



The Essential Guide  
to establishing a  
business in the  
United Kingdom

Dechert  
LLP

## This Essential Guide concentrates on two principal methods for a non-UK entity to create a presence in the UK, namely setting up an establishment and incorporating a subsidiary.

There are, of course, alternative methods and/or vehicles which may be used for this purpose, including a public limited company, a company limited by guarantee, an unlimited company, a European company, a partnership, a limited liability partnership, agency agreements and joint venture agreements. Information on each of these alternatives is available upon request.

A UK **subsidiary** is a separate legal entity. This means that, other than in exceptional circumstances, the liabilities and debts of the UK subsidiary cannot be claimed from the non-UK parent (and vice versa). However, there will be greater administrative obligations involved.

By contrast, an **establishment** is regarded as a simpler (and quicker) process, with fewer ongoing administrative requirements. An establishment is not a separate legal person, but (effectively) an extension or division of the non-UK entity. As a result, the liabilities and debts of the UK establishment rest with the non-UK entity. However, in the case of an establishment, it is important to remember that details of the non-UK parent (which may include accounting documents) will need to be filed with the Registrar of Companies (more commonly referred to in the UK as 'Companies House'), and those details will need to be updated on a regular basis. Moreover, copies of those records filed at Companies House will, ordinarily, be available for public inspection

### Setting up an establishment

Not all forms of business activity by a non-UK entity involving the UK will amount to establishing a business. For example, investing in UK-based property/real estate, conducting business through an agent (which itself has premises and operations in the UK), or a director conducting business during periodic visits to the UK from an occasional location (such as a hotel), will not. However, establishing a physical presence, regularly conducting business at a certain

address or holding out that it is contactable at that address, or setting up a permanent location from which business is conducted (such as an office or warehouse), will.

### Registration

It is therefore a question of fact as to whether an establishment has been created in the UK by a non-UK entity but, where this is the case, that non-UK entity is required to register certain details with Companies House. See the text box entitled "Registration of an establishment" for details of what must be disclosed when registering a UK establishment with Companies House.

The name to be used by the UK establishment must be approved by Companies House, and there are certain restrictions which apply to the name which may be used. These restrictions are similar to those set out under the heading "Company name" (pg. 3).

### Ongoing disclosure requirements

Following registration of an establishment with Companies House, the non-UK entity has ongoing disclosure obligations. These include notifying Companies House of:

- Changes to the name or address of the UK establishment.
- Changes to the officers or constitution of the non-UK entity.
- Changes to the details of the permanent representatives or persons authorised to accept service in the UK on behalf of the non-UK entity.
- Subject to certain accounting law requirements, accounting documents of the non-UK entity.

- Details of any winding-up or liquidation process applicable to the non-UK entity.
- Closure of the UK establishment.
- Certain charges created by the non-UK entity or a third party over property of the non-UK entity in the UK.

Regulations also govern use of the name of the non-UK entity in the business communications, office stationery and at the business premises of the UK establishment. Additional information on this is available upon request.

### Registration of an establishment

An application by an overseas company to register an establishment in England and Wales is made on a prescribed form, Form OS IN01, which must be delivered to Companies House. The Form OS IN01 must:

1. State the non-UK entity's name, legal form, country of incorporation, and details of registration in its home country.
2. Specify details of the officers of the non-UK entity, including name, nationality, date of birth, business occupation, service address and residential address (residential addresses are not disclosed on the public record).
3. Enclose a certified copy of the non-UK entity's constitution.
4. Enclose the latest disclosed accounts for the non-UK entity (these may have to be certified and translated).
5. Specify details of the permanent representatives (persons authorised to represent the non-UK entity in respect of the UK establishment).
6. Specify details of persons authorised to accept service of documents on behalf of the non-UK entity in respect of the UK establishment.
7. Be filed with the appropriate registration fee.

Dechert can assist with the preparation and filing of Form OS IN01. Additional information on the above is available upon request.

### Incorporation of a private limited company (as a subsidiary)

See the text box entitled "Company incorporation requirements" for details of what must be disclosed in the application to Companies House for the incorporation of a new UK company (as a subsidiary of a non-UK parent).

### Trading prior to incorporation

A company does not exist as a legal entity, and, therefore, cannot carry on a trade, until it has been incorporated. Trade purportedly carried on by the company before it is incorporated is actually carried on by the future directors of the company (the company's 'promoters'), who will be personally liable for any liabilities incurred in the pre-incorporation trading period. The liability of the company is separate and distinct from that of its promoters: a company is not bound by a contract purportedly made on its behalf before it was incorporated. The contract may be novated from the company's promoters to the company, so that the company must comply with the terms of the contract.

### Company name

The name of the company may not be identical or materially similar to another company which already exists. It is not possible to reserve a name with Companies House. Limitations exist on the characters and punctuation that can be used in a company's name and there are also certain words, expressions and name endings that are either prohibited or will only be approved in limited circumstances. The chosen company name will only be allocated when the application for incorporation is processed. Further, care must be taken in order to ensure that the proposed name of the company does not infringe a current trade mark or trading name of an existing business.

A company may trade under a name (its 'business name') which is different to its company name. There are rules and restrictions which govern the use of a business name by a company. Additional information on use of a business name is available on request.

### Registered office

A company must have a registered office, to which all official letters and notices to the company will be

## Company incorporation requirements

An application to incorporate a new company in England and Wales is made on a prescribed form, Form IN01, which must be delivered to Companies House. The Form IN01 must:

1. State the proposed name of the company (the name chosen must comply with statutory requirements).
2. State what the address of the registered office of the company will be.
3. State who the officer(s) (the director(s), one of whom must be a natural person, and secretary, if any) of the company will be, and include details of each such officer, including name, nationality, date of birth, business occupation, service address and residential address (the residential address is not disclosed on the public record).
4. Set out share capital details, including a statement of capital and shareholding details of the subscriber members.
5. Be signed (a) by each of the officers of the company agreeing to their appointment and (b) by or on behalf of the subscribing member(s) agreeing to subscribe for shares in the company.
6. Be filed with the company's governing documents: the memorandum and articles of association, which must be signed by or on behalf of the subscribing member(s).
7. Be filed with the appropriate incorporation fee.

Companies House aims to complete the incorporation of the company within five days of receipt of the items listed above. It is possible (at an increased incorporation fee) for a company to be incorporated on the day on which the necessary documents are lodged with Companies House, provided the documents are lodged in sufficient time that day.

Notaries are not involved in the incorporation or ongoing administration of a UK company.

Dechert can assist with the preparation and filing of Form IN01. Additional information on the above is available upon request.

delivered. That office must be physically located in England or Wales (or Scotland or Northern Ireland, for companies to be incorporated in those countries: each has separate registrars of companies). The statutory books of the company (see further under the heading "Ongoing disclosure requirements," pg. 5) must be kept at the registered office, and certain other documents (for example, documents to be approved, at meetings of members otherwise known as 'shareholders') must be displayed there and available for inspection by shareholders. The registered office may be a different address to that at which the day to day business of the company will be undertaken.

### Officers: directors and secretary

**Directors** have the power to manage the company's business, subject to the company's articles of association. It is their role to take business decisions and enter into contracts on behalf of, and in the name of, the company.

A private company must have at least one director, although the company's articles of association may impose a higher minimum requirement. A director may be another company or legal entity, but a company must have at least one director who is a natural person. Anyone may be appointed as a director, provided that the relevant person:

- Is not an undischarged bankrupt.
- Has not been disqualified from acting as a company director.
- Is aged 16 or over.

There is no restriction on the nationality or residency of a director (although there may be work permit restrictions which affect the work which may be undertaken whilst in the UK by a person who is not a national of a state within the European Economic Area).

The service address of all directors of the company will be available for inspection through a public register. The service address does not need to be the director's residential address and may be the same as the registered office of the company. Directors must also file their residential addresses with Companies House, but these are not displayed on a public register.

It is possible for a single natural person to act as the sole director and sole shareholder of a private company, with no other officers or shareholders.

Directors of a UK company must act in accordance with certain general duties, known as fiduciary duties. In particular, the UK Companies Act 2006 identifies seven general duties: to act in accordance with the company's constitution and to exercise powers only for the purposes conferred; to promote the success of the company; to exercise independent judgment; to exercise reasonable care, skill and diligence; to avoid conflicts of interest; not to accept benefits from third parties; and to declare interests in proposed transactions or arrangements. Directors owe these duties to the company. Further information on directors' duties is available upon request.

A **company secretary**, on the other hand, is an administrative officer whose main function is to ensure that the company complies with certain statutory requirements to which it is subject. As such, the secretary has no role in the management of the business of the company, although the secretary will be able to enter into contracts, and carry out other acts, on the company's behalf. The secretary can, in general terms, be someone who is also a director.

A private company is not required by law to have a company secretary, but may appoint one; although its articles of association may include an obligation for a company secretary to be appointed. The company secretary can be an incorporated entity (i.e. not a natural person).

### **Constitutional documents: memorandum and articles of association**

The company's memorandum of association is a simple document, largely in a prescribed form, and has a limited purpose. It confirms the intention of the subscriber(s) to form a company and become members of that company upon its formation. The memorandum will also provide evidence of the subscribers' agreement to take at least one share each in the company. The memorandum must be signed by each of the subscribers to the company.

The articles of association of the company form its internal rulebook and are commonly referred to simply as the company's 'articles'. The articles form a legally binding contract between the company and

its members/shareholders, regulating the internal management affairs and running of the company. Typically, the articles will address: allotment, issue and transfer of shares; procedure for declaring dividends and other distributions; alteration of share capital; regulation of shareholders' meetings (known as 'general meetings'); appointment and removal of directors; directors' powers and duties; and regulation of directors' meetings.

The non-UK parent (as member/shareholder) has complete freedom to choose which rules go into the UK subsidiary company's articles, save that the articles must be contained in a single document, be divided into paragraphs which are numbered consecutively, and not contain rules which breach English law.

The Companies Act 2006 provides standard form articles (known as 'model articles', which replaced the former statutory form known as 'Table A'). If no other articles are adopted, these model articles will automatically apply. The non-UK parent should always consider whether bespoke or tailor-made articles of the UK subsidiary would be more appropriate for their specific business purposes. Often, a wholly-owned subsidiary would adopt articles which are largely based around the 'model articles', but with certain modifications.

### **Ongoing disclosure requirements**

Following incorporation of a new company, that company must comply with certain ongoing disclosure obligations. These obligations include notifying Companies House (such notification may be in a prescribed form and/or require copies of the relevant documents to be filed) of the following:

- Changes to the name, address, officers (or details of such officers) or constitution of the company.
- Allotment of shares.
- Subject to certain accounting law requirements, accounting documents (to be filed annually).
- Charges created over the company's property and assets.
- Certain resolutions passed by the shareholder(s) of the company.

An annual return must also be filed with Companies House, in a prescribed form, providing details of the officer(s), registered office, main business activities,

share capital and shareholder(s) of the company. Largely, this should reconcile with the information already on record at Companies House, but it includes details of transfers of shares. Failure to deliver the return within 28 days of the date to which it is made up is a criminal offence.

In addition, the UK subsidiary must maintain certain registers, known as the 'statutory books', which should be kept at the registered office and made available, on request, for inspection by the shareholder(s) of the company. These include: minute books (of shareholders' and directors' meetings) (not available for public inspection); register of members; register of directors; register of secretaries (if any); register of directors' residential addresses (not available for public inspection); register of charges over the company's property and assets; register of debenture holders; and copies of directors' service contracts (not available for public inspection).

Regulations also govern use of the name and details of the company in its business communications, office stationery and at its business premises. Additional information on this is available upon request.

### Next steps

In connection with the setting up of a business in the UK, whether as an establishment or a subsidiary (or some other form), the following matters may require careful consideration:

1. Finance (including opening bank accounts) and accounting.
2. Tax.
3. Commercial arrangements.
4. Employees and personnel.
5. Real estate/property and planning.
6. Health and safety, product safety/liability and environmental.
7. Intellectual property (including e-commerce and data protection).
8. Competition and merger controls.
9. Availability of grants and/or other financial incentives.
10. Approval to conduct FSA regulated activities.

Dechert can assist in each of these areas, Additional information on each of the above is available upon request.

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