa for trading UK businesses: Skilled Worker and Global Business Mobility (which used to be called Intra-company Transfers or ICT). Global Business Mobility (GBM) covers Senior or Specialist Workers – the main intra-company transfer route - and Graduate Trainees. In both cases, the UK entity must have a sponsor licence and visa permission is tied to skilled employment with the sponsoring business – a sponsored visa is not a general right to work for any UK employer.

Skilled Worker visas

This is the main sponsored work visa route under the post-Brexit rules. Applicants must have a UK job offer from a licensed sponsor at or above the required skill level and minimum salary level and must also prove English language to the required standard. Proving English is automatic for citizens of certain majority English speaking countries or alternatively applicants can take a test with an approved provider or show that they have a degree that was taught in English. Skilled Worker is popular with employers and applicants because it leads to permanent residency (settlement) after five years' continuous UK stay.

- Sponsors must be able to prove the role is genuine, that the applicant is suitably skilled to do the job and the recruitment activity undertaken, but employers do not have to demonstrate that they conducted a formal advertising process (this used to be called the 'Resident Labour Market Test').
- There's no cooling off, meaning GBM or ICT visa holders already in the UK can switch into a Skilled Worker visa from inside the UK at any time, for their existing sponsor or a new employer.
- There's no cap/quota on the total number of visa approvals either regionally or nationally, so it's easier to predict outcomes.
- There's no limit on visa duration so sponsored workers in this route can keep extending indefinitely, if they don't apply for permanent residency after five years' continuous stay.
- The minimum skill level for Skilled Worker roles is lower than for GBM visas, so more roles are available for sponsorship.
- The minimum baseline annual salary is £25,600, although in many cases only basic salary can be included. If the going rate for the specific job is higher than the baseline, the sponsor must pay that higher amount. There are also further possible reductions to minimum salary in some specific cases, such as where the UK role is designated as shortage

occupation, or if the applicant is under 26 or a recent UK graduate.

- There is no limit on the size of the shareholding in the sponsoring business that the applicant can hold.

GBM: Senior or Specialist Workers (previously known as ICT)

GBM/ICT used to be the main visa route for international employers moving skilled workers to the UK, because sponsors did not have to advertise the UK vacancy. Now that advertising has been removed for Skilled Worker applicants and because Skilled Worker leads to permanent residency (whereas GBM does not), the Skilled Worker is a more popular route for businesses and applicants wanting long-term stay in the UK.

GBM applicants must have 12 months' service overseas with a linked company, or alternatively be offered a UK salary above a high-earner threshold (£73,900 at time of writing) if the employee has less than 12 months' service. The minimum skill level of the UK role – graduate level – and the minimum baseline salary of £45,800 are both higher than for Skilled Worker, but a GBM applicant is exempt from proving English language ability.

Time spent across any GBM routes is capped at five years in any six- year period, or nine years in any 10-year period for high-earners (again £73,900 at the time of writing). GBM visas do not lead to permanent residency, but anyone on a GBM visa can switch into Skilled Worker with the same or a different sponsor at any time, to start the clock running on settlement.

Although GBM does not lead to settlement and has a higher minimum salary, in some circumstances there are still reasons to use GBM (so international business should still apply for a licence covering that category):

- for urgent assignments where the applicant needs to prove English language. As GBM applicants are exempt from proving English proficiency, the visa can potentially be arranged faster than Skilled Worker for applicants that are not citizens of majority English speaking countries; and

- although minimum salary is higher, allowances such as cost of living adjustments can be treated as "salary" for the visa, whereas in Skilled Worker only basic salary can be included.

Scale-up visas

Scale-up visa route opened in August 2022 and is aimed at established UK scale-up businesses.It is a new sponsored route alongside the other sponsored work immigration routes like Skilled Worker and GBM routes. The difference is that Scale-up sponsors do not have to pay the Immigration Skills Charge for sponsored visas, which is a tax on employers. And unlike GBM visas, Scale-up visas lead to settlement after five years' continuous stay in qualifying visas.

To qualify for a Scale-up sponsor licence, the UK entity needs to show annual growth in either revenue or headcount of at least 20% for the previous three-year period and that they had a minimum of 10 UK based employees at the start of the period.

The Scale-up visa involves two stages. The first sponsored stage will give Scale-up workers permission to stay in the UK for two years and requires a job offer from a Scale-up sponsor of up to at least six months. The UK job must have a skill level at graduate level or above and a minimum annual salary of at least £34,600, or the going rate for the role if higher.

In the second unsponsored stage of up to three years, Scale-up workers no longer require sponsorship, if previous earnings paid through the payroll met that salary threshold for at least 50% of the time covering their initial permission to stay as a Scale-up worker.

Scale-up workers will be able to switch to different sponsored roles in the first six months, and after at least six months in sponsored work, Scale-up workers can work for any business and can perform any work without restriction (except as a professional sportsperson or coach).

Other non-sponsored work visas

Global Talent

This personal non-sponsored visa used to be called 'Tier 1 Exceptional Talent'. The Global Talent route is uncapped and is for a non-British/ non-Irish citizen that:

- has been endorsed as an internationally recognised leader in digital technology, science, arts, humanities, engineering or medicine ('exceptional talent'); or
- is an emerging leader, so can demonstrate the potential to become a leader in one of those fields ('exceptional promise').

This route which is particularly popular for applicants in the tech sector, as it covers both applicants that are technically gifted and also those that have founded/run tech businesses provides a long- term work visa leading to permanent residency. In some cases, permanent residency is available after three years, rather than five years. The visa is personal to the individual, it is not tied to a sponsoring employer, it has no minimum skill/salary requirement and no shareholding restrictions– but gives the right to work in the UK. Unless the applicant has won a 'prestigious prize' such as a Nobel Prize or an Oscar, each applicant needs prior endorsement from a designated UK industry body.

Innovator Founder

This visa route replaces the previous Start-up and Innovator routes and is a personal UK visa designed for business founders. It has a three-year visa period and family members can apply for dependant visas too. Applicants will be assessed on three factors:

- innovation (having a unique business concept);
- viability (proving that the applicant has or is developing the required experience and expertise to run the business); and
- scalability (evidence of a clear growth strategy and job creation plans).

Applicants must have received prior endorsement by an approved endorsing body before they can apply for the visa. In a change to the previous Innovator visa rules, Innovator Founders are not required to invest any capital funds in the business – previously applicants had to invest at least £50,000. Also, in another change to the previous rules, Innovator Founders can engage in other employment outside the running of their business, provided that any such secondary employment is in skilled roles. This concession is beneficial for entrepreneurs involved with more than one start-up or growth business.

The Innovator Founder visa will not be suitable for many applicants due to the need to have a unique and scalable business and other complicating factors, such as a shortage of suitable endorsing bodies and the risk to the applicant if the endorsing body decides to withdraw its endorsement for any reason. The criteria for the applicant and their business to meet to ensure long term stay and possibly permanent residency through the Innovator Founder route will be difficult to meet for some people, but where it is a viable option, the availability of settlement after three years continuous residence in the UK (rather than the five years needed for most visas) makes it an attractive option.

High Potential Individual visas

This is a personal non-sponsored visa route for graduates of top global universities who wish to work, or look for work, in the UK. It allows either employment or self-employment.

The High Potential visa route is a two-year visa (three years for PhD or other doctoral level qualifications), but it does not lead to settlement in the UK. Applicants must have graduated in the last five years from a university outside the UK ranked in the top 50 (there are annual lists available), meet the English language requirement and show they have sufficient funds to support themselves. But this visa does not require a job offer, a sponsor licence or endorsement from any external body.

Visa	Minimum UK annual salary	Permanent residency
UK Expansion Worker	✓	×
GBM	✓ (salary can include allowances and be paid in overseas country of origin's currency or GBP) May be more tax efficient to structure as an assignment rather than a local hire	× (visa usually capped at five years, or nine years for high-earning employees)
Skilled Worker	✓ (salary means basic salary only)	✓ (no cap on visa duration, so applicant can keep extending indefinitely if permanent residency is not granted)
Global Talent	×	✓
High Potential	×	×
Scale-up	✓	×

Employment

Employment laws in Europe can differ significantly from those in other jurisdictions. There is no concept of 'at-will employment' so written contracts are essential. While employees have a raft of protections, employment law is more flexible and more employer-friendly in the UK than in other European countries, and has become increasingly so in recent years.

It is now reasonably close to employment at will during the employees' first two years, subject to short minimum notice periods. However, it is still important to be fully informed of the nuances of UK employment law before setting up any arrangements and contracts in order to prevent some serious issues arising later.

Trends and hot topics

- **Hiring self-employed contractors or consultants:** this can seem an attractive option, especially if it means saving or delaying costs such as those involved in setting up an entity or registering for payroll. However, it is important to ensure that the relationship is that of a genuine consultancy and that the individual is truly self-employed. If, in fact, it is one of employer/employee, there are certain implications:
  - The individual has employment law rights and, as employer, you are responsible for the deduction of income tax and social security contributions from payments. This can quickly become a significant amount.
  - Having an employee can create a permanent establishment in the UK for tax purposes without a UK entity of the overseas company having been set up and the appropriate tax planning done.

  - From 6 April 2021 medium and large companies (as defined) must deduct income tax and social security contributions from payments to contractors providing services by way of a limited company in certain circumstances, rather than paying them gross and the individuals' personal service companies making the deductions.

- **If the relationship is one of a contractor:** if a contractor creates any intellectual property it usually belongs to them unless expressly assigned to the business – the UK does not have a 'work for hire' concept.
- **Workers:** there has been sharper focus on the distinction between a worker and a self-employed contractor. This is the result of a number of individuals (notably Uber drivers) claiming that they are workers. In February 2021, the UK's highest court decided Uber drivers are workers and this will have a knock on effect on similar businesses.

The company must also carry out an analysis of whether this applies and communicate this to the contractor.

  - 'Worker' is a wider term than employee and includes other individuals who perform work personally for a business and have some legal rights, including a right to paid vacation. Find out more about modern work: **CLICK HERE**
  - Workers are entitled to receive a written statement of their terms in the same way as employees.

- **Gender pay gap reporting:** there is a requirement for employers with 250 or more employees ordinarily working in Great Britain to publish information relating to pay. The purpose is to establish whether there are differences between pay and bonuses for male and female employees. Employers are required to collect gender pay gap data as at 5 April each year and publish it within the following 12 months and then on an annual basis.

- **Modern slavery statement:** the UK's Modern Slavery Act introduced a reporting requirement for organisations with an annual global turnover of at least £36 million and that carry on any part of their business in the UK. Such organisations have to publish an anti-slavery and human trafficking statement on their website. Find out more about modern slavery: **CLICK HERE**
- **Unfair dismissal:** after two years complete service, an employee has the right not to be unfairly dismissed. That means you need a legally fair reason for dismissing them. You also have to follow a fair procedure before the dismissal or you risk a successful claim from the employee for which they can receive compensation for loss of earnings up to a capped amount.

Key legal considerations

Minimum legal rights

Employees have minimum legal rights, including for:

- pay
- hours of work
- vacation
- sick pay
- family leave
- notice on termination
- dismissal.

Although extensive, the UK rules are less rigorous than those in other European countries.

Employment contract

Each employee has a right to and will expect a written statement of their terms or a contract of employment. A simple letter offering employment, which might be more typically expected in some jurisdictions, is not enough.

The contract or statement must include basic terms such as:

- hours of work
- pay
- sickness absence
- minimum vacation of 28 days including public holidays (for full-time employees)
- other paid leave (statutory paid family leave)
- notice periods
- details of any training provided
- grievance and disciplinary procedures
- other benefits.

As there is no 'at-will employment', employers in the UK rely on the contract of employment to protect the company during and after employment. If there is no written contract a court will imply what it considers reasonable and an employer may also be liable for failure to provide written terms and conditions of employment.

Non-compete and non-solicitation provisions

Post-termination, non-competition and non-solicitation obligations can be enforced in the UK if reasonable. Usually North American non-competition agreements, for example, are too wide in scope and duration to be enforceable in the UK in full or n part. It is strongly advisable to ensure that you have UK specific provisions for UK employees.

Discrimination

Discrimination because of sex, race, disability, sexual orientation, pregnancy and maternity, marriage and civil partnership, religion, belief, age or gender reassignment is unlawful in the UK. Compensation is uncapped and there is no minimum period of service required to bring a discrimination claim.

Automatic transfer of employees

When you acquire a business (or part of a business), the employees' contracts of employment transfer automatically as they stand. This takes place under the Transfer of Undertaking (Protection of Employment) Regulations (TUPE). You will need to honour all existing terms and conditions with the exception of certain occupational pension obligations. A similar law applies in most European countries. If acquiring a business or assets, or outsourcing/insourcing services, seek local advice early on in order to understand your obligations and the implications for your business.

Settlement agreements

Employers can obtain a full release of almost all potential employment claims from an employee in the UK. This must be in the form of a settlement agreement and the employee must obtain independent legal advice on the terms of the agreement for this to be enforceable.

Right to notice on termination

Every employee has the right to a statutory minimum period of notice. After one month's service, this is one week for each complete year of service up to a maximum of 12 years. It is common for the employee and employer to agree a longer period of notice, especially for more senior employees. This needs to be taken into account when hiring, as the candidate's existing employer may require them to work their notice period, which is typically one to three months but can be longer.

Creation and ownership of intellectual property

Intellectual property (IP) created in the course of an employee's employment is assigned to the employer. It is important to consider, in line with your IP strategy, whether there should be a transfer of the IP to the parent company or another entity in the group.

Pensions

When setting up in the UK you have to organise a pension plan into which certain workers must be automatically enrolled.

Types of benefits

- A defined contribution pension is where the employer makes a pension contribution of a fixed amount (usually a percentage of the employee's salary). Providing defined contribution benefits has become more popular because of the greater certainty of cost to the employer.
- A defined benefit pension is designed to provide a defined payment from retirement (usually based on earnings and length of service). Defined benefit pension plans are now very rare in the private sector.

Types of arrangements

- Group personal pension plans (generally referred to as "GPPs"), belong to the employee but are managed by an insurance company. In some ways these are similar to a 401(k) plan in the US.
- Participation in a commercially operated 'Master Trust' in which other, often unrelated, employers also participate, but which is managed centrally by one set of trustees. These are also heavily regulated and must be authorised by the Pensions Regulator.
- Overseas businesses setting up in the UK will generally offer contributions to personal pension plans or Master Trusts to meet the auto-enrolment requirements, in line with market practice. From the employers perspective, these two options are similar in terms of cost and complexity, with the employer generally only being liable to make contributions for current employees at the agreed percentage of pay

Auto-enrolment

Employers are legally required to automatically put certain workers into a pension plan and make minimum contributions with respect to them. Even with auto-enrolment, mandatory contributions to pensions in the UK are substantially lower than the contributions in most of Western Europe, with minimum employer contributions being 3% of the worker's pay in most cases.

Key legal considerations

Choosing a pension plan

A key factor will be having a pension plan that satisfies auto enrolment requirements.

Some businesses, especially smaller ones, find it hard to find an appropriate plan that will accept them. However, the National Employment Savings Trust (NEST) (a Master Trust set up by the government), is generally available.

Costs and regulation of pension plans

Traditionally employers can avoid significant costs and administration by opting to contribute to personal pensions and Master Trusts but there are still costs associated with auto-enrolment compliance, which need to be considered and minimum employer contributions paid in (currently 3% of the worker's pay in most cases).

Entitlement to auto-enrolment

All eligible workers have to be auto-enrolled as soon as the law applies in respect of them, though limited relief is available for up to three months providing the correct procedure is followed. The business generally cannot auto-enrol anyone else. Other workers may have the right to opt in to a pension. Identifying who is eligible and who falls within the relevant category for auto-enrolment purposes can be complex, and depends on factors such as age, pay, employment status and location. Compliance is key. There can be heavy fines for breaching the statutory requirements.

Overseas nationals and UK pension plans

UK tax legislation has made it simpler for overseas nationals to join UK pension plans but the tax consequences for a non-UK national joining a UK pension plan still require careful consideration.

Employee incentives

Many businesses use stock options or other equity incentives in order to incentivise their employees. There are several methods of doing so available in the UK. For emerging businesses that meet certain qualification requirements there is a particularly attractive tax favourable employee option plan: the EMI option plan.

It is very important to obtain specialist employee incentives advice before granting options or other equity incentives. Failure to do so can lead to the business and employees incurring substantial tax liabilities and breaching the UK's securities laws.

Trends and hot topics

- **Tax-favoured options:** many overseas headquartered businesses use Enterprise Management Incentive (EMI) options. These are a flexible incentive and, providing you satisfy certain conditions, the rate of tax for an employee on selling shares can be as low as 10%.
- **Share option plans:** all businesses with employee share option plans and arrangements have to register and report activity to HMRC online. Annual self-certification is required demonstrating that tax-favoured plans meet certain requirements.

Key legal considerations

Securities laws

many overseas headquartered businesses use Enterprise Management Incentive (EMI) options. These are a flexible incentive and, providing you satisfy certain conditions, the rate of tax for an employee on selling shares can be as low as 10%.

UK sub-plans

To comply with UK securities laws, many will need to put sub-plans in place in order to grant UK options or other equity incentives.

Tax

It is important to obtain advice prior to granting options or other equity incentives in the UK. In most cases you need to take certain steps and prepare documentation to protect the business from potentially significant tax liabilities on the exercise of options, these arise from employer National Insurance Contributions (NICs) – the UK's equivalent to social security.

EMI options

Where EMI options are available, they can be a very attractive incentive for UK employees. If you decide to use EMI options make sure that you follow tax legislation and reporting requirements.

CSOP options

If the company does not meet the qualifying requirements for EMI options, CSOP is another type of tax favourable option plan in the UK. It is not as flexible as EMI but is a good alternative following recent changes in law.

Filings, reporting and withholding

Tax filings, reporting and withholding requirements relating to equity incentives must be followed for HMRC compliance. There is an online filing system for all existing and new share option plans and arrangements. There is also a requirement to self-certify on an annual basis that any tax-favoured plan meets its requirements. Automatic penalties apply for late reporting.

Ensuring that filings, reporting and withholding requirements are properly undertaken will ease due diligence and avoid UK issues on any future transactions, such as a sale of the overseas parent. It is common for stock options or other equity incentives to be the main UK issue on the sale or merger of the overseas parent. This is particularly the case where the appropriate planning was not undertaken prior to the grant of the interests or where steps are necessary in order to protect EMI tax treatment.

Structuring your business

A key part of successfully setting up and doing business in the UK is to establish the appropriate business structure.

This will usually include:

1. The registration or incorporation of an entity in the UK.

2. Taking steps early in the process to consider the most appropriate structure from a commercial, corporate and tax perspective.

3. Considering how the UK fits in to any wider international expansion plans.

Trends and hot topics

- A key part of successfully setting up and doing business in the UK is to establish the appropriate business structure, because:
    - company law is likely to require it; and
    - having an entity helps the business to ensure it is managing international tax issues appropriately. Without an entity, the overseas entity may find it has an unregistered branch in the UK which could well constitute a UK permanent establishment for tax purposes which could give rise to unanticipated tax issues in the UK, although setting up a formal registered permanent establishment can also be simply achieved.
- The UK as a holding company jurisdiction: given the UK's competitive corporation tax rate (which, although it increased from 19% to 25% on 1 April 2023, remains one of the lower rates of the G20 nations) broad 'participation exemption', as well as other inherent advantages such as the availability of talent, the sophisticated professional services and market infrastructure, a business friendly regime and the attractiveness to overseas employees, we are seeing many corporates use the UK as a holding company jurisdiction for European or even worldwide sales. Research and development credits may be available and the UK Patent Box regime is a further incentive for businesses with UK or European Community patents to obtain an effective corporation tax rate of potentially 10% in the UK on revenues derived from qualifying patents which are developed in the UK (subject to satisfying the relevant requirements).

PEO models

Some businesses choose to expand into new markets using a professional employment organisation (a 'PEO'). The PEO acts as the employer and will deal with payroll tax withholdings and will contract directly with the employee. This can appear to be an attractive option when expanding into a new market on a lighter touch basis, and we have seen it successfully deployed. However there are a number of risks with such models:

- the contract with the PEO will typically include broad indemnities in favour of the PEO, passing employer and other liabilities on to the business
- such an arrangement also blurs the employee/employer relationship which can hamper integration of the local team into the company's culture
- the company will not be able to grant tax favoured options to any employees engaged via the PEO (and even non-tax favoured option grants are made more difficult)
- the PEO model could leave the business exposed by constituting a permanent establishment for tax purposes
- there may be issues with IP assignment where the employer is the PEO rather than the actual employer company.

Key tax considerations

The UK is an attractive jurisdiction from which to set up a holding company or operating subsidiary, for the reasons set out below.

Corporation tax

Although the UK's main rate of corporation tax increased from 19% to 25% on 1 April 2023, it remains competitive.

Incoming and outgoing dividend payments

The UK imposes no withholding tax on dividends paid by companies to shareholders, irrespective of where they are located, which makes it a desirable holding company jurisdiction.

In addition, there are wide-ranging exemptions available such that dividends received by UK companies from subsidiaries are typically exempt from UK tax (subject to relevant conditions being met).

The UK's extensive treaty network with other jurisdictions can reduce (or sometimes eliminate altogether) non-UK withholding taxes on dividends (or interest or royalties) payable to UK entities. This treaty network also mitigates to a large extent any adverse implications of the UK ceasing to benefit from the EU Parent Subsidiary Directive.

Participation exemption

As a general rule, any disposal by a UK company of a subsidiary may give rise to a 'chargeable gain' which would be subject to corporation tax. However, the UK has a 'participation exemption' such that any such disposal will be exempt from corporation tax if certain criteria are met.

Encouragement of R&D

The UK itself is a popular jurisdiction for holding and developing intellectual property. For instance, there are various well-established tax incentives, such as the 'Patent Box', which enables companies to apply a lower 10% rate

of corporation tax to a wide range of profits earned from its patented inventions or products incorporating a patented element.

Similarly, there is a generous R&D tax relief scheme where companies can obtain additional tax deductions, or payable tax credits (depending on certain criteria), for qualifying expenditure on R&D.

UK tax affairs

As with most jurisdictions, corporate tax affairs can be complex and when a new company or establishment is set up in the UK there are certain tax notification and filing obligations. However, the UK is in many respects a simpler jurisdiction to operate in from a tax and corporate perspective than others that are considered as holding territories.

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They provide well thought-through advice and can be relied on to deliver under tight timeframes.

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Key legal considerations

Trading in the UK

Overseas companies expanding to the UK use a number of different structures to enter the UK market. Identifying the right structure for your business will depend on factors such as sector, business product or service and the extent to which you require a local presence. Examples include:

- trading through a limited liability company, typically a wholly owned subsidiary company (or a group of companies)
- setting up a UK establishment (previously known as a 'branch' or a 'place of business')
- running the business from outside the UK via the internet or another means of selling into the UK
- using a franchise or licensing model
- using a distributor or agent
- using a joint venture with a third party
- acquiring an existing business in the UK
- entering into a partnership with another business. Both limited and limited liability partnerships can be formed in the UK in addition to traditional partnerships.

Choice of entity

The two entities typically used by overseas businesses setting up in the UK are a limited company (akin, for instance, to a US 'C' corporation) and a UK establishment (often referred to as a 'branch').

Most choose a limited company, which is usually set up as a wholly owned subsidiary (ie 100% of the shares are owned by the overseas parent). Common reasons for choosing a company include the additional commercial credibility that can be achieved by showing commitment to the UK market and the additional limitation of liability it provides. When compared to a UK establishment it could also protect the parent corporation's financial statements from public disclosure in the UK. For US headquartered groups, a subsidiary can also be treated as a branch for US tax purposes by 'checking the box'. UK companies have accounting, tax, audit and regulatory requirements that need to be complied with. A UK company can be formed within one day.

A UK establishment can be a useful alternative for commercial or other reasons in some cases. It is seen as a lighter form of entry into the UK market, with lower regulatory requirements and maintenance costs. Also, the register of persons with significant control requirement does not currently apply to a UK establishment, although this may change in future. This can be an attractive option if you want to make a tentative first step into the UK market or if the levels of activity are likely to remain limited.

A UK establishment is a registration that indicates that the foreign headquartered entity itself is doing business in the UK. The two are not separate legal entities and any liabilities of the UK establishment are liabilities of the foreign entity that registered it.

UK establishments have to comply with certain accounting, tax and regulatory requirements. These include filing annual financial statements of the entity that holds the UK establishment on the public record at Companies House. This can be a material concern for corporations from jurisdictions with a lower (or no) requirement for public disclosure of financial statements. Ways to avoid this disclosure include setting up a UK company or setting up a new corporate entity in the parent company's jurisdiction to hold the UK establishment.

A UK establishment can be taxable or non-taxable depending on whether it carries on a trade in the UK.

There are often no compelling tax factors in favour of establishing a UK establishment rather than a subsidiary. Each has its own advantages and disadvantages and therefore any decision will depend on the particular circumstances involved.

Among the advantages of a UK establishment is that the expenses incurred at the outset are likely to be incurred by the non-UK resident 'parent' and, therefore, can be set against the parent's worldwide profits (depending on the parent's domestic tax rules). In contrast, a subsidiary can only set its losses against its own UK profits. This ability to apply losses on a global basis will often help utilise start-up costs more effectively than a subsidiary which, on incorporation, will have no profits against which to set-off its initial losses. However a subsidiary's losses can generally be carried forward indefinitely and set against future profits of the same trade.

Advantages of a UK subsidiary above a UK establishment frequently include its ability to defer taxation on UK profits in the parent jurisdiction until such time as the profits are remitted and the commercial advantage that having a local UK company can bring.

Name availability

For a company or UK establishment to be registered at Companies House its name cannot be identical or too similar to an existing UK registered entity. In addition to checking the register when forming the entity, it is advisable to carry out a trade mark search to assess the risk of infringing an existing registered trade mark. It can also be helpful to use a search engine to investigate whether the proposed name is similar to any existing business name in the same or a similar trade as there can be a risk of a passing off action if there is a pre-existing business that has established goodwill in the name and there is a risk of confusion.

A list of companies and UK establishments registered in the UK can be found on the Companies House website: **CLICK HERE**

Methods of trading

Once you have decided which type of UK entity to set up, the next consideration is how you will trade in the UK. Will customers contract with the UK entity or the parent corporation? Which entity will own the intellectual property? Before you make these decisions it is important to obtain tax advice and consider all the relevant commercial issues.

Typical structures include:

- a commission and/or cost plus arrangement
- a distributor/stripped distributor/limited risk distributor arrangement
- a buy/sell arrangement; and
- a combination of some of the above.

Many overseas businesses start doing business in the UK using the cost plus method of trading at least initially.

In this model the UK operation provides sales and marketing services to the parent entity. In exchange, the parent entity pays it the costs plus a mark-up to reflect the price that a third party would charge.

Customers contract directly with the overseas parent, which recognises the revenue, rather than the UK entity.

Businesses often move to a different arrangement (for example a buy/sell model) as they grow. That said, with UK corporation tax rates currently significantly lower than in many other jurisdictions, and with changes in the international tax landscape, there has been an increasing trend towards having more functions based in the UK with correspondingly greater profit attributed to and taxed in the UK.

Bank accounts

Partly due to the know your customer rules that are prevalent across Europe, it can take some time to set up a bank account once a UK entity has been established. However, unlike in many jurisdictions, you do not have to establish your bank account before registering the entity.

Consider immigration first

If you are planning to send an employee to the UK to work, it is important to obtain immigration advice before registering an entity. It can be all too easy to inadvertently disqualify yourself from the sole representative visa.

See the **Immigration section** of this guide for more information.

Tax

An understanding of the UK tax system is essential for overseas companies looking to establish and operate a business in the UK. The key features of the UK corporate tax regime are outlined below.

Trends and hot topics

Open for business

In light of its growth agenda, the UK is particularly keen to attract overseas investment, and its competitive business tax regime plays a key role. Highlights include:

- **Tax rate:** the UK has a competitive corporation tax rate of 25%.
- **Dividends:** dividends paid by UK companies are not subject to withholding tax, and dividends received by UK companies are generally exempt from tax.
- **Patent Box regime:** a 10% corporation tax rate is available on profits attributable to qualifying patents.
- **Research and development (R&D) tax reliefs:** deductions or tax credits are available for certain SMEs, with above-the-line credit for other companies.
- **Participation exemption:** disposals of substantial shareholdings are exempt from tax where certain conditions are met.

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Chambers and Partners, 2020

- **Digital taxation:** In common with other jurisdictions, the UK is concerned that highly digitalised businesses are paying too little tax on profits generated from UK users. Pending implementation of the OECD's two-pillar international tax reforms, it has therefore introduced a 2% Digital Services Tax (DST) on the revenues of search engines, social media and online marketplaces which derive value from UK users (but only where the group's worldwide revenues from these digital activities exceed £500 million, and more than £25 million of these revenues are derived from UK users).

Global minimum tax rate

At the vanguard of international tax reform, the UK has confirmed it will implement the OECD's 'Pillar Two' proposals for a minimum 15% corporate tax rate from the end of December 2023. Applying to the largest multinationals, the rules will impose a top-up tax on corporate income taxed below the minimum rate.

R&D tax relief reform

With the aim of improving the competitiveness of the UK's R&D regime, the government is consulting on the design of a single, simplified R&D tax relief scheme. If implemented, the existing research and development expenditure credit (RDEC) and the small and medium enterprise (SME) R&D relief would be merged into a single RDEC-like scheme from April 2024.

Key tax considerations

Corporation tax

The UK tax-resident company is generally subject to corporation tax on its worldwide profits and gains.. A company will be a UK tax-resident if it is incorporated in the UK or if it is centrally managed and controlled in the UK. Non-UK tax-resident companies are liable to corporation tax if they trade in the UK through a permanent establishment.

The main rate of corporation tax is currently 19% but increased to 25% on profits over £250,000 from 1 April 2023. A Small Profits Rate will be created for businesses with profits of £50,000 or less, maintained at the prior corporation tax rate of 19%. Businesses with profits between £50,000 and £250,000 will be taxed at the main rate but may claim marginal relief.

Trading profits are calculated by deducting expenses incurred wholly and exclusively for the purposes of the trade, together with certain reliefs and allowances (such as fixed writing down Trading profits are taxed on an accruals basis, generally in accordance with accounting treatment; capital gains are generally taxed on realisation. Trading losses can be set off against other profits and gains (including capital gains) arising in the same or previous accounting period. They can also be carried forward and set against future profits (limited to 50% of profits in a single year for companies with profits exceeding £5 million).

Under the UK's transfer pricing rules, the UK tax authorities can adjust a UK company's profits for corporation tax purposes if it fails to negotiate an arm's length price in transactions with its foreign parent (or other non-UK group companies), unless the UK company is a small enterprise (ie with fewer than 50 staff and annual turnover or balance sheet assets not exceeding €10 million).

The UK also has a Diverted Profits Tax which applies a penal rate of 31% tax tax to profits artificially shifted out of the UK.

UK holding company

If a UK company is to be established as a holding company for further expansion into European territories, it should be noted that the UK operates a controlled foreign company (CFC) regime. Under this regime, profits of foreign subsidiaries in lower tax territories could be attributed to the UK parent company.

Any dividends received by a UK company from a foreign subsidiary are generally exempt from tax in the hands of the UK company. It is also possible to elect for profits of a foreign branch of a UK company to be treated as exempt from UK tax.

As a general rule, any disposal by a UK company of a subsidiary may give rise to a chargeable gain which would be subject to a corporation tax. However the UK has a "participation exemption such that the disposal will be exempt from corporation tax if certain criteria are me (broadly, the subsidiary must be trading and have been held for at least 12 moths).

Financing a UK subsidiary

The issues involved in the consideration of the financing of a UK subsidiary will often be tax driven. Of particular importance is the availability of tax relief for interest due from the UK subsidiary, and UK withholding taxes on the payment of interest by the UK subsidiary.

Interest paid on borrowings by a UK subsidiary to its foreign parent will generally be allowable on an accruals basis as a deduction in calculating the UK subsidiary's taxable profits. However, tax relief for interest may be restricted where:

- The UK's corporate interest restriction (CIR) rules apply. Broadly, these rules restrict a group's deductible net tax interest expense to 30% of its taxable earnings before interest, tax, depreciation and amortisation (EBITDA). This is subject to an optional group ratio rule, which may permit greater deductions in some cases. All groups can deduct up to £2 million of net interest expense per annum before the restrictions apply.

- The loan could effectively be treated as a form of equity (such that interest on the loan is reclassified as a 'distribution').
- Transfer pricing and thin capitalisation rules apply to disallow interest on related party borrowings where the borrowing does not reflect arm's length terms, based on the debt capacity of the UK subsidiary itself.
- Certain other anti-avoidance rules apply, for example where the loan has been entered into for an unallowable purpose or where the anti-hybrid rules apply (ie where the interest is also eligible for tax relief in another territory or would not be taxable in the hands of the lender).

UK withholding tax (at 20%) applies to any interest paid by a UK corporate borrower to a foreign company, although this could be reduced or eliminated under an appropriate double tax treaty or if the loan is a quoted Eurobond listed on a recognised stock exchange. Formalities must be complied with when seeking treaty clearance to reduce any interest withholding taxes.

Repatriation of profits from a UK company

The payment of dividends by a UK subsidiary to a foreign parent does not attract withholding tax under UK domestic law. In contrast, the payment of royalties by a UK subsidiary to a foreign parent would ordinarily give rise to withholding tax of 20%, although this could be reduced or eliminated under an appropriate double tax treaty.

Where the foreign parent ultimately wishes to sell the UK subsidiary, the UK would generally not subject the foreign parent to UK tax on the sale of the shareholding.

Pay As You Earn (PAYE)

A UK company with directors and employees must operate the PAYE scheme, through which income tax and National Insurance Contributions (NICs) on their remuneration is collected.

Value Added Tax (VAT)

VAT is a sales tax payable on the supply of most goods and services in the UK by a taxable person. The standard rate of VAT is currently 20%. A business is required to register for VAT if its taxable supplies for the previous 12 months exceed £85,000 or if it expects to make taxable supplies of more than £85,000 in the next 30 days. Certain supplies are exempt from VAT, such as finance, insurance and some supplies of land.

A VAT-registered business must charge VAT on taxable supplies made by it (output tax) but can recover VAT charged on supplies made to it (input tax) to the extent it was incurred in making taxable supplies. However, VAT is a real cost for businesses making exempt supplies.

Stamp taxes

Stamp Duty Land Tax (SDLT) is payable on all land transactions in England and Northern Ireland over £250,000 (for residential property) and £150,000 (for commercial land and property), unless an exemption or relief applies. Rates of SDLT on residential property range from 5% to 7% on a 'slice' basis. A 15% rate is levied on residential property over £500,000 purchased by companies, partnerships or collective investment schemes. SDLT on commercial land and property is also levied on a 'slice' basis, with rates ranging from 2% to 5%. There is an additional 2% surcharge for non-resident purchasers (individual or entities) and a further 3% surcharge for residential purchases other than a main family home. Land transactions in Wales attract Land Transaction Tax (LTT), with those in Scotland subject to Land and Buildings Transaction Tax (LBTT).

Stamp duty is payable on the transfer of shares in a UK company at 0.5% of the total chargeable consideration, unless a relief or exemption applies. If shares are transferred via a paperless system (such as CREST) then Stamp Duty Reserve Tax (SDRT), also at 0.5%, is levied.

Encouragement of R&D

The UK itself is a popular jurisdiction for holding and developing intellectual property. For instance, there are various well-established tax incentives, such as the ‘Patent Box’, which enables companies to apply a lower 10% rate of corporation tax to a wide range of profits earned from its patented inventions or products incorporating a patented element.

Similarly, there is a generous R&D tax relief scheme where companies can obtain additional tax deductions, or payable tax credits (depending on certain criteria), for qualifying expenditure on research and development.

UK tax affairs

As with most jurisdictions, corporate tax affairs can be complex and when a new company or establishment is set up in the UK there are certain tax notification and filing obligations.

However, the UK is in many respects a simpler jurisdiction to operate in from a tax and corporate perspective than others that are considered as holding territories.

Mergers and acquisitions

Many businesses enter the UK market by acquiring a UK company or, having established a presence, later turn their attention to expanding their UK presence through strategic acquisitions. UK mergers and acquisitions (M&A) activity has been, and continues to be buoyant.

Successful deals and smooth transitions start with early and effective due diligence and planning. It is important to understand the process, timetable and compliance requirements from the outset.

Trends and hot topics

- **Early exits:** founders and management teams of many businesses in the UK are typically more prepared to consider an early exit than might be the case in some other markets (in particular, the US) although with the increase in the availability of growth capital this trend is changing.
- **Founder buy-in:** this inevitably means a high degree of buy-in from founders and managers to the acquiring business, something that is often of utmost importance to acquirers, as talent acquisition and retention tend to feature prominently on their M&A checklist.
- **Acceleration of market entry:** many overseas companies find that acquiring a UK company complete with an established team with local market knowledge and an existing business is an excellent way of accelerating their entry and growth in the market, delivering material revenue from day one. This may take the form of small acquisitions focused on the team and/or the IP or much larger acquisitions.

Key legal considerations

Merger control

It is important to determine whether clearance for an acquisition should be sought. The earlier you consider this the better as the notification process can impact heavily on the transaction timetable.

The UK has a share of supply test in addition to turnover thresholds.

Earn-outs and deferred consideration

An earn-out or some other form of deferred or contingent consideration can enable you to address valuation and retention or buy-in issues.

Sellers will want to see appropriate ring fencing provisions in the sale documentation to allow them to run the business in a way that delivers the earn-out. Buyers need to reconcile these protections with their own requirements to ensure effective integration. You need to consider such arrangements carefully from an employment and tax perspective.

Shares or assets

Buyers often like to keep their options open as to whether they acquire shares in a business or its assets.

Asset purchases in the UK are the exception rather than the norm. This is principally because selling shareholders typically enjoy a significantly better capital gains tax outcome on a share sale than if a company's assets are sold and cash returned to them. As with many other European countries, employment laws also mean that the employees transfer automatically with the business on an asset deal (see the section on **Automatic transfer of Employees under Employment**.

Warranties and indemnities

In a US style M&A deal, the buyer is customarily protected on an indemnity basis. This is typically done on a warranty basis only in the UK, with indemnities provided only for tax and specific identified issues. For most warranty claims, the buyer is required to prove and mitigate loss to a greater extent than is the case with an indemnity.

Escrow/retention accounts

Warranty and working capital/ completion accounts retentions are commonplace in the UK. Warranty retentions tend to be in the order of 10%-20% of the consideration.

The use of warranty and indemnity insurance is becoming increasingly prevalent in M&A deals in the UK.

Disclosure

The disclosure process in the UK tends to impose a greater burden on the buyer to review and accept more general disclosures, including the contents certain public registers and data rooms than in some other jurisdictions, for example the US. However, deals with US buyers in particular will tend to require more specific (rather than general) disclosure.

Stamp duty

A buyer of shares in a UK company will need to pay stamp duty on the transfer of those shares. Stamp duty is payable at a rate of 0.5% of the consideration for the shares (rounded up to the nearest £5).

National security and investment control

The National Security and Investment Act 2021 came into force in January 2022 and has radically overhauled the UK Government's ability to review and call in transactions which might raise national security issues. It is separate from the merger control regime under competition law.

The new law requires mandatory notifications across 17 sectors: advanced materials, advanced robotics, artificial intelligence, civil nuclear, communications, computing hardware, critical suppliers to Government, critical suppliers to the emergency services, cryptographic authentication, data infrastructure, defense, energy, engineering biology, military and dual use, quantum technologies, satellite and space technologies, transport. In other sectors, parties may want to notify transactions that may give rise to national security issues due to the extensive remit of the act.

The new law also has a retrospective effect and the UK government can call in transactions dating back to 12 November 2020 which raise national security concerns.

Parties to any such transaction might want to seek informal advice from the UK government.

Contracts and commercial arrangements

When entering the UK and EU market, you will need to decide on your approach to contractual arrangements. Whether you choose to contract under online terms with consumers or businesses, small print terms attached to purchase orders or invoices, or traditional 'wet' signatures on formal agreements, changes will be needed in order to protect your business as it expands into the UK.

Trends and hot topics

- **Choice of law and jurisdiction:** for companies coming in from outside Europe, EU companies typically resist non-European (e.g. US/Canadian) law and jurisdiction, so unless you are happy to contract under local law, it is wise to have a compromise position at hand. English law is often a good compromise choice, not just in the UK but across the EU as English law judgments will be easily enforceable.

  Being a common law system, the style and 'what you see is what you get' basis of English law means, for B2B contracts at least, the contractual rules are more straightforward and familiar for many inward investors than those of most continental European jurisdictions, many of which have a codified legal system. For many overseas companies, having English as the language of the contract is also beneficial.

- **B2C relationships need special care:** EU legislation closely regulates B2C relationships throughout the EU and UK law continues to do so following Brexit. Many terms which are standard in non-EU/UK contracts will be void so a review and localisation exercise is often required. Businesses cannot, for example, widely disclaim liability against consumers. Online orders for goods, services or content by consumers are also typically cancellable by consumers without cause under the EU Consumer Rights Directive (and the UK's Consumer Contracts Regulations) for a limited period. Consumer protection law is not fully harmonised in the EU so different rules may apply in different EU countries. Some but by no means all aspects of EU consumer law are mirrored in UK legislation. New consumer protection legislation is coming into effect this year and next which will create further differences between the UK and EU regimes.

Key legal considerations

Anglicisation

If you are looking to replicate your current business model in the UK, existing contract templates can provide a valuable starting point for UK contracts. However, as they often contain terms that cannot be enforced in the UK, they should be reviewed and updated to ensure that they comply with English law. The focus of this process is usually on legal issues rather than on changing commercials. Stylistic changes might also be advisable so that the template looks right for the UK market. This can help avoid unnecessary queries or resistance from contracting parties.

Agency agreements

As in other parts of Europe, certain types of agency appointments and arrangements are protected under UK law. This can provide the agent, regardless of contractual arrangements, with the right to claim commission on expiry or termination.

Before you enter into any such agreements, it is wise to seek legal advice on their terms so that you are clear about the implications and can take steps to mitigate risk.

Indemnities

English law on indemnities is different to that in many jurisdictions and it is a good idea to give these arrangements careful consideration before agreeing to enter into them. If you decide to go ahead, make sure the scope is severely restricted, as an indemnity can result in the loss of many of the protections of English contract law – and potentially operate as a blank cheque.

Enforcement

Court decisions taken in some other jurisdictions can be difficult to enforce in the UK and EU because of the lack of a mutual recognition treaty. For example, if a North American business is suing for payment under its contract, it is easier to enforce a UK or EU judgement against the local assets of the other party.

Mandatory rules

Regardless of the law and venue agreed, when dealing with UK or EU parties or performance of a contract in the UK or EU, certain local mandatory rules apply. Often these override what the parties have agreed. The mandatory rules in each country are different so consider getting local counsel to review high value or strategically important contracts that are not governed by the law of the market in which the customer is based.

Data Protection, Consumer law and IP

There is a raft of legislation in these areas, referred to in other sections of this guide, which you also need to consider when drafting contractual terms.

eCommerce

Online developments have revolutionised the way companies can do business and interact with their customers.

An effective online presence can enable you to enter the UK and EU markets rapidly and often at a relatively low cost – driving brand recognition and sales in a new market. Make sure you are clear on the local legal and regulatory implications of trading in the UK at the outset.

Trends and hot topics

- **An evolving framework:** the EU has recently introduced major EU-wide legislation aimed at removing barriers to cross-border sales within the EU. The changes cover a huge range of areas including selling digital content and online goods and also introduce fines of up to 4% of turnover for non-compliance. Consumer protection law varies across EU Member States and will continue to do so even after the incoming EU laws are finalised.

  The UK's Consumer Rights Act already covers some of the elements in the new EU laws, including consumer contracts for digital content, but with differences. This means businesses will need to continue to consider the law of each Member State as well as the UK when selling online.

- **Platforms:** eCommerce platforms are under a lot of scrutiny, not only in terms of consumer protection but also competition and data. As the market evolves, the law has to adapt which means that there is a regular stream of new rules for businesses to take on board. Disruptive business models need to be particularly careful and there is a particular focus on use of AI.

Not only are there financial penalties for getting it wrong, reputational damage is also a risk. Platforms may also have obligations to their business users, including around transparency of ranking parameters and any advantages given to their own platforms or services.

- **Divergence between UK and EU law** The UK government has proposed a Bill that could result in a significant amount of UK legislation which was originally derived from the EU falling away or being replaced. It is unclear whether the Bill will pass as the government intends or what exactly it will mean for the UK's legal framework. Businesses will need to get advice in all areas of law as the situation evolves.

Key legal considerations

Website information

All website operators are required to make certain information available to their users, including names, company registration numbers and registered office addresses, VAT registration and details of any regulating body.

There are additional requirements for websites that are used to sell to consumers.

Consumer Rights Directive

This is relevant across Europe. In the UK, the Consumer Contracts Regulations apply. This requires a review of the entire sales lifecycle: pre-contractual information, contract confirmation process, cancellation and returns and refund policies, and terms and conditions. Online retailers also need to make sure they comply with special pre-contractual information provisions and clearly inform consumers at the point where they enter into a payment obligation. Particular points to note are:

- the no fault cooling off period of 14 days
- the requirement to refund within 14 days
- the obligation to provide standard cancellation forms for distance contracts
- contractual terms.

Terms and conditions for the supply of goods and services must be easily accessible and brought specifically to the consumer's attention or they may not be enforceable.

A pre- populated 'accept' tick box is not enough. Some contractual terms (such as those that seek to restrict certain conditions and warranties implied by statute) are absolutely prohibited from being included in consumer terms of supply. Similar consideration needs to be given to the sellers' online terms of use as well as its terms of supply.

Governing law

The beauty of an online business is that you are able to reach users all over the world. However, this creates a legal challenge that has not yet been satisfactorily resolved. In some countries, the law governing the country in which the consumer lives applies to the purchase, in others this is not the case. The governing jurisdiction can also depend on the functionality or even the domain of the website. It is important to take advice on the best approach for your business.

Advertising of prices and payment surcharges

UK law allows you to recover the cost of processing payments but prohibits excessive payment surcharges on all forms of payment.

These regulations apply to all contracts between businesses and consumer however they are concluded.

Social media

It is important to decide whether (and if so, how) you will moderate user generated content and when to take material down to avoid liability. Effective deployment of intermediary defences and prompt action can help you manage the legal risks associated with social media.

Note that the EU's new rules on intermediary liability under the Digital Services Act are now in force and will apply (for the most part) from 17 February 2024. The UK's incoming Online Safety Bill will also need to be taken into account once it becomes law.

Advertising

Getting your UK advertising right will strike an appropriate tone for your target audience, and avoid customer disappointment and unwanted regulatory or public scrutiny. It is important to be familiar with the UK regime, as it has key differences from other jurisdictions.

Advertising in the UK is regulated by a combination of legislation and self-regulatory codes of conduct. The relevant legislation is enforced by the Competition and Markets Authority (CMA) and trading standards authorities, and prohibits misleading actions, misleading omissions and unfair commercial practices. The self-regulatory codes set out more specific rules which reflect the requirements of the legislation and are enforced by the Advertising Standards Authority (ASA).

Trends/hot topics

Environmental Claims

Claims such as 'environmentally friendly' and 'green' should not be used in the UK without clear qualification unless you can provide convincing evidence that your product will cause no environmental damage, considering the full product life cycle. You should also take care with recycling claims. If you claim that a product is 100% recycled, then it must be 100%, not merely close. There is a lot of regulatory interest in this area. The CMA, and Department for Environmental, Food & Rural Affairs (DEFRA) have all set out guidance on making environmental claims. The CMA is also investigating certain companies and sectors.

Dark patterns and online choice architecture

Dark patterns are a current hot topic for advertising/consumer regulators and legislators. They have been used to describe a range of behavioural and design techniques which are allegedly used to influence consumer choice online, in ways that exploit cognitive biases and can be detrimental to the consumer. Examples include drip-pricing (only revealing additional charges at the final stage), subscription traps, misleading free trials, giving more prominence to one choice over others, confirm shaming and making it hard to change default settings. It is important to identify practices which have been called out as potentially problematic and seek to mitigate the risks

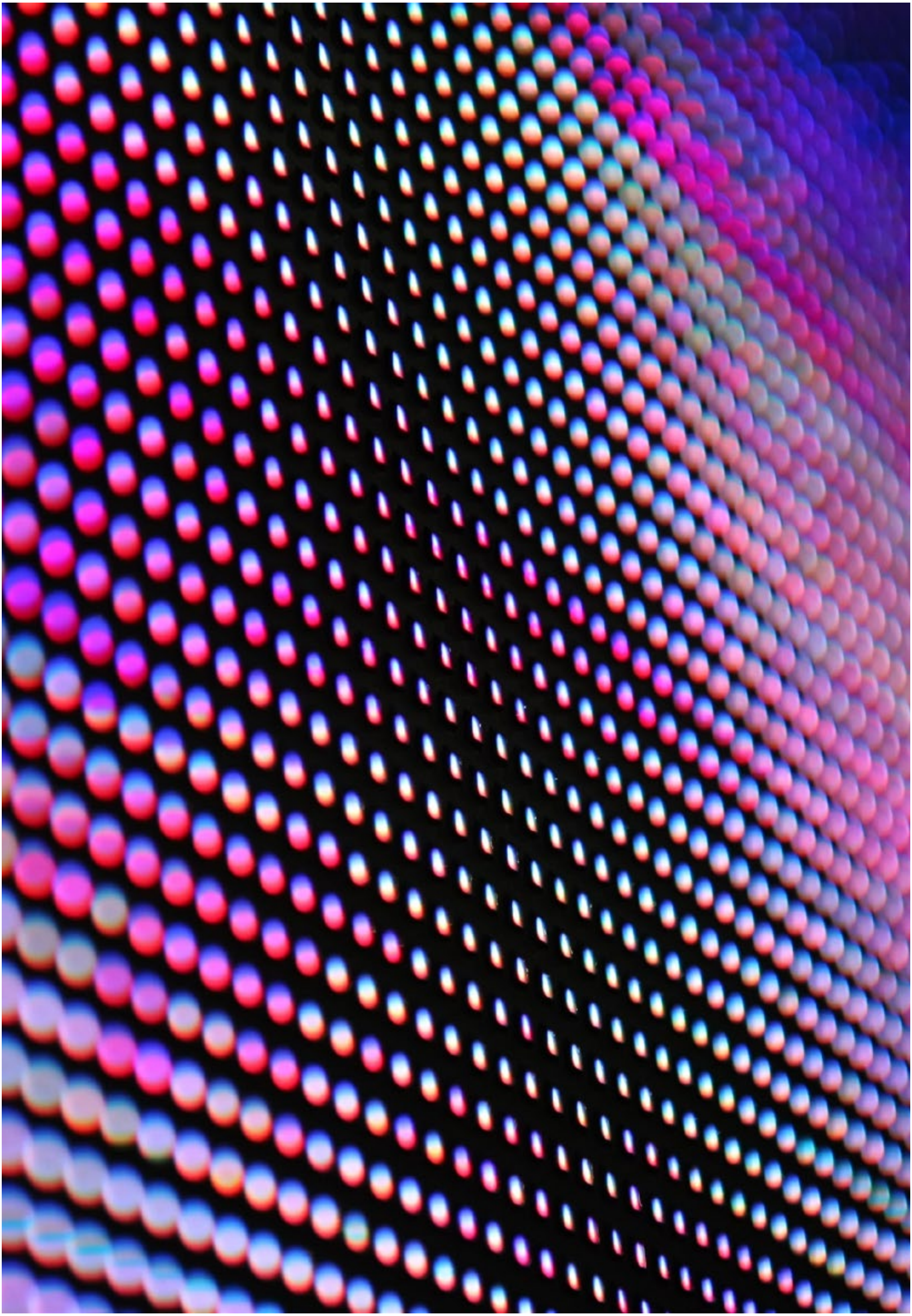
Appointing media agencies

We've been seeing big improvements in the last few years in the terms advertisers have agreed with their UK media agencies, achieving improved transparency, access and behaviours. We expect that trend to continue. Transparency should be embedded throughout the appointment agreement, including in the following areas: reporting obligations; audit access; income pass-through; media purchase disclosures; prohibition of proprietary/inventory media; channel neutrality; and avoiding conflicts of interest. These obligations should be applicable across the agency group.

Influencer advertising

IInfluencer advertising continues to be a focus for regulators. CMA investigations have led to some influencers and companies providing undertakings to the CMA to improve disclosures in their social content and social media platforms committing to do more to prevent hidden advertising being posted on its platform.

The ASA has also published a list of influencers who routinely fail to clearly disclose when they are advertising to consumers on their social media channels. The key requirement for influencer advertising is that the social content is obviously identifiable as an ad. Consumers should be able to recognise that



something is an ad, without having to click or otherwise interact with it. This will usually require the influencer to include a prominent label. The UK regulator's preferred labels include 'Ad', 'Advert', 'Advertisement' (including a hashtag if appropriate). The term 'sponsorship' (and associated abbreviations) should not be used to identify an ad. The UK regulator usually deems both the brand and the influencer to be responsible for ensuring that advertising complies with the rules.

Targeting age-restricted ads

The UK advertising rules place a particular emphasis on protecting children and young people from potentially harmful, irresponsible or inappropriate ads. Depending on the products advertised, alcohol, gambling and other age-restricted ads must not be directed to children (under 16) and young people (aged 16-17) and must not appear alongside media where children and/or young people form more than 25% of the audience. Advertisers must ensure that age-restricted campaigns are targeted appropriately through content,media placement and audience targeting restrictions.

Key legal considerations

Comparative advertising

An ad campaign which refers to a competitor or its products (whether explicitly or implicitly) is only permitted where it complies with specific comparative advertising criteria. They include ensuring that the ad objectively compares one or more material, relevant, verifiable and representative features of those goods and services. The ad must also compare goods and services meeting the same needs or intended for the same purpose. If you do not comply with the rules on comparative advertising, you could also be liable for trade mark infringement and possibly other causes of action.

Complaints to the ASA

A consumer or competitor can complain to the ASA if they believe that an advertiser has breached an advertising code. The ASA may then investigate the matter to determine if there has been a breach of the advertising codes. The two main routes following an investigation are: (1) an adjudication on whether or not the ad breaches the code; or (2) if the ASA agrees, an informal resolution whereby the advertiser agrees that the particular ad will not appear in exactly the same form again. Adjudications are published and can be picked up by mainstream and specialist press. If an advertiser refuses to comply with the ASA's decisions and requests, the ASA can take enforcement action. The sanctions include the ASA advertising the breach of the advertising codes. In the most serious cases (or where an advertiser ignores the ASA), the ASA can refer the advertiser to the CMA to take enforcement action under the law.

Agency vs principal

It is standard industry practice for agencies to act as principal when dealing with third parties in the UK (e.g. buying media space in their own name). The term 'agency' can therefore be misleading. This is different to other jurisdictions such as the US where agencies frequently act as agents on behalf of their clients.

Price claims and VAT

It is important that your price statements do not mislead by omission, undue emphasis or distortion. You should not use the term 'free' (or similar) to describe a product in the UK if consumers must pay anything other than the unavoidable cost of responding, collecting or delivering the item. Ensure any 'from' or 'up to' savings claims you use represent the true overall picture of the promotion and do not exaggerate any potential savings. Price reductions must only be used against properly established earlier prices. You must also include VAT in any quoted price in the UK unless everyone the price claim is addressed to can recover VAT or pays no VAT.

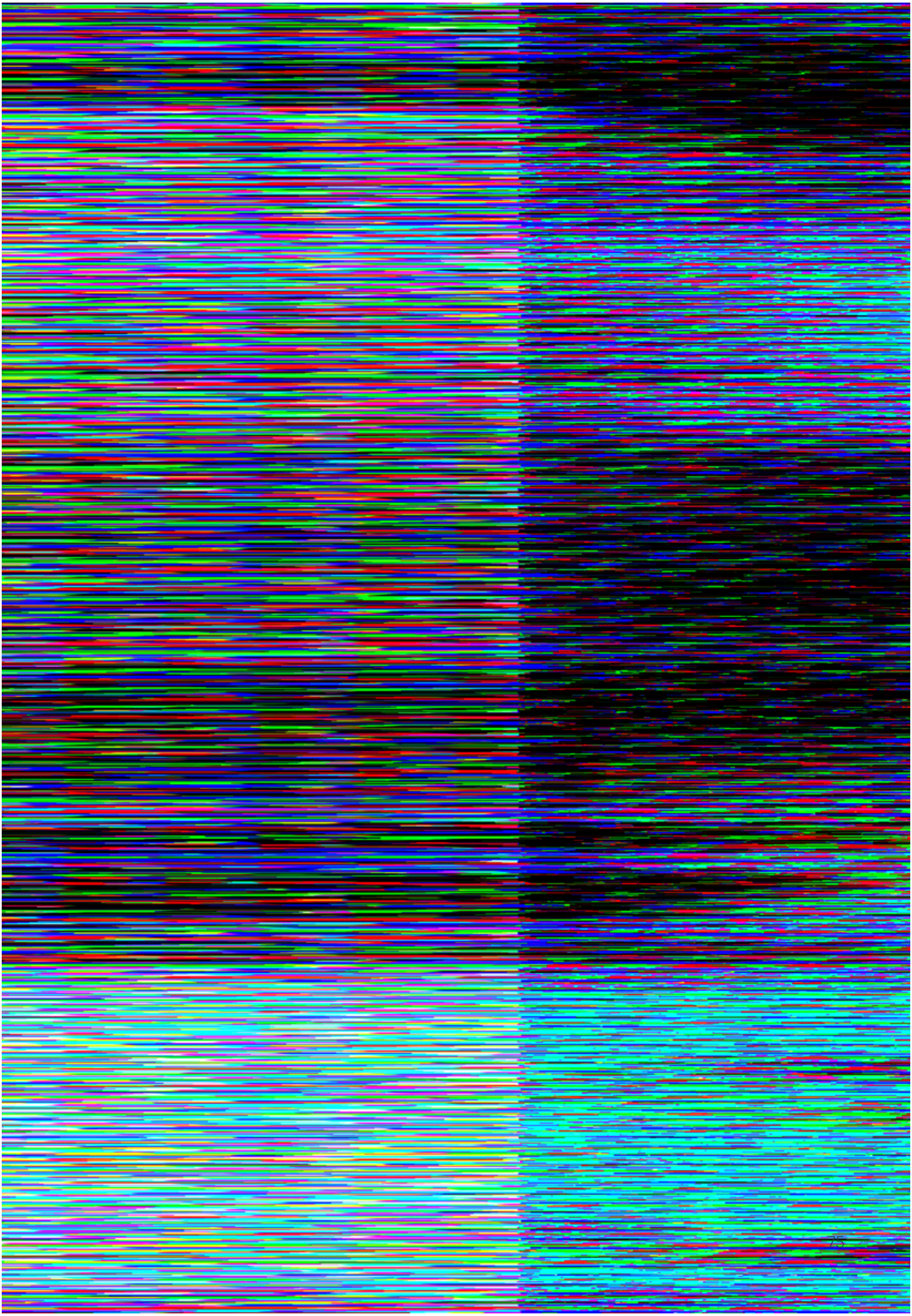
Subscription traps and free trials

There is nothing wrong with offering free trials to subscription services in the UK, but if consumers are automatically signed up to the subscription service and this is not clear in the ad, the ad is likely to be misleading. The ad must include all significant conditions likely to affect a consumer's decision to participate in the promotion. For subscriptions, this is likely to include at least: (a) whether a paid subscription starts automatically (after the trial) unless cancelled, and (b) the extent of the financial commitment if the subscription is not cancelled (during the trial).

Promotions and prizes

Promotional marketing covers a broad range of techniques from simple discount voucher offers to prize promotions. The specific UK rules which are relevant will depend on the kind of promotion being run but the core principles are the same. Examples include:

- You must run promotions fairly and avoid causing unnecessary disappointment.
- All promotional marketing should clearly include all significant T&C's upfront in initial marketing material. T&C's are considered significant if they are likely to affect a consumer's understanding of the promotion and their decision on whether to participate.
- Be clear on the difference between gifts and prizes. Prizes must be awarded.



Privacy

Businesses collate, store and use information about individuals on an unprecedented scale. This ranges from a person's contact details, to tracking their online habits.

The EU has adopted privacy laws which, in the UK, are referred to as laws on data protection, to ensure that this information is lawfully obtained, kept securely and used responsibly for permitted purposes. Data protection (privacy) is an increasingly important area of compliance for businesses across the EU and UK, not least because the General Data Protection Regulation (GDPR) which came into effect on 25 May 2018, introduced fines of up to the higher of 4% of annual global turnover or €20m for non-compliance. Non-compliance can also trigger negative PR, brand damage and regulator enforcement and litigation.

The GDPR sets out rights for individuals and obligations on controllers and processors. It has extended territorial reach and may apply to organisations processing the data of EU individuals, whether or not they are based in an EU Member State.

Privacy has been a particularly fast moving area of law in recent years. The GDPR is only part of the updated EU and UK privacy regime which covers not only data protection but also cybersecurity.

Rules on privacy requirements for electronic communications service providers which will impact on electronic direct marketing are also undergoing change.

While the GDPR harmonises EU data protection law to a large extent, there are still differences across EU countries which may also need to be taken into account. Member States and the UK all have their own data protection legislation in addition to the GDPR. In the UK, it's the Data Protection Act 2018. Although the UK has left the EU, it has imported the majority of the provisions into the UK GDPR. This means that for now, the two regimes are more or less the same.

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Being clear on the legal requirements can help you protect yourself from sanctions and reputational damage, and enable you to use the personal information you process to your competitive advantage.

Trends and hot topics

- **Incoming legislation:** There is a raft of incoming data and cybersecurity legislation in this rapidly developing area. In many cases, the legislation covers personal and non-personal data. In the EU, for example, the draft Data Act aims to remove barriers to data sharing, giving businesses access to data they contribute to creating and individuals more control over their data. The Data Governance Act covers public sector data sharing, and both the EU and UK are introducing legislation to make the internet of things more secure. Businesses will need to take advice on incoming and pending requirements across data and cybersecurity, and note any differences between the EU and UK regimes.
- **Digital advertising:** data protection regulators are looking closely at the digital advertising economy. The complexity of the data supply chain and the number of players involved can make GDPR compliance a challenge. Data controllers in the ecosystem need to think carefully about compliance issues which include information and transparency requirements, the lawful basis for processing data, rules around disclosure of the data, and how to obtain valid consent where required.
- **Consent:** consent used to be seen as an easy option to make processing personal data lawful (rightly or wrongly). That has changed. Under the GDPR, consent must be informed, specific, freely given and an unambiguous indication of the individual's wishes. This is a high standard to meet and it also applies to the use of consent to cookies which is required under the Privacy and Electronic Communications (EC Directive)Amendment Regulations 2011 as amended. These rules oblige organisations using cookies orsimilar tracking tools to only place them on user devices, or access information from their devices, where users have first given their consent. This applies to any business with a website actively targeting UK users regardless of where they are based. While ePrivacy rules in the EU are under review, the cookie rules and consent requirements are unlikely to change significantly.

- **US data transfers:** the UK and EU both restrict the export of personal data outside the UK and European Economic Area (EEA) unless certain preconditions are met to safeguard the data (see below). Equivalent provisions Protect UK data transfers. Transfers to the US have been under particular scrutiny, particularly since a CJEU decision struck down one of the approved solutions for EU-US transfers, the Privacy Shield, and cast doubt over whether data transfers to the US from the EEA and UK can ever be lawful. The European Commission is close to agreeing an adequacy arrangement (called the Transatlantic Data Privacy Framework) with the US which would allow for frictionless transfers between the EU and USA, and it is likely that a UK-US adequacy arrangement will be concluded around the same time. This area continues to evolve and advice needs to be taken in relation to US data transfers and indeed in relation to any data transfers to a country not benefitting from an EU or UK (as the case may be) adequacy decision.

Key legal considerations

Personal data

'Personal data' for EU and UK purposes is any information relating to an identified or identifiable (either directly or indirectly) person. This is a very broad definition which can differ from similar terms in other jurisdictions, such as 'Personally Identifiable Information' in the US.

Transparency and accountability

Any activity where a business interacts with its users is likely to trigger some personal data collection. Employee data is also likely to be collected. Individuals need to be given clear information about what data is being collected, how it is being used and on what basis, what their rights are and how the data is being protected.

Businesses have to put in internal systems and policies in place to ensure compliance and also, crucially, to enable them to demonstrate compliance.

Notification

The UK regulator, the ICO, has replaced the old notification regime with a new annual data protection registration fee of up to £2,900 (depending on number of employees and turnover). The fee is payable by controllers (subject to limited exceptions).

Transferring data out of the EEA and UK

The GDPR generally prohibits personal data transfers to countries outside the EEA unless the destination country meets certain preconditions that provide adequate protection for the data or an approved data transfer mechanism is used. These include:

- use of EC-approved standard contractual clauses, or UK International Data Transfer Agreement (as the case may be)
- adherence to Binding Corporate Rules for intra-group transfers
- in certain other limited circumstances.

Where data is being transferred to a third country, the controller is responsible for assessing whether that country provides a level of protection which is essentially equivalent to that in the EU. If it does not, supplementary measures must be taken to protect the data and achieve equivalency. If this is not possible, the transfer cannot take place and must cease if it is ongoing. Note that the UK benefits from an EU adequacy decision and personal data can flow freely between the EU and UK without a need for additional transfer mechanisms. Again, similar provisions apply to transfers of UK data.

Cybersecurity

The UK GDPR places security obligations around the processing of personal data. Certain types of data breaches must be reported within tight timescales, in some cases, to the ICO (or other relevant regulator) and in others, to the individuals affected by the breach.

The Network Information Systems Directive (implemented in the UK as the NIS Regulations) also places cybersecurity, risk and incident management obligations, together with breach notification requirements, on operators of essential services and on digital service providers, defined as providers of online marketplaces, online search engines or cloud computing services.

The EU recently passed a second NIS Directive which will apply from 18 October 2024. The UK is also likely to update the NIS Regulations. Other incoming cybersecurity legislation covers the internet of things, infrastructure and the financial sector.

Taylor Wessing has an innovative suite of online products (which we continue to develop) to help businesses understand and meet their international data privacy obligations. The tools range from a dedicated microsite providing thought leadership and practical compliance advice, to interactive apps and guides covering issues including cybersecurity and HR data.

These are all available through our **Global Data Hub**.

You can also find out more about data protection on the Information Commissioner's Office (ICO) website **www.ico.org.uk**

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A really strong practice with a great critical mass of people who show excellent understanding of their clients.

Chambers and Partners

Intellectual property

Intellectual property rights can arise and be protected in the UK at national level, and under international treaties. Different rights arise and are protected in different ways.

The protection of intellectual property (IP) right (particular trade marks and designs) in the UK has changed substantially in recent years. Being aware of the legal intricacies well before you enter the UK market means you can properly protect your intellectual property rights and minimise the risk of infringing someone else's rights. In the UK, there are a broad range of IP rights. Some arise automatically; others must be registered. Overleaf is a summary of the main types of IP rights.

Trends and hot topics

- **The Unified Patent Court (UPC) and Unitary Patent:** For the very first time, after almost 50 years of negotiations and many stops and starts along the way, right holders in Europe will get the option to add unitary patents (UPs) to their patent portfolios and also the addition of a single patent litigation system covering the major part of the Uropean market – the Unified Patent Court (UPC).

  The protection of the UP and the decisions of the UPC will have effect in the territory of the participating countries, be it injunctions and damages due to infringements of patents or patent revocations. In total, the UPC covers will eventually cover a market of approximately 350 million people, comparable to the US.

In addition to UPs it will also be possible, subject to their opt-out from the new court, to litigate European patents in the UPC. The UPC agreement (UPCA) was signed by 25 member states on 19 February 2013. Only the EU member states Spain, Poland and Croatia have not yet signed the UPCA. However, the Czech Republic and Hungary have since indicated that they will not participate and the UK formally left the system in July 2020 after it left the EU. As a result, when all countries that can ratify have done so the UPC will cover 22 EU countries. In the meantime, the UPC is expected to open on 1 June 2023 with 17 country participants.

- **Parallel imports:** The EEA (including the EU member states) applies rules of EU-only exhaustion of IP rights. This means genuine goods first sold outside the EEA (including in the UK) cannot be imported into the EEA by third parties without the IP owner's consent. To help enforce and take advantage of this 'fortress Europe' approach, it is helpful if goods intended for sale in non-EEA jurisdictions only can be easily identified. This can be achieved with bar codes or stickers. However, the customs authorities will not generally assist in blocking the import of such goods and companies need to police this grey market themselves, perhaps working with their EU distributors. Since the end of the Brexit transition period, the UK has been operating a unilateral EEA exhaustion regime ever since. This means that goods can be imported into the UK from the EEA without the IP owner's consent (but cannot be imported from the UK into the EEA without the IP owner's consent).

Summary of the main types of IP rights

Form of protection	Examples of what can be protected
Confidential information	Commercially sensitive information, such as customer and supplier information, know-how and manufacturing processes.
Copyright and database rights	Original works such as text, graphics, pictures, drawings, videos, music, and aspects of databases and software are protectable as copyright. Data, including consumer and sales data, might also be protectable via the database right.
Passing-off	Goodwill in such things as brand names, logos and the 'look' of products.
Registered* and unregistered designs	Aspects of the appearance of the whole or part of a product excluding features with a technical function.
Registered trade marks*	Distinctive signs such as corporate, trading, product/service and brand names, logos and potentially also shapes, colours, motions and sounds.
Patents*	Novel and inventive products and processes.

*Must be registered for protection to arise.

Key legal considerations

Uniformity across the EU

It is a common misconception that IP is protected in exactly the same way across the EU and the UK. While many EU laws are harmonised, some are not, and each member state has its own requirements. Thus, national trade mark laws are fairly harmonised across the EU (and, for now, the UK) whereas unfair competition/passing-off laws are less so. However, pan-EU rights (such as EU trade marks, Community Registered Designs and Community Unregistered Designs) are single rights that are essentially afforded the same protection throughout the EU.

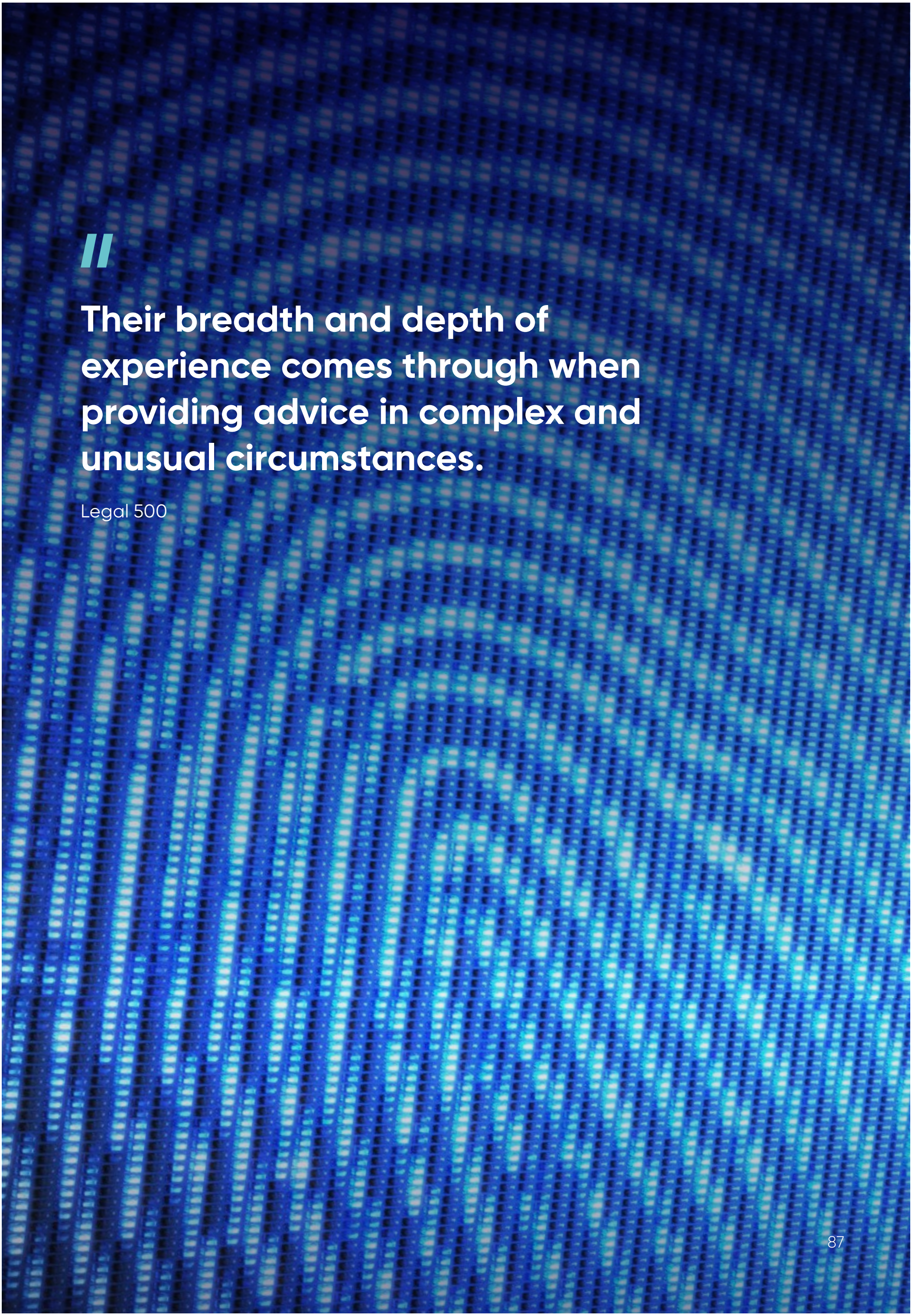
With the aim of creating a seamless and consistent digital marketplace across the EU and fully tapping into the growth potential of ecommerce, the European Commission has been rolling out an ambitious series of legal initiatives, in part aimed at modernizing and harmonizing EU copyright laws. One such initiative is the DSM Copyright Directive, which EU member states must implement by June 2021. The UK has said that it does not plan to implement the Directive and that it will review UK copyright laws.

Intellectual property ownership

In most cases, you as the employer own any IP rights developed by your employees in the normal course of their employment. However, if an independent contractor or consultant developed them on your behalf (or they were developed before your business was set up), you do not automatically own them and need to enter into a signed, written contract that assigns the rights to your business.

Trade marks

In the UK distinctive names and signs can be protected by filing a national UK trademark application at the UK Intellectual Property Office (IPO). If protection is required in the EU as well, then a separate application should also be filed for an EUTM (which covers the whole of the EU but not now the UK) at the EU IPO. Both UK trade mark and EUTM applications can be filed through the international trademark system administered by WIPO (which is sometimes cheaper and administratively easier than filing separate national/regional applications and results in a bundle of rights.)



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Their breadth and depth of experience comes through when providing advice in complex and unusual circumstances.

Legal 500

Registration of a trademark potentially allows the owner to prevent others using the same or a similar mark (including potentially as part of a business name or domain name) in relation to the same or similar goods and/or services for which it is registered. Marks that are particularly well-known are afforded greater protection.

As in other jurisdictions, it is good practice to clear use of a new name or sign in the UK or EU before first using or applying to register it ie to check for prior conflicting rights.

Failure to do so can be very costly and embarrassing, with injunctions preventing use easy to obtain in some jurisdictions.

The UK and EU both largely operate on a first to file system. Unlike in some other jurisdictions, securing registered trade mark protection is not dependent on first using the mark (although, in the UK, the applicant must have a bona fide intention to use the mark). Instead, there is a five-year grace period within which use needs to start.

This means that a registration can be secured in the UK or across the whole of the EU with one trade mark application, with no real obligation to use the trade mark for up to five years.

A benefit of an EUTM is that it can give indefinite protection in all EU member states without having to use it in all of them. Use in just one EU member state might suffice to maintain the EUTM registration.

It is also worth noting that, when a trade mark application is filed in most countries worldwide, it is usually possible to back-date any subsequent applications (filed within six months of the first application) to the date of the first application. This is called claiming priority and means that trade mark applications do not need to be filed simultaneously around the world.

Whatever you decide to do, filing a trade mark application early – well before launching in the UK or EU market – is strongly advisable if you are to protect the relevant mark(s).

Designs

There are several types of design right protection available in the UK and two forms of pan-EU design right. Designs protect aspects of the appearance of part or all of a product. Registration provides a longer term and greater scope of protection. Registered Community Designs and UK Registered Designs can be very useful as they are quick and low cost to register, cover the whole of the EU (and UK for the UK right) and can be maintained without use. There are specific rules governing whether a design can benefit from Unregistered Community Design and Supplementary Unregistered UK Design protection, particularly around where the design is first disclosed. It is therefore worth obtaining advice before first marketing new designs.

Copyright

Copyright is an automatically arising right in the UK and there is no register, unlike in some other jurisdictions. There is no pan-EU system although the laws of the EU member states have been harmonised to some extent.

There is also no general 'fair use defense' to copyright infringement in the UK, as there is in some other jurisdictions. Instead there is a range of 'fair dealing' exceptions applicable to discrete uses, such as the reporting of current events.

Patents

A patent is a form of exclusivity right affording protection to inventions on a country by country basis. Inventions that can be protected by a patent include processes as well as products. A patent may be secured for the UK either through the UK IPO or the European Patent Office (EPO), with the additional possibility of entering either system by means of an international application under the Patent Co- operation Treaty (PCT). If granted, a patent confers exclusivity to the patent owner on the exploitation of the subject matter covered by the patent. It can give 20 years' protection provided it is renewed (and the relevant fee paid). This period can be extended by up to five years for specific medicinal and plant protection products by applying for a Supplementary Protection Certificate (SPC).

Trade secrets

In the UK, it is good practice to use non-disclosure agreements and include enforceable confidentiality provisions in all employee and contractor agreements and other agreements. (The blanket use of one template clause for all employees and contractors should be avoided as you risk encountering problems with enforceability.)

IP litigation

The UK has traditionally been seen as an expensive jurisdiction to litigate IP rights but one with solid and reasonably predictable outcomes from specialist judges. The perception of expensiveness is fast receding. In addition to the Patents Court (which hears IP cases of all kinds), the UK has a further

specialist court hearing smaller claims, known as the Intellectual Property Enterprise Court (IPEC). Like the Patents Court, this deals with a range of intellectual property disputes (such as copyright, design, trade mark and patent disputes).

IPEC aims to provide a quicker, more efficient and less expensive route for intellectual property litigation.

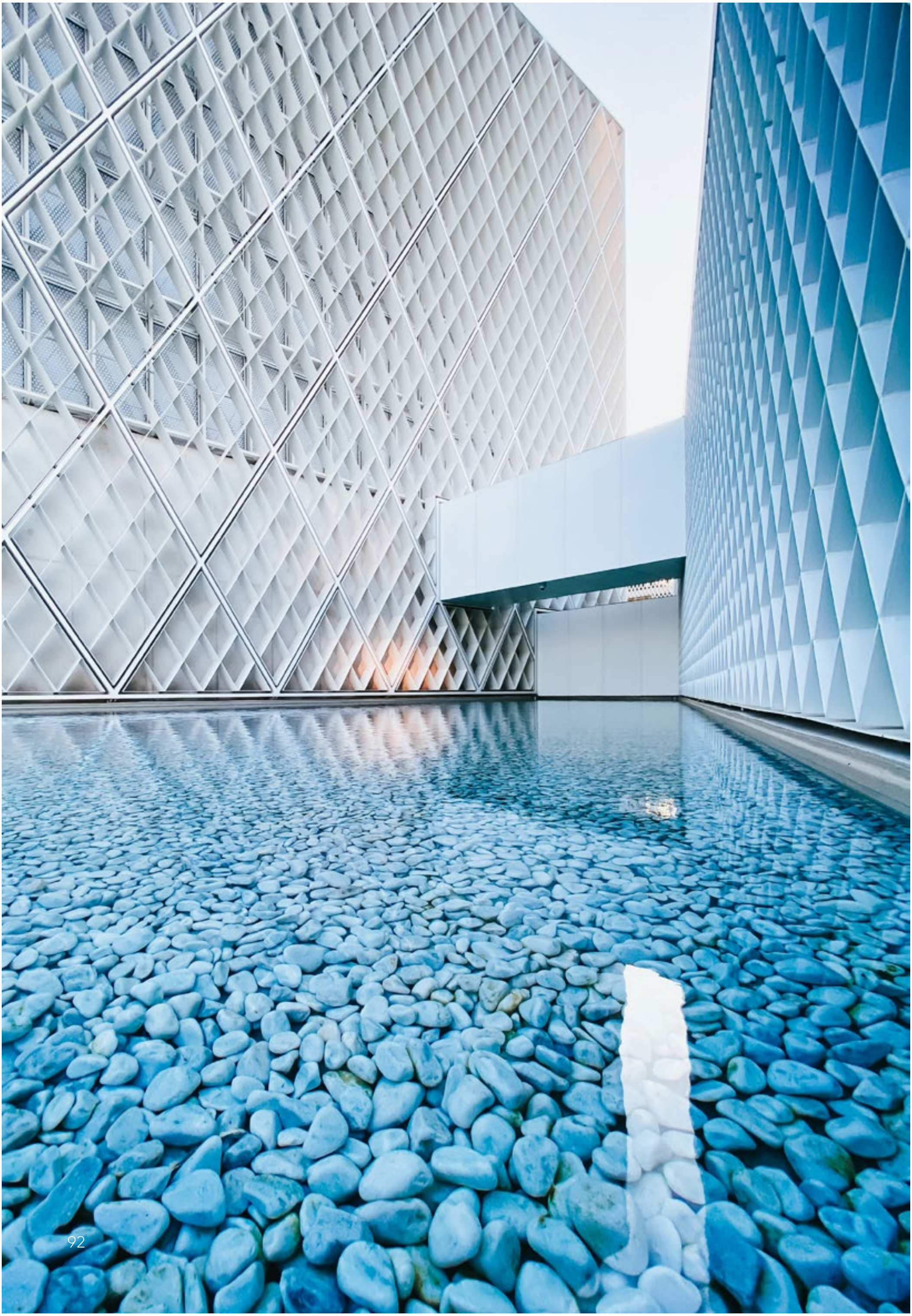
There is a cap on fees, damages and the length of a trial (two days). One particular difference to US litigation, for example, is the lack of jury trials, but otherwise the process can involve similar steps, including disclosure and oral witness testimony, as in trials in North America. There are also options for shorter trials.

Find out more

- For insight, news and guidance on brands, visit our website's brand **insights page**
- For insight, news and guidance on legal and commercial issues in the life sciences sector, visit our synapse microsite: **www.taylorwessing.com/synapse**
- For insight, news and guidance on media and tech law go to our download site: **www.taylorwessing.com/download**
- For updates on the digital single market visit our **insights page**

The following websites may also be of interest:

- UK Intellectual Property office: **www.gov.uk/ipo**
- EU Patent office: **www.epo.org**
- EU Intellectual Property office: **euipo.europa.eu**



Real estate

Overseas businesses setting up in the UK often start with a few employees working from home or from a co-working space. Sooner or later however, most will need their own premises. In the UK, you will be competing for space in a crowded market, so it is important to develop an informed real estate strategy. Property is likely to be your businesses' biggest overhead, but it can also provide a significant return on investment.

In order to devise the best real estate strategy for your business, consider some key questions:

- Do we want to lease commercial space or own it outright?
- Do we have a flexible exit strategy for the UK operation?
- Can we flex our space or our lease term if our needs change?
- How do we manage our ongoing real estate liabilities?
- And many others...

Trends and hot topics

The UK has, like the rest of the world, been affected by tumultuous events in recent years. A pandemic, war in Europe, Brexit uncertainty and political instability have added pressure to an inflationary landscape. Nonetheless, its property market remains a strong and stable economic force. We expect London, with capital appreciation and strong yields, to continue as a key centre for overseas investment, but with concerted efforts to rebalance the economy, there is increasing investment across the whole UK, particularly in areas designated for industrial and sector growth (such as the life sciences "golden triangle" between London, Oxford and Cambridge).

Thinking about broader market trends, consider also:

- **Flexibility:** this is increasingly important to landlords and tenants. Changes to planning rules heralded increasing flexibility on uses of real estate. Meanwhile, a rise in serviced office provision is impacting on traditional letting models. Leases are often shorter, with more extensive break provisions, giving tenants greater flexibility for use and exit.
- **ESG:** high-quality commercial space, which delivers on environmental targets and enhances employee wellbeing, is dominating market premiums. "Green lease" clauses are also gaining traction.

Key legal considerations

When devising your UK real estate strategy, be aware of the nuances of property law in the jurisdiction as well as common practice. Different sectors of the market often approach the issues is different ways, but broadly:

Freehold vs leasehold

While purchasing freehold property can be a solid investment (depending largely on market conditions and existing lettings), most businesses first setting up in the UK decide not to tie-up capital long term, and look instead to occupy premises on a leasehold basis.

Length of lease term

Having settled on a location, the next largest consideration is the length of a lease term you are prepared to take. Outside the more flexible serviced office market (in which you are a licensee rather than a tenant, without various statutory protections) lease terms are commonly five or ten years. You may be able to negotiate break rights at the outset to leave the property sooner or take a shorter lease with options to renew (there are tax efficiencies in this scenario). Business tenants may benefit from a statutory security of tenure, meaning they apply to court for a new lease at the expiry of an existing one.

Full repairing and insuring lease (FRI) model

The UK's full repairing and insuring (FRI) lease model tends in the commercial world to obligate the tenant to keep the premises in a full state of repair and condition. The exact formulations of this covenant can vary in strength and, allocating liability largely depends on the age and nature of the building, but it couldresult in material liabilities and will commonly include reinstating any fit out undertaken at the beginning of the term.

Rental liabilities

FRI leases typically reserves a quarterly principal rent which is payable by the tenant as well as insurance costs and (on a letting of part) a service charge. Businesses requiring certainty of outgoings may be able to negotiate an inclusive rent, or caps on other contributions. In the retail sector, a turnover rent may be appropriate (if acceptable to the landlord).

Rent review

Commercial leases typically allow for an upwards-only review of the principal rent every five years of the term. The review may be assessed by a qualified surveyor on an open market basis (taking into account various negotiated assumptions and disregards) or calculated by reference to an inflation index (commonly) the government's retail prices index (RPI).

Incentives

The landlord may incentivise a business to take a lease, for example by offering a rent-free period at the start of the term or a contribution to the tenant's fit-out.

Service charge

If the lease premises form part of a larger building or estate, the tenant will likely pay a service charge to the landlord for the repair and management of common areas. The quantum of service charge will change year to year but it may be possible to agree an annual cap, or to exclude contributions to certain larger ticket items you won't be using. Landlords will be keen however to keep its services regime consistent across its lettings.

Fully repairing lease

As a tenant you will likely be obliged to put and keep the premises in a full state of repair and condition. The exact formulations of this covenant can vary in strength, but is likely to result in material liabilities and will commonly include the cost of reinstating any fit out undertaken at the beginning of the lease.

Additional taxes and expenses

UK rules on real estate taxation have been subject to considerable change over the last few years. A transaction tax (stamp duty land tax) is generally levied on purchases and lettings and should be properly accounted for. Sales tax (VAT) applies to certain dealings in property, including where commercial property owners 'opt to tax'. While corporation tax applies to rental profits from investment purchases, capital gains tax will also accrue on a subsequent disposal. And while reliefs are available in certain circumstances, commercial occupiers are generally liable to the local authority for business rates. Tax rules are complex, and specialist advice on operations, transactions and structuring should be sought.

Compliance and regulatory

Many sectors in the UK are regulated, bringing confidence to companies and investors to do business and invest here. No business operating in the UK is insulated from some form of regulatory compliance. Non-compliance can result in potentially heavy civil and criminal penalties.

Trends and hot topics

- **Compliance programs:** as the regulatory landscape in the UK becomes more extensive and complex, an increasing number of companies are implementing robust compliance programs. Companies are conducting risk assessments to understand their potential exposure. They are also seeking guidance on the design and implementation of compliance programs that suit the business' size, complexity and risk profile.
- **Regtech:** technology is increasingly being used as a tool to assist companies to efficiently navigate applicable and sometimes fast evolving regulations. RegTech is a good example – technologies that work alongside FinTech services (as well as more traditional banking), which seek to safeguard those services against fraudulent activity, and to align those services with regulatory requirements.
- **Failure to prevent:** a new criminal offence has been introduced which holds companies liable for failing to have adequate procedures to prevent the facilitation of UK or foreign tax evasion by employees or other associated persons in certain circumstances. It follows similar concepts as the UK Bribery Act, so a company should have a defence if it had already put in place 'adequate procedures'. This is another reason why more companies have strengthened their compliance programs.

Key legal considerations

Financial services

The UK is home to one of the world's most important financial centres and is a destination of choice for financial services businesses looking to expand overseas. It has great access to markets and investment opportunities, a tried and tested legal infrastructure, and a well-placed time zone. Moreover its regulatory regime is highly regarded internationally and is characterised by its focus on fostering innovation and promoting the adoption of trailblazing technologies, while maintaining strong standards of customer protection and financial stability.

The UK is also committed to becoming one of the foremost financial centres for sustainable finance in the world. We are able to support financial sector participants on their compliance with a range of applicable Environmental, Social, and Governance (ESG) disclosure and reporting obligations.

As is the case in most jurisdictions, the financial services sector is heavily regulated and a range of business models and activities attract attention, including:

- mobile or electronic payment technology
- digital banking
- online peer-to-peer lending or investment websites
- cross-border promotion of financial products
- various forms of collective or alternative investment funds or schemes.

The UK has identified the great potential that crypto technologies have for the financial services industry and is looking to establish a comprehensive regime for the regulation of cryptoassets that is proportionate and clear and enables firms to innovate fast but which also maintains financial stability. We are recognised as market leaders in understanding and advising on cryptoassets, blockchain and distributed ledger technology in the UK and EU.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The UK regulators cast their net widely and a business does not need to be physically present in the UK to be caught.

If a business (or its website) could be seen as actively targeting the UK market, it may well be within the remit of UK regulation. Taking appropriate advice at the outset can help you decide whether your firm needs UK authorisation or whether you may be able to structure your business model to benefit from any exemptions. If you do require authorisation, our regulatory experts can support you throughout the process and beyond, including guiding you through the regulations that will apply to you once authorised advising on the regulators' exercise of their supervisory or enforcement powers, and managing regulatory change and any impacts on your business.

Anti-money laundering

All companies are advised to implement know your customer procedures to avoid falling foul of the UK's anti-money laundering regime.

A company can be held liable if it handles proceeds of a crime, such as profits of a contract obtained through bribery. If you are a regulated business (for example, financial services), you are subject to additional requirements.

Anti-bribery

All companies operating part or all of their business from the UK are subject to the UK Bribery Act. This is a strict piece of legislation, imposing additional requirements to, say, the US's anti-bribery legislation, the Foreign Corrupt Practices Act. You can also be held liable for corrupt activities of agents operating abroad. You can offer a defence against this strict liability corporate offence if you can show that you have put adequate procedures in place to seek to prevent bribery.

Export controls and financial sanctions

All companies operating part or all of their business from the UK must comply with sanctions legislation. The UK has enacted this legislation to bring into force international and EU sanctions. The Export Control Organisation requires licenses for – or in some cases completely prohibits – the export of certain goods from the UK. It is important that you review all products against the export controls lists and seek advice on obtaining the necessary licences.

HM Treasury maintains a list of individuals and organisations on which it has imposed asset freezes. Thorough due diligence on end-users, for example, is key.

Supply of goods and services

The UK's advanced consumer protection regime brings with it consumer confidence. It also means that any business looking to sell products in the UK needs to get advice on compliance with product regulation relating to:

- labelling and packaging
- safety
- defective goods
- recalls
- consumer law.

Certain sectors and products are subject to specific regimes, such as:

- medical devices
- toys
- automotive products
- electrical product.

Telecoms services and activities such as gaming/competitions and advertising are regulated in the UK in ways that are not necessarily intuitive or similar to practices in other jurisdictions.

Competition

Any company that sells into the UK must adhere to UK competition law which, at the moment, is based on the principles. If they sell in the EU as well, under both EU and UK competition rules, certain agreements restricting competition are void. This can lead to fines and the relevant clauses – or perhaps the whole agreement – can be found to be unenforceable. It is, for example, important to take advice if you are seeking to impose resale prices or an export ban on a distributor within a specific territory.

Other issues

As an overseas business setting up in the UK, you may have other issues that you need to consult on that are not covered by this guide, such as UK advertising laws and product liability laws.

You are also likely to need specialist advice in other areas in addition to the law, such as:

- corporate, international and expat tax
- VAT
- accounting, audit and back-office assistance
- payroll registration
- recruitment
- relocation
- compliance and regulatory
- pensions/benefits provision
- real estate location
- banking, including a UK bank account
- insurance.

The UK has a well-developed professional services sector on hand to assist overseas businesses looking to set up and do business in the UK market. The UK government, through the Department for International Trade, and other local agencies such as London & Partners, the official promotional organisation for London, provide a valuable service to many such businesses through their presence in the UK and with local posts in many other markets. Taylor Wessing works regularly with these agencies and with other professional service providers to provide businesses with a seamless entry into the UK market.

About us

Taylor Wessing is a global law firm that serves the world's most innovative people and businesses.

Deeply embedded within our sectors, we work closely together with our clients to crack complex problems, enabling ideas and aspirations to thrive.

Together we challenge expectation and create extraordinary results.

By shaping the conversation in our sectors, we enable our clients to unlock growth, protect innovation and accelerate ambition.

Technology, Media & Communications

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Life Sciences & Healthcare

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- Business & Professional Services
- Consumer & Retail
- Hotels, Hospitality & Leisure
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- Automotive & Mobility
- Chemicals
- Financial Institutions & Insurance
- Logistics & Transport
- Public Services & Education

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