

DOING BUSINESS IN SCOTLAND



Different flags. One Standard.

WELCOME TO SCOTLAND, the small country making a big impact on the global landscape.

In Scotland, you will find excellence in education, a flair for invention and a penchant for research. It's a place where great minds connect to produce a dynamic business environment.

You'll find us progressive and pioneering. With a track record of innovation and enterprise, we punch above our weight in industries like finance, engineering, life sciences, technology and energy.

The shining jewel in our crown is our people; by locating in Scotland, you'll access a highly educated, skilled workforce with a strong work ethic.

You'll be connected to a culture of research, innovation and creativity through our academic institutions which have an outstanding record of collaboration with industry.

Scotland is a land of great natural beauty and strong heritage, and our warmth and generosity are world-renowned. Our friendly communities offer an exceptional quality of life, while progressive government policies strive to make Scotland an even fairer and better place to live and work for everyone.

Our driving determination is the key to our success. We'd love you to join the very many global businesses that choose to locate, operate and grow in Scotland alongside our ambitious local companies.

We're here for you throughout the journey – you will be supported before, during and after you locate in Scotland.

Now is the time to invest in Scotland. So come on in; be part of Scotland's continuing success story.

Neil Francis
Interim Managing Director
Scottish Development International

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WHY SCOTLAND?

Scotland has a long history of international trade and welcomes investment and business interests from all over the globe. Outside of London no other UK region attracts more foreign direct investment and, with operating costs being up to 40% lower than in London, many businesses are choosing to set up here. Our skills, expertise, infrastructure and services have always been in strong demand globally. Thanks to a high concentration of universities and accessible education programmes, over half of the Scottish working population has benefitted from higher education or further qualifications.



Source: Financial Times FDI Benchmark 2022

The Scottish government has traditionally offered significant support to many Scottish businesses, whether it be funding to secure jobs, tax reliefs or financial support for innovation and R&D. Scotland continues to offer significant incentives in the form of grants or subsidies to foreign investors, and Scottish Enterprise and Highland and Islands Enterprise have a budget of nearly £2.7 billion to invest in the Scottish economy over a three-year period. This collaborative approach is a key reason why almost 40 new investors chose Scotland in 2022 and 7,780 skilled jobs were created via inwards investments.

In 2021 Scotland recorded a 14% increase in foreign direct investment (FDI) projects, making it the leading investment region in the UK outside of London. The top four investment sectors in Scotland during 2021 were digital, health, real estate and cleantech.

Scotland is brilliantly connected. With five international airports and most major European cities within two hours, it truly is an ideal steppingstone into Europe for your business.

Making a business investment in a new jurisdiction is not a decision to be taken lightly and can challenge the way you have become accustomed to running your business. Burness Paull has a wealth of experience in advising clients from across the globe on their business ventures in Scotland, particularly how best to navigate potential pitfalls and maximise the benefits offered by the Scottish market.

-  Financial and tax incentives
-  Innovation
-  Trade Opportunities
-  People and skills
-  Cost of doing business
-  Supportive environment



Source: SDI 2022

This guide covers some of the main legal and regulatory compliance requirements for businesses operating in Scotland and is aimed at those who are looking to expand or invest into the UK, and at the organisations which are supporting them in this move.

Local expertise is vital, as the law in Scotland, and indeed the UK, differs significantly from other jurisdictions. Burness Paull is passionate about helping businesses investing in Scotland to have the best possible start and can guide you through the legal and regulatory landscape.



Different Flags. One Standard.

FOREIGN INVESTMENT POLICY & REGULATION

Historically, Scotland and the United Kingdom have recognised foreign investment as one of the key factors in economic growth and the creation of wealth.

The Companies Act 2006 is the key statute to which all types of company must adhere, regardless of whether they are registered in Scotland or England and Wales, and is a comprehensive code on company law in the UK.

Until recently foreign investment in the UK (and therefore in Scotland) has not generally been restricted or governed by any particular regulatory framework although some sectors (such as the financial services industry and utilities) have been regulated to some extent. Importantly, towards the end of 2020 the National Security and Investment Bill (“NSI Bill”) was published, introducing a new regulatory framework for investment into the UK.

The NSI Bill introduces a new reporting regime where there is investment into one of the key identified sensitive sectors (where notification will be mandatory) or where there is a potential national security issue (where notification will be voluntary). The Bill also gives the Government an overall power to ‘call-in’ any transaction that is not notified. The Bill as currently drafted is very wide with no minimum turnover or deal size thresholds. It is expected that the Bill will come into force in late summer 2021 but the call-in power of the Government may be used for any transaction completed from 12 November 2020.

The UK is the European leader for inward investment, with both the UK and Scottish governments playing an active role in attracting foreign investment and despite the wide provisions of the NSI Bill it is expected that this will continue. Scotland in particular works hard to cultivate a supportive business environment and organisations such as Scottish Development International, which has a network of offices in 20 countries across the world, are on hand to offer assistance to those looking to establish and grow their business in or from Scotland.



We'll get you the best seat in the house.

Whatever your ambitions, we'll get you to where you want to sit...

STRUCTURING YOUR BUSINESS

When making a business commitment to expand to Scotland, one of the first issues to be discussed should be how to appropriately structure your business from a commercial, corporate and tax perspective.

There are various ways in which investors may choose to enter the Scottish market, for example:

- Trading through a UK incorporated entity;
- Establishing a UK branch;
- Acquiring an existing business in the UK;
- Entering into a joint venture or partnership with another business;
- Using a distributor or agent; or
- Running your business from another jurisdiction and selling into the UK.

When deciding which business vehicle is the most appropriate UK entity, it is important to consider factors such as the sector and the product or service being supplied. However, in most cases a UK registered entity will be the most favourable in terms of managing international tax issues and can be set up in as little as 24 hours.

In Scotland, there are a number of different types of entities, including: a private limited company, a public limited company, a limited liability partnership and a Scottish limited partnership. We will focus our commentary on the private limited company as this is the most common.

Private Limited Company

Private companies limited by shares (Limited, Ltd or ltd) are by far the most common form of registered entity in the UK, benefiting from the limited liability of its shareholders and separate legal personality. It is common to see private limited companies used as a wholly owned subsidiary of an overseas parent. A UK company can be beneficial in terms of demonstrating commitment to Scotland and therefore providing additional credibility to third parties looking to trade or do business.

Incorporating a private limited company can be done in as little as a day. It must, as a minimum, have at least one director and at least one shareholder. The shareholders are the ultimate owners of the company but the directors, or board members, manage the company on behalf of its shareholders.

Although the company must have a registered office in the UK and retain its statutory records at its registered office, there is no requirement for either the shareholders or directors to be UK residents or for board meetings to be held in the UK.

A UK private limited company must also have a constitution in the form of articles of association which govern how the company should be operated and place restrictions on what it can and cannot do. Modification to the articles of association can only be made by shareholders passing a special resolution (which requires at least 75% of shareholders to vote in its favour).

A private limited company cannot offer shares to the public or trade its shares on a public market such as the London Stock Exchange. If a private limited company wishes to raise capital, it can do so by issuing more shares "off market" (subject to the provisions in the articles of association), or increase its gearing by taking out a loan. Alternatively, it can convert itself into a public limited company.

Public Limited Company

A public limited company (PLC, Plc or plc) requires a minimum authorised share capital of £50,000, at least two shareholders and directors and may offer its shares to the public. However, such entities are subject to strict regulation and scrutiny. This guide does not address the intricacies of setting up a plc but please contact us if you are interested in this type of entity.

Limited Liability Partnership

Limited liability partnerships (LLPs) also have separate legal existence from their partners (referred to as members) and afford the partners flexibility in how to manage their business

affairs. LLPs are tax transparent, meaning that each partner is responsible for their own tax, and are popular with professional services firms. LLPs require the involvement of two or more partners.

Scottish Limited Partnership

Scottish limited partnerships (SLPs) are a business entity unique to Scotland and are often used for private equity and property investment fund structures. Again, they are transparent for tax purposes but, unlike English limited partnerships, they have separate legal personality.

SLPs also require the involvement of two or more partners; one being a general partner who is responsible for the liabilities of the SLP and the other being a limited partner who is only liable for the extent of its capital contribution. The limited partner is not allowed to take part in the management of the SLP if it is to receive the benefits of limited liability. SLPs in some circumstances are not required to disclose details of their accounts.

The SLP's separate legal personality means it can hold property, enter into contracts, borrow money in its own name and, most importantly, can be a partner in other limited partnerships. Because of this, SLPs are frequently used in layered structures and are ideal as fund of funds, carried interest, co-invest or feeder/blocker vehicles.

A SLP may be designated as a private fund limited partnership. This is a relatively new vehicle, aimed specifically at the needs of private investment funds, including private equity and venture capital funds.

Bank Accounts

Bank accounts for UK entities can be set up relatively quickly, although this is dependent on the overall structure of the business. Unlike some other European jurisdictions, there is no need to establish a bank account before incorporating your UK entity.

COMPANY FILING REQUIREMENTS

In order for companies to remain compliant with the Companies Act, there are certain documents which must be lodged at Companies House, which is a UK wide company register accessible by the public.

| DOCUMENT | DESCRIPTION | FILING REQUIREMENT |
|--|---|-------------------------------------|
| Confirmation Statement | This is a statutory statement by the Company that the information held by Companies House relating to shareholders, registered office and People with Significant Control are up to date and accurate. Any changes in the shareholder position are notified on this form. | At least once Annually |
| Accounts | Details of the Company's performance during the previous financial year which, dependent on the size of the Company, must include a profit and loss account, a balance sheet, notes to the accounts, a director's report and, for larger companies, an auditor's report. | Annually |
| People with Significant Control (PSC) | Details of any PSC must be notified to Companies House on the incorporation of a Company. A person or entity is defined as having "significant control" | Annually and upon any change of PSC |

| | | |
|-------------------------------------|---|---|
| | <p>where they hold, directly or indirectly, more than 25% of the shares in the capital of the Company, and/or more than 25% of the voting rights of the Company, and/or the ability to appoint or remove a majority of those who manage the Company. They may also qualify as a PSC if they have the right to exercise significant influence or control over the decision making activities of the Company.</p> | |
| Changes to the Board | <p>Any appointment or resignation of a director from the Company's board must be notified to Companies House, as well as any appointment or resignation of a named company secretary.</p> | <p>Within 14 days of the appointment or resignation</p> |
| Change of registered address | <p>You must tell Companies House if you want to change a company's registered address, as the change will not take effect until Companies House have registered it.</p> | <p>Upon the change of address</p> |

FUNDING YOUR BUSINESS

Restricted cash flow is often the primary barrier to business growth. Any growth strategy therefore is likely to need funding. Generally, the laws governing the lending and recovery of money and the taking and enforcement of security in Scotland are considered to facilitate an expansion or acquisition strategy assisted by debt funding.

Types of Lender

There are a number of lenders currently operating within Scotland offering a variety of lending products. These range from banks to a plethora of non-bank lenders. Banks tend to offer cheaper pricing but tend to be less risk adverse and can be more inflexible in relation to terms and structuring than non-bank lenders. Non-bank lenders obtain their cash from several sources (private equity, institutional cash, peer-to-peer lenders) and are not subject to certain regulatory capital and liquidity requirements which are imposed on UK banks. For this reason their facilities can be more expensive than those offered by banks, however they can offer more flexibility, longer terms and slightly looser covenants and usually require less equity contribution. They can also provide mezzanine finance or serve as a bridge to obtaining more traditional, cheaper sources of funding. The majority of non-bank lenders have focused their attention in England, but many are looking for opportunities to lend against assets in Scotland.

Types of Debt Product

The array of products offered by lenders operating in Scotland is equally as diverse. Most bank lenders will offer the full range from the more traditional term and revolving facilities for funding real estate, corporate and leverage opportunities to renewables, invoice and asset finance, and leasing and hire purchase. Banks are also most likely to be able to provide clearing and operational banking facilities such as BACs, credit cards and overdrafts. Non-bank lenders

tend to specialise in one or two asset classes such as real estate or leverage financing and many are particularly interested in lending against distressed assets where it can be demonstrated that a credible business plan can be implemented to increase value.

Choosing a Lender/Debt Product

When considering which lender and product is most appropriate for your business it is important to: (a) consider all relevant attributes and determine which are the most important to you; and (b) do your research. The level of margin and up front fees are often the deciding factor when picking a lender however it is wise to consider matters such as certainty and speed of execution as well as length of term and extent of commitment. Many lenders will only offer 3 year facilities. Some lenders will offer more leverage than others. Often refinancing and equity costs are not taken into account when determining overall cost funding. Sometimes lower cost facilities will be on demand which removes certainty.

Good rapport is fundamental in creating long-term robust lending arrangements. Talking to peers and professional advisers can provide an insight into the culture and approach of different lenders particularly in distressed situations where collaboration becomes crucial.

Finally, consider what additional advantages can be gained from entering into borrowing arrangements with a particular lender. Identifying and maintaining strong local partnerships and developing good business networks can be imperative when entering a new market. Many lenders can assist with sourcing these via world wide portals, networks and relationships that customers can access. Lenders with international networks can help amalgamate international banking operations.

Debt Documentation

The type of documentation used to provide finance will vary depending on the type of debt product and the level of finance required. For real estate, corporate and leveraged loans if a large facility is required the documentation will be based substantially on that produced by The Loan Market Association ("LMA"). If a mid sized facility is required, many lenders have produced abbreviated versions of LMA's documents, which are often in bilateral form. For smaller facilities, most lenders will have simpler template debt documents that do not allow for much negotiation. Documentation for invoice, leasing and asset finance tends to be a template in nature and again does not allow for much negotiation.

Security Documentation

The type of security documentation used in Scotland will depend on the collateral available and intended to be secured.

In Scotland there are two types of security which can be granted over an asset. The first is fixed security which affords the holder absolute priority in respect of any proceeds of enforcement of the secured asset. The second is floating security which can only be granted by a corporate entity (being a company or a limited liability partnership) and which offers the holder priority over the proceeds of enforcement of the secured assets subject to leakages to appointed insolvency practitioners and certain types of other creditors. The most common form of security granted by a corporate entity is a floating security which extends over all of its assets located in the UK. This type of security can afford the holder with a quicker and cheaper route to enforce its security.

In Scotland separate security documents are used depending on what type of security is to be taken. For this reason and because Scots law requires complete control over an asset before fixed security can be created over it, the main types of fixed security created over Scottish assets are security over (a) land and buildings; (b) receivables; (c) rights and (d) shares.

It is necessary to register fixed security over certain classes of assets in special registers in order to create or validate such security. Where the grantor is a corporate entity incorporated in Scotland all security must be registered at Companies House in the UK in order to ensure it is recognised by an insolvency practitioner or another creditor of the grantor.



For us employment is elementary.

It's our chemistry with clients that defines us.

EMPLOYMENT

There are many reasons why businesses of all sizes are attracted to Scotland, including the ever-expanding talent pool in a variety of areas and professions, the reasonable cost of living compared to other parts of the UK, typically low attrition rates across a multitude of sectors and the transport links to various global hubs including London.

However, there are many important issues to consider when hiring staff in Scotland, the first being whether the traditional “employee” model suits your business or whether engaging self-employed consultants, contractors or agency workers may be more suitable. Employees receive the greatest degree of protection but “workers” also receive some of the rights afforded to employees. The decision as to the best staffing model often comes down to the business requirements and tax considerations.

Much of UK employment law is derived from European law, and therefore applies throughout the UK, but these laws differ significantly from jurisdictions outside Europe. In recent years, there has been a move to reduce the burden of employment regulation on UK employers, with notable changes including the increase of the service requirement for unfair dismissal claims to two years and capping compensation for unfair dismissal claims at the lesser of one year’s gross pay or £88,519.

UK Employment Rights

UK employees have a number of rights that have no equivalent in many other countries. For example:

- **Written contract** - UK employees have a right to receive a written statement of their terms of employment by no later than the date they commence employment and this contract must contain certain minimum information.
- **Working hours** - Most UK employees cannot be required to work more than an average of 48 hours a week, unless they expressly agree otherwise with their employer.
- **Annual leave** - UK full-time employees are entitled to 28 days' paid annual leave, which can include public and bank holidays, of which employers generally recognise nine in Scotland.
- **Sickness leave** - There is no statutory limit on the amount of time which employees may take off due to illness or injury. However, their entitlement to statutory sick pay ceases after they have been absent for sickness for more than 28 weeks.
- **Notice periods** - After one month's service, employees are entitled to notice from their employer of the termination of their employment. The minimum statutory right is one week's notice and, once the employee has two years' service, this rises by one week for each year of service, up to a maximum of 12 weeks. It is common for longer periods of notice to be agreed between employees and employers and this should be taken into account when hiring.
- **Termination** - Once employees have been employed for two years, they may only be dismissed for one of five prescribed reasons, including redundancy, incapability and misconduct. Compensation for unfair dismissal is currently capped at £93,878 or a year's gross salary, whichever is lower. Redundant employees with more than two years' service are entitled to statutory redundancy pay.

UK employers must follow a fair procedure when dismissing an employee. Failure to do so, or terminating employment for a reason other than one of the reasons permitted by law, could lead to a claim for unfair dismissal.

- **Discrimination** - UK employees have the right not to be discriminated against on grounds of age, disability, gender-reassignment, marriage or civil partnership, pregnancy or maternity, race, religion or belief, sex or sexual orientation. Compensation for discrimination is not subject to any cap and there is no minimum period of service required to bring a discrimination claim.
- **Pensions** - UK employers are required to automatically enrol eligible workers in a pension scheme and contribute to it. However, mandatory contributions in the UK are substantially lower than the contributions in other jurisdictions.

- **Business transfer protection** - UK employees are offered protection from dismissal in the event of a transfer of an undertaking or a contracting in or out of services. This means, for example, that when you acquire a business (or part of a business) the employees' contracts of employment will automatically transfer to you and any dismissal connected to such a transfer will be unfair unless it is for an "economic, technical or organisational" reason. Employers also have certain obligations to consult with employees on the sale of a business.
- **Waiving rights** - UK employees can waive almost all of their potential employment claims but this must be done through a formal settlement agreement, for which the employee must receive independent legal advice.
- **Consultations** - UK employees have no freestanding right to collective employee representation but they do have rights to collective consultation in certain circumstances. Examples include proposals to make at least 20 employees redundant, certain types of changes to pension benefits, business transfers and certain health and safety issues. There is generally a spirit of voluntarism when it comes to trade union recognition, but there are legal provisions entitling a trade union to apply for recognition if they can evidence, broadly speaking, 40% support.
- **Non-competes** - Post-termination, non-competition or non-solicitation obligations can only be enforced in the UK if they are reasonable and restrictions which may be acceptable in non-European jurisdictions are often too wide in scope and duration to stand up to challenge.

Employers in the UK have statutory duties to take measures to ensure the health, safety and welfare of employees and others affected by work activities. Risks associated with work activities require to be formally assessed and appropriate measures implemented to avoid or control the risks. Where a business employs more than 5 employees the risk assessments and relevant control measures must be recorded in a written document. Employers are also required to have a written health and safety policy and liability insurance. Failure to comply with health and safety duties is a criminal offence which can lead to serious financial penalties for businesses and imprisonment for individuals.

International Employees

Employees from within the European Union, the wider EEA and Switzerland now require sponsorship by an employer or a residence permit before being able to work in the UK.

The UK like many other countries has been gradually tightening immigration laws in recent years and now the UK has left the EU, the UK government has indicated that any EU workers coming to the UK after January 2021 will need to obtain an appropriate residence permit.

EU workers who were living in the UK before 31 December 2020 need to apply for settled status or a temporary residence permit, depending on how long they have been resident in the UK.

Unless they have indefinite leave to remain in the UK or are otherwise exempt from immigration control (and are therefore not restricted in the work they can carry out), foreign employees from outside the EU, EEA and Switzerland also require a visa which allows them to work in the UK.

The UK has a number of different visa categories that facilitate the attraction of skilled and highly skilled people to the UK for work, study or business. The visa that is required will depend upon the reason for coming to the UK and the intended length of stay. It is possible for employers to formally sponsor skilled employees for work visas or to transfer employees to the UK from overseas offices. The visa rules have various criteria that need to be met in order for employees to qualify for sponsorship and there are also significant concessions for major inward investors to help speed up the visa process.

IMMIGRATION & VISAS

When doing business in Scotland, it is important to ensure that the appropriate visa is in place to enable you to work, invest or live in Scotland. Whilst nationals of some countries can enter Scotland for business trips without the need to obtain a visa in advance, anyone who is not British or Irish will need a visa in order to live in Scotland.

The visa requirements for Scotland are the same as the rest of the UK, though there are circumstances where investment in Scotland can mean that applications are processed quicker. The key to obtaining a visa is preparation and anyone requiring a visa to work, live, study or invest in Scotland should consider the various visa requirements at an early stage. Some of the more common visa routes include:

Start-up visa

This is a new route for those wishing to start up their own business in the UK. This route requires endorsement by a Home Office approved endorsing body. There is no requirement to demonstrate access to investment funds to qualify for this visa. This may make this an attractive option for new entrepreneurs with limited funding. You can stay in the UK for up to two years on a Start-up visa, after which time you may be eligible to switch into an Innovator visa which offers a path to settlement in the UK.

Innovator visa

This is a new route for those seeking to set up or run a business in the UK and who have access to at least £50,000 investment funds. Those who have already established a business which has been endorsed for a previous visa may be eligible to switch into the Innovator category without

demonstrating access to investment funds. This route also requires endorsement by a Home Office approved endorsing body. An initial Innovator visa can be granted for up to three years, with an option to extend for a further three years. After three years in the UK, you may be eligible to apply for Indefinite Leave to Remain.

Skilled Worker visa

This route is suitable for individuals who have received an eligible job offer from a UK employer. The UK employer must hold a sponsor licence or is willing to apply for one. There is a minimum salary requirement with the general starting point being £25,600 gross per annum. Permission to work in the UK is initially granted for up to five years and is broadly tied to the sponsor/employer. After five years in the UK, you may be eligible to apply for Indefinite Leave to Remain.

Global Business Mobility: Senior or Specialist Worker visa

This route is suited for individuals employed overseas and will be transferred to work for linked entity in the UK by common ownership. The UK entity must hold a sponsor licence or is willing to apply for one. There is a minimum salary requirement with the general starting point being £42,400 gross per annum. The minimum salary requirement increases to £73,900 gross per annum if individuals have been employed by the overseas entity for less than 12 months. The initial visa can be granted for up to five years, and in some circumstances, there is an option to extend for a further five years.

Global Business Mobility: UK Expansion Worker visa

This is a new route which will suit those businesses that are currently trading outside the UK and want to explore opportunities in the UK market. The overseas parent entity will require to apply for sponsor licence and will then be able to send up to five senior members of staff to the UK in order to set up a UK branch or wholly owned subsidiary. This route has no criteria around minimum levels of investment funds required. You can stay in the UK for up to two years.

Global Business Mobility: Service Supplier visa

This is for overseas workers who are contractual service suppliers employed by an overseas service providers or self-employed independent professionals based overseas. There must be a need to undertake a temporary assignment in the UK, covered by one of the UK's international trade agreements. There is a minimum salary requirement with the general starting point being

£42,400 gross per annum. The initial visa can be granted for up to 12 months depending on the trade agreement.

Global Business Mobility: Secondment Worker visa

This is suitable for overseas workers temporarily being seconded to the UK as part of a high value contract for goods or investment by their overseas employer. This must be worth at least £10 million per year and no less than £50 million overall. The initial visa can be granted for up to 12 months, with the possibility of extending for a further 12 months.

Global Talent visa

Those who are already recognised leaders in their field or who are widely viewed as emerging leaders might consider this route. It is limited to the fields of digital technology, engineering, medicine, science, humanities and the arts. The endorsement is given by sector-based bodies and the route enables flexibility with the holder not being tied to a particular business or an employer. Dependent on your circumstances, you may be eligible to apply for Indefinite Leave to Remain after three or five years.

Family Members and Dependents

Almost all of the visa categories allow the main visa holder to bring their spouse or partner to the UK with them, along with any dependent children. Partners need not be formally married and dependent children must usually be 18 years old or younger in order to qualify as dependants.

There are often additional criteria around maintenance for dependants which require increased levels of funds to be held to demonstrate the main applicant's ability to maintain and accommodate their dependants. The level of maintenance funds required increases with every dependant. Those in the UK with dependent visas are able to work and or study without restriction on dependant visas, even where the main applicant's visa might prohibit employment or restrict it to a certain employer or type of work.

Dependants can apply at the same time as the main applicant or at a later stage should, they wish.



A refreshing approach to an
established institution.

ENTERING INTO CONTRACTS

Entering into contracts is an everyday occurrence for most businesses, although some may be regarded as business as usual whilst others are more bespoke and may tie the business into a certain arrangement for a longer period of time.

UK and European third parties are typically reluctant to contract on the basis of non-UK/European law or jurisdiction but both Scots and English law are commonly accepted. Your existing contract templates may contain terms that cannot be enforced in the UK and we would recommend that these are reviewed and updated at the outset.

There are certain basic requirements for a valid contract to be formed in Scotland. In particular, the parties must have the necessary legal capacity and there must be agreement on the key terms. Unlike with English contracts, there is no need for consideration and most contracts do not need to be in writing, although it is advisable to do this in any case so that there is clarity as to the agreed terms. Many contracts can be signed electronically, but advice should always be taken on this and no assumptions made.

Consumer Contracts

When contracting with UK consumers, there are certain statutory rights which are implied into every contract and "unfair terms" are not binding on the consumer. For example, it is not possible to limit liability for death or injury and terms which allow for the non-consumer to unilaterally terminate the contract on an arbitrary basis or without notice are also deemed unfair.

Agency

Agents act as intermediaries between the supplier and the customer and can be appointed on a sole, exclusive or non-exclusive basis. There are two main types of agents: a 'sales' agent has the authority to bind a supplier to contracts with third parties and the more common 'marketing' agents, who do not have power to contractually bind the supplier and merely act as a channel of communication.

Using agents can be attractive to suppliers as a means of developing a wide marketing and support network for the products without incurring the overheads associated with employing a full sales team, whilst retaining a measure of control over the destination of those products. However, many agency relationships are closely regulated by UK law to protect agents. For example, qualifying agents have a legal right to commission, a minimum period of notice prior to termination and, in some circumstances, a right to commission on transactions concluded after the agreement has been terminated. In certain circumstances, the agent may even have the right to compensation or indemnity on termination of their agency agreement. This remains the situation following the UK's exit from the EU, but the situation may change in time and this area should be kept under review.

Distribution

The appointment of a distributor can be an attractive option for a supplier moving into the Scottish market because the distributor should have a better understanding of the local industry. The distributor will also bear the costs and commercial risks associated with the development of the business. Unlike with agents (at time of writing), there is generally no requirement for the supplier to pay compensation to the distributor on termination of the agreement. However, a supplier has less control over the way in which its goods are marketed.

Franchising

Franchising can be adopted as a strategy for maximising brand value while retaining a significant degree of control. There is little in the way of formal regulation of the franchising industry in Scotland, although certain principles of competition law are applicable to distribution agreements and/or brand and know how licensing may also apply to franchise agreements, so care should be taken to ensure that a franchise arrangement will not in fact breach the competition rules.

The British Franchise Association also requires its members to comply with certain rules, which should be observed and kept under review.



**Winning isn't about one thing.
It's about improving everything.**

INTELLECTUAL PROPERTY

The law relating to intellectual property rights is UK-wide and is generally similar to those of most major countries. The undernoted intellectual property rights are available throughout the UK.

Patents

Patents protect new inventions and/or processes. An invention will only be capable of patent protection if it is considered to be new, inventive, capable of industrial application and not specifically excluded from patent protection. A UK registered patent gives the owner the exclusive right to use the patented invention and to stop others from copying, manufacturing, importing or selling that invention in the UK for a period of up to 20 years.

Registered patent protection can be obtained by making an application to the UK Intellectual Property Office before the invention has been made public. The registration process can often take in the region of five years. The patent only protects your invention in the country where the patent is registered. For protection outside the UK you can, for example, file the application with the European Patent Office (EPO), under the Patent Cooperation Treaty or separately in the office of each country where you want the protection.

Legal proceedings for the enforcement of a patent are often technically complex. The owner of a patent may seek orders from the courts including damages or an account of profits. There is also the potential to pursue orders for destruction of infringing material, interdict (the Scottish equivalent of an English injunction) or a declaration that the patent is invalid and should be revoked.

Trade Marks

A UK registered trade mark may be any sign that can be represented graphically and is capable of distinguishing the goods or services of one undertaking from those of another. Signs that can be protected as trade marks include words, logos, device marks, product packaging, certain types of product shapes and sounds.

A UK registered trade mark is infringed if, without the trade mark proprietor's consent, an identical or similar sign is used in relation to the goods/services to which the trade mark is registered and which is likely to cause confusion on the part of the public. In the case of infringement, the trade mark owner can seek an interdict preventing further use of the identical or similar sign and damages or, as an alternative to damages, an account of profits for infringement together with orders for destruction etc.

Trade mark protection in the UK can be obtained in different ways. The applicant can apply to register the trade mark on the UK Trade Marks Register, by filing an application with the UK Intellectual Property Office. It is also possible to obtain registration of a Community Trade Mark through the European Union Intellectual Property Office (EUIPO) or an International trade mark which designates the UK through the World Intellectual Property Organisation (WIPO).

Once a trade mark has been successfully registered, either on the UK, Community or International Trade Marks Registers, it lasts for a period of 10 years from the date of filing the application. Once this 10-year period has expired, it is possible to renew the trade mark registration for subsequent periods of 10 years, subject to the payment of the appropriate trade mark renewal fees and provided that there are no grounds for having the registration cancelled, such as non-use.

Trade Secrets

Trade Secrets laws supplemented the UK common law of confidential information. Trade secrets protection enhances and clarifies the existing rules on confidentiality. Under our Trade Secrets legislation "trade secret" is defined as meaning confidential information which (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

Registered and Unregistered Designs

A registered design is a monopoly right for the appearance of the whole or part of a product including features such as lines, contours, colours, shape, texture, materials or ornamentation. A registered design can be obtained in the UK by making an application to the IPO and must be new and have individual character in order to be registered. A UK registered design lasts for a period of up to 25 years but requires to be renewed every five years. It is also possible to register the design with the EU IPO. To establish an infringement of the registered design, the rights holder must demonstrate that the third party product does not create a different overall impression on the informed user.

Unregistered design rights occur automatically and no formal registration is required. These rights protect the shape and configuration of the product itself. In order to succeed in showing that an unregistered design right has been infringed, the rights holders must be able to prove that the third party has copied the design and, in doing so, has produced a product which is exactly or substantially the same as the design of the rights holder's product.

UK unregistered design rights last for a period of 15 years from the end of the calendar year in which the design was first recorded or 10 years from the end of the calendar year that the product was first put onto the market, whichever of these is the earliest. You can also attract unregistered EU design right protection.

Copyright

Unlike trade marks, registered designs and patents, copyright exists on creation and does not require formal registration. The right arises automatically from the date of creation or recording of the work in question. Copyright protects a wide range of original work, including computer programs and software. For the work to attract copyright protection, it must be sufficiently original and therefore not copied. Generally copyright protection lasts for 70 years from the end of the calendar year in which the author dies.

The copyright owner has a number of exclusive rights in the copyrighted work, including the right to copy, adapt, distribute or perform the work in public. The original author will also have the right to be identified as the creator of the particular work. Copyright will be infringed if the whole, or a substantial part, of the copyright work is used by a third party without permission and the owner will be able to prevent the use of the protected work and obtain damages or, as an alternative to damages, an account of profits for the act of infringement.

Commissioned Work

UK law differs from other jurisdictions in that if you commission a piece of work then ownership will not automatically transfer to the commissioner. In order to transfer ownership, a written agreement will need to be signed by the parties.

Intellectual Property Developed by Employees

Generally speaking, any intellectual property rights created by an employee in the course of employment will be owned by the employer. However, under UK patent law, if an employee creates a patented invention that is of “outstanding benefit” to the employer then they may be entitled to additional compensation over and above their salary. Instances of additional compensation being awarded to employees in these circumstances are very rare in the UK.



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PROPERTY

In line with the general cost savings, the average price per square foot of office space in Glasgow and Edinburgh is half that of the City of London. Making Scotland an attractive location for businesses with large property requirements, whether office or manufacturing, to invest in.

Owning Property

The property system in Scotland is different from that in the rest of the UK and although some concepts are similar there are distinctions in the detail and terminology. A company's interest in Scottish land will either be the outright ownership of heritable property (freehold) or the right to occupy and use the land for a specified duration (leasehold). Land is commonly held subject to title conditions which can be real burdens or servitudes (easements) either enforceable by third parties against landowners (a burden on the land) or, conversely, enforceable by the landowner against third parties (a benefit to the land), for example access to bring services on to the land.

Title to land in Scotland will either be recorded in the historic Register of Sasines or registered in the Land Register of Scotland: a digital, map-based public record of land ownership in Scotland. Both are stable registration systems maintained by the Registers of Scotland. All new qualifying land transactions go into the Land Register enabling confident land and property transactions.

Leasing Property

Scottish leases contain similar provisions to those in England and other jurisdictions such as repair, alterations, use, alienation (dealings) and termination: the rights and obligations of both landlord and tenant are generally governed by the terms of the lease document. There are key

differences due to the application of Scots common law and the general lack of legislative controls.

Scottish property law is dedicated to the Scottish government and has undergone recent reforms. There are currently no specific restrictions on a foreign incorporated company owning land in Scotland but draft regulations requiring the provision and publication of information about persons who have controlling interests in land have been published for consultation. This register is to contain information about persons who influence and control owners and tenants of land to enable transparency for the public in engaging with the parties. This is a separate register from the register of overseas entities' beneficial owners which the UK Government propose to establish, which will apply to overseas companies that own land anywhere in the UK.

Land Tax

Land and Buildings Transaction Tax (LBTT) applies to land and property transactions in Scotland. It is administered by Revenue Scotland. LBTT is a self-assessed tax payable by the purchaser acquiring property (and by the tenant taking a lease). Whilst the taxpayer's solicitors will usually deal with submitting the tax return and paying the tax, the responsibility for the tax lies with the taxpayer.

LBTT is a progressive tax in that different rates of tax are charged on the purchase price of property falling within each tax band, with a different basis of charge applying to rent payable under leases. Various LBTT reliefs and exemptions exist, such as group company relief or charities relief which can reduce or eliminate any tax due.

Some UK taxes (other than Stamp Duty Land Tax) may also apply to land and property transactions.



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DISPUTE RESOLUTION

Litigation

Civil proceedings in Scotland are conducted in either the appropriate Sheriff Court or the Court of Session in Edinburgh, which is Scotland's "High Court" for civil matters. The Sheriff Courts have, subject to certain exceptions such as intellectual property disputes, exclusive jurisdiction to deal with cases where the sum sued for is £100,000 or less. Notwithstanding that rule, both courts can hear high value or complex claims, although it tends to be the case that these are dealt with by the Court of Session.

The civil court system in Scotland is undergoing a period of reform in terms of which various changes have already been, and will be, introduced. These include the introduction of (1) summary sheriffs to deal with low value, routine civil disputes; (2) a new "Simple Procedure" to replace the previous small claims and summary cause procedures; and (3) new specialist sheriffs to deal with particular matters. In addition, in January 2016 the newly established Sheriff Appeal Court came into operation for civil matters.

Civil cases are heard in the first instance by a single judge in the "Outer House" of the Court of Session or a single sheriff in the Sheriff Court. The process of litigation is largely managed by the parties, but there is a move towards more judicial management of cases particularly in the "Commercial Courts" within both the Sheriff Courts and the Court of Session.

Remedies which a court can apply are, for example, an award of damages, a declaration, an interdict (Scottish equivalent of an injunction), and/or specific implement (an order to carry out a contractual obligation). Interest may be awarded on any monetary judgements.

The unsuccessful party is usually liable to pay expenses to the other side. The successful party can hope to recover a proportion (but not all) of its costs - usually in the range of forty to sixty percent of their actual legal spend. However, the courts have discretion to decide the extent to which costs are payable by one party to another.

Scottish judgments obtained in proceedings commenced before the end of the transition period, i.e. 31 December 2020, can be enforced in European Union member states under the Brussels Regulation or the newer Brussels Regulation (Recast), depending on the date on which proceedings were commenced. At present there is no agreement between the UK and EU for reciprocal enforcement of judgments arising from proceedings raised after 31 December 2020. Scottish judgments will be recognised and enforced in European Union member states (and others) under the Hague Convention in certain circumstances. Outside the EU, various reciprocal arrangements allow for international recognition and enforcement of Scottish judgments in a number of countries.

The “Inner House” of the Court of Session is an appeal court – hearing appeals from first instance cases in the “Outer House” of the Court of Session and appeals from the Sheriff Appeal Court. The UK Supreme Court sitting in London is the highest civil appeal court for Scottish cases. Permission to appeal to the Supreme Court must be granted either by the Inner house or by the Supreme Court itself.

Alternative Dispute Resolution

Businesses can use the following alternative methods to resolve disputes in Scotland:

- **Arbitration** - In Scotland, arbitration is governed by the Arbitration (Scotland) Act 2010 which contains two types of rules - mandatory, which apply in all cases and cannot be disappledied by agreement between the parties; and default rules which apply if there is no contrary agreement between the parties. An arbitral award is legally enforceable and can be enforced internationally under the New York Convention.
- **Adjudication** - Adjudication is a “fast track,” binding, interim method of dispute resolution that is often used in construction disputes. An adjudicator is appointed by the parties or by a third party institution. The adjudicator must conduct the adjudication within strict time limits and then issue an adjudication award. The adjudicator’s decision can be “appealed” to the courts, or to arbitration.
- **Expert determination** - Expert determination is the resolution of a dispute by an expert. In Scotland, it is used for disputes which require specific expertise. For example, in a financial dispute, an accountant might be appointed to give an expert determination; in a property valuation dispute, it would be a surveyor. Expert determination is used as agreed by the parties and there is no right of appeal.
- **Mediation** - Mediation is a negotiation facilitated by a third-party neutral mediator, who works with the parties confidentially and on a without-prejudice basis to try to achieve an agreement between them. If an agreement is reached, it will be recorded in writing. Mediation is encouraged by the Scottish courts and the courts have power to “sist” (freeze) civil proceedings while mediation takes place.



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TAX

A Scottish company will be responsible for the following main UK tax matters:

Corporation Tax on Profits

Profits for tax purposes differ from accounting profits and there is no deduction for depreciation but instead there is a tax-specific deduction system called “capital allowances” for tangible assets.

Registration with the UK tax authority (HMRC) for Corporation Tax occurs automatically upon incorporation of a UK company and in the general case tax returns require to be filed within one year, with Corporation Tax paid within nine months of the end of the relevant accounting period.

Currently, UK Corporation Tax is levied at 19% on both income and capital profits. Corporation tax will increase to a standard rate of 25% from April 2023. There will be a small profits rate of 19% for companies with profits of £50,000 or less. Companies with profits between £50,000 and £250,000 will be taxed at the main rate but with “marginal relief”; this means tax is paid at a gradually increasing effective rate.

VAT

VAT is a type of consumption tax, collected and paid to HMRC by the seller and payable at the point of sale by the buyer to the seller as an element of the sale price. Any business that is registered for VAT, and making a supply of taxable goods or services in the UK and in the course of business, has a duty to charge VAT on sale.

Any business established in the UK, and making annual taxable supplies in the amount of £85,000 or more is required to register for VAT.

VAT is charged on every supply of goods or services that is taxable for VAT purposes and not zero-rated. Businesses pay a VAT element on receipt of supplies from other businesses subject to VAT (input tax) and charge VAT on the sale of their products and services (output tax), and are required to account on a quarterly (sometimes monthly) basis to HMRC for the amount by which output tax exceeds input tax. For VAT purposes, every supply is either taxable or exempt (exempt supplies do not carry an output tax VAT charge and restrict the ability of a business to recover its associated input tax).

Taxable supplies can either be:

- **Standard rated (20%)** – most taxable supplies will be subject to VAT at standard rate.
- **Reduced rated (5%)** – for example, domestic fuel, and children's car seats.
- **Zero rated (0%)** – for example, most food, books, newspapers and new houses.

Payroll Taxes

All UK companies are obliged to register as employers and apply payroll withholding for income tax (PAYE) and social security contributions (NICs) on employee remuneration and benefits. The taxes withheld from employees are returned and paid to HMRC on a monthly basis along with associated employer's NICs charges.

The amount of income tax withheld will depend upon the individual employee's PAYE tax coding. Personal income tax rates for employment income of UK residents who are not residents of Scotland range from 20% basic rate through 40% higher rate to 45% additional rate. Personal income tax rates for employment income of residents of Scotland are generally 1% higher than rates in the rest of the UK and from April 2023 will be 2% higher for higher rate and additional rate taxpayers. Starting rates of 19 and 20% apply in Scotland and then rates range from a 21% intermediate rate through a 41% (42% from April 2023) higher rate to a 46% (47% from April 2023) top rate. Above a lower threshold of earnings, NICs contributions by employees are charged at 12% of earnings up to an upper earnings level and 2% of earnings above that level whilst employers are required to contribute 13.8% of earnings. NICs rates are uniform for residents of Scotland and the rest of the UK.



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DATA PROTECTION

The Data Protection Act 2018 and the UK GDPR (the General Data Protection Regulation (EU) 2016/679, as retained in UK law following Brexit) set out the legal framework under which the processing (including the obtaining, holding, use and disclosure) of personal data is regulated in Scotland (and the rest of the UK). Since Brexit, the UK has more scope to deviate from the GDPR applicable to EU member states and there have been proposals (though, as at the time of writing, no enacted law) to do so. In some cases the UK data protection regime has extraterritorial effect.

There are seven principles which must be observed by organisations that process personal data. The requirement to process personal data fairly and lawfully and the requirement to keep it secure are the two which often have the most practical impact. The data protection legislation also contains a number of rights for individuals, such as rights to access and request erasure of the personal data that is held about them.

Businesses that use personal data for direct marketing purposes or use cookies or similar technologies also need to comply with the Privacy and Electronic Communications (EC Directive) Regulations 2003 (PECR). PECR imposes requirements on the use of fax, telephone, electronic mail, SMS and automated calling systems for direct marketing purposes and in connection with the use of cookies and other technologies on e.g. websites.

A controller is the person or entity who determines the purposes for which, and the manner in which, personal data is processed. Unless exemptions apply, controllers are required to pay an annual fee to the Information Commissioner (ICO). ICO has authority to enforce, and issue penalties under, data protection law. It is also important for controllers to ensure they have appropriate privacy policies/notices in place which meet the legal requirements.

A processor is an organisation that processes personal data on behalf of a controller. A processor may not use personal data for its own purposes. Both controllers and processors must comply with statutory duties and written contracts must be put in place between

controllers and processors. Having the right contractual arrangements in place with partners and suppliers is key to ensuring data protection compliance.



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over your head.**

BRIBERY & CORPORATE CRIME

The Bribery Act 2010 has provided the UK with some of the toughest anti-bribery legislation in the world. It created four types of offence:

- a general offence of paying a bribe;
- a general offence of accepting a bribe;
- a specific offence prohibiting the bribery of foreign public officials; and
- a corporate offence of failing to prevent bribery.

Some of the provisions have broad international reach and hold a company strictly liable for a corrupt act committed anywhere in the world by someone performing services on its behalf. For example, a UK-based business which is undertaking a contract abroad would be subject to UK bribery legislation.

Certain limited defences apply to the offences of paying and accepting a bribe but there is no exception for facilitation payments. A business will have a defence of the corporate offence of failing to prevent bribery if it can show that it had in place adequate procedures designed to prevent bribery. An international standard has been issued on Anti-Bribery Management Systems (ISO37001).

Anti-money Laundering and Fraud

Money Laundering

Under the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000 (TA), there are essentially three "substantive" money laundering offences. A person (including an individual or a firm) commits a money laundering offence if he:

- conceals, disguises, converts or transfers the proceeds of criminal conduct or of terrorist property;
- becomes concerned in an arrangement to facilitate the acquisition, retention or control of, or to otherwise make available the proceeds of criminal conduct or of terrorist property; or
- acquires, possesses, or uses property while knowing or suspecting it to be the proceeds of criminal conduct or of terrorist property.

There are three further offences, the first two only apply to those in the "Regulated Sector":

- failure to disclose that a third party has committed one of the above offences;
- tipping off of persons engaged in money laundering or terrorist financing as to any investigation; and
- prejudicing an investigation in relation to money laundering or terrorist financing offences.

The provisions of POCA and the TA apply to all legal persons, individual and corporate, so fines can be imposed not only on corporate entities but also on individual directors, managers and officers, who can also be imprisoned for up to 14 years.

The UK anti-money laundering (AML) regime applies in Scotland. AML regulations detail a risk based approach to anti-money laundering compliance with prescriptive requirements around risk assessment and customer due diligence.

To assist the investigatory and enforcement processes involved in tackling money laundering and terrorist financing, law enforcement agencies have wide ranging powers, including enforcing disclosure, undertaking account monitoring and powers of seizure, civil recovery and confiscation.

Fraud

In Scotland, fraud is a common law crime, which is committed by the “bringing about of any practical result by false pretences”. The false pretence can be express or implied and may result from either positive actions (such as an outright lie) or a failure to do something (staying silent). There must be an intention to deceive or defraud and the victim must have acted in a way that they would not have otherwise done, without the false pretence, to the benefit or advantage of the person committing the fraud, or to the prejudice of the interests of another person.

There are also a number of different types of statutory fraud including under the Companies Act and Insolvency Act. For example, The Criminal Justice and Licensing (Scotland) Act 2010 also contains two fraud offences:

- a person commits an offence if he has in his possession, or under his control, an article for use in, or connection with, the commission of fraud, and this offence carries a possible sentence of imprisonment of up to five years, or a fine, or both; and
- a person commits an offence if he makes, adapts, supplies or offers to supply an article knowing that the article is designed or adapted for use in, or in connection with, the commission of fraud, and this offence carries a possible sentence of imprisonment of up to 10 years, or a fine, or both.

A statute may expressly create criminal liability for businesses, however, the offence of fraud may be committed by a corporate body if any director, manager, secretary or officer acts as a directing mind of the body. Fraud requires that the accused knew that the pretence was false and intended to deceive the other party and it is possible to ascribe to the company the necessary state of mind of a natural person who is the company's controlling mind and decision-maker, and thereby attributing the company with criminal responsibility.

Concerns for Business - Bribery, Money Laundering and Fraud

As well as potentially heavy fines, damage to reputation and value, it is important to mention that companies in the UK and EU convicted of fraud, bribery, corruption or money laundering may be debarred from tendering for public contracts.

A proactive and effective compliance program can significantly mitigate risks for businesses.



CONTACT US

We hope this guide provides you with a helpful summary of some of the main legal and regulatory compliance requirements for your business needs in Scotland. This is a guide to doing business in Scotland, but is not intended to be taken as legal advice and should not be relied on as such. This guide is up to date as at September 2022. Some matters may be subject to change as the Brexit withdrawal agreement is implemented but these changes have not been addressed in this guide.

Should you require any further information on making a business investment into Scotland please get in touch.

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