

BRODIES^{LLP}



DOING BUSINESS IN SCOTLAND

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1 INTRODUCTION

Scotland's commitment to economic growth, its highly-skilled workforce, worldwide reputation for cutting edge research and abundant natural resources have made it one of Europe's premier locations for business investment. A growing number of global firms are recognising the wealth of opportunities that Scotland has to offer in dynamic sectors ranging from



oil & gas, renewable energy and financial services to food & drink, education, engineering, life sciences, aerospace and defence. However, establishing a business in a new country can sometimes be a little more complicated than it looks, particularly when dealing with a new and different regulatory regime and business environment. It is always tempting for executives to assume that overseas business practices will mirror those of their own country when Scotland, like any other nation, is a distinct commercial environment with its own rules and regulations.

When a business makes a commitment to expand into Scotland there are several important issues that need to be addressed immediately – what business structure is the most suitable? Where will the business locate? What type of employees are needed and how will they be paid? How will the company deal with taxation? How can it protect its competitive position and raise finance, if required? Investing in a new jurisdiction can throw up significant challenges to the way you plan and operate your business. Strategies that have worked well in your own territory may not work as well abroad and doing business in a new country requires executives to look carefully at their basic business practices and commercial objectives.

A key part of Brodies' practice is advising clients worldwide in relation to their business activities here in Scotland. Brodies is the largest independent legal firm in Scotland and has a wide range of industry ranked specialists in all key legal areas including M&A, corporate finance, employment, commercial contracts, property, taxation and intellectual property. In addition to our own expertise, our overseas clients are able to access our extensive list of contacts in areas such as local government, planning, and finance. We can help with both legal and business issues to help your project go smoothly.

We work with clients at all stages of the growth cycle, from those who are just starting to consider possible business activities in Scotland, to those with concrete expansion plans and others who are already active here. Brodies can offer practical commercial advice and solutions to help overseas clients avoid potential problems and access the Scottish marketplace, and its many opportunities, more easily. We are in the business of making things happen for our clients.

2 CHOOSING YOUR BUSINESS STRUCTURE

Choosing how to operate your new business in a foreign country is one of the first decisions that has to be made and the correct structure is not always obvious. In Scotland there are a number of options: a private limited company, a public limited company, a limited liability partnership, a Scottish limited partnership or taking the non corporate route by appointing an agent or a distributor, establishing a branch office or setting up a joint venture with a third party.

2.1 Private Limited Company

The most popular type of business structure in Scotland is the private limited company. A private limited company must be registered with the Registrar of Companies and has the advantage of separate legal personality and limited liability for trading purposes. There is no requirement for either the shareholders or the directors of the company to be resident in the UK or for board meetings to be held here and there is no prescribed amount of share capital required. The company must have a registered office located in UK and the company's statutory records need to be kept in the country of incorporation. Accounts must be filed annually. Private limited companies are not allowed to offer their shares to the public and usually have a small number of shareholders, however the structure is extremely flexible and can accommodate shares with a variety of different rights.

2.2 Public Limited Company ('plc')

A public limited company differs from a private limited company in two ways. First, the minimum authorised share capital for a public company to incorporate is £50,000 and second, public companies are permitted to offer their shares to the public provided they comply with a strict regulatory financial promotion regime. Some clients prefer to trade as a plc because they are generally perceived to be larger and more stable organisations.

2.3 Limited Liability Partnership ('LLP')

Limited liability partnerships are registered with the Registrar of Companies and have separate legal existence from their partners. This means an LLP can grant security to funders and enter into contracts in its own right. This structure provides the benefit of limited liability but affords members the flexibility to organise their internal structure subject only to minimum legal rules in the same way as a traditional partnership. An LLP is required to disclose publicly any changes to its membership and must file an Annual Return and annual accounts. An LLP is generally tax transparent, which means each partner is responsible for their own tax. However, the UK Government has introduced legislation so that some partners of LLPs can be treated as employees for tax purposes, meaning that the LLP will be responsible for administering and paying some of the tax attributable to them (see part 8). It can be used in a business that is carried out with a view to a profit. This structure is popular with professional services firms, such as lawyers and accountants.

2.4 Scottish Limited Partnerships ('SLP')

Scottish limited partnerships are a uniquely Scottish vehicle. They have been around for over a century and have been used extensively in recent times for private equity and property investment fund structures.

The unique feature of SLPs is they have separate legal existence from their partners whilst, at the same time, being transparent for tax purposes. This makes them different to limited partnerships incorporated elsewhere in the UK which, although tax transparent, do not have separate legal existence from their partners. That means that SLPs can be used as vehicles in funds or other corporate structures which require that the vehicle be distinct from its members.

Relative to other entities such as companies and LLPs, SLPs are subject to fewer disclosure requirements.

A limited partnership must have two or more partners; however, it is unlike a general partnership where all partners are jointly and severally liable for debts. An SLP has two kinds of partner: a general partner liable for the debts and obligations of the SLP; and limited partners whose liability is limited to the extent of their capital contributions. Every SLP must have at least one general partner and one limited partner but to benefit from limited liability the limited partner cannot take part in or interfere in the management of the SLP.

2.5 Branch Office

An easy way for a foreign company to start to operate in the UK is to register at Companies House as an overseas company with a UK branch office. Whilst this has the advantage of being relatively simple to set up from a structural point of view, in the long run it lacks the benefits of using a UK business structure. Often third parties in the UK wish to deal with other UK entities rather than overseas companies and a branch office will not satisfy this requirement.

Within one month of opening a UK branch office an overseas company is required to register with Companies House and file copies of its constitutional documents and its most recent accounts. If these documents are not in English then they will have to be properly translated. On an ongoing basis the company will be required to notify the Registrar of Companies if there are changes to the company constitution, details of directors and other officers and alterations to the name, address or business activities of the organisation. Any charges granted by the company over property situated in the UK will also have to be registered.

2.6 Other Options

There are a variety of other ways to access markets in Scotland:

2.6.1 Agents

This is often seen as an easy way to access new markets quickly, however it is important to ensure that proper agency contracts are put in place and to consider the applicability of the Commercial Agents Regulations which provide for significant payments to be made to agents by their principals on termination of those contracts. These obligations cannot be contracted out of.

2.6.2 Distributors

Appointing a distributor in Scotland can be an effective way to release products into the market but it is important to consider and properly document the nature and scope of the arrangement so that it is clear whether the appointment is on an exclusive or non-exclusive basis, what the respective roles and obligations of the parties are, whether minimum sales targets apply and what the arrangements are for termination in order to avoid a situation where you are unable to appoint further distributors should the initial contract fail to provide the anticipated returns.

2.6.3 Joint Ventures

Joint Ventures can take many forms, from loose collaborative arrangements to a private limited company with two joint venture shareholders. It is important to make sure that any arrangement is entered into properly documented to be binding on both parties and to clarify exactly what is expected of each of them.

3 HIRING AND MANAGING YOUR STAFF



There are a number of important issues to consider when hiring staff in Scotland. Scotland has its own legal system but, for the most part, employment rights are governed by statutes which cover the whole of the UK. In this chapter we highlight the key issues to be aware of if you are thinking of engaging individuals to work for your business in Scotland. Most points that follow will also apply throughout the rest of the UK.

3.1 Do you want to employ staff or engage another form of labour?

Before employing individuals to work for you as employees, you should consider whether the traditional 'employee' model is best suited to your business. There are other ways to engage staff in Scotland – for example, by engaging self-employed contractors or consultants (under a contract for services) or even using partners in a partnership. Consider the pros and cons of using, for example, agency workers; fixed-term employees; or forms of casual working.

Depending on the relationship that is created between the business and the staff, your rights and responsibilities will differ. Generally, employees enjoy the greatest legal protection, particularly the right to claim unfair dismissal and entitlement to a redundancy payment. There is a wider category of 'worker' that enjoys some (but not all) of the protections afforded to employees. The decision as to which staffing model to

use is often driven by tax considerations and before engaging anyone to work for you, you should consider the tax consequences. (For more detail see chapter 8.)

Since 1 September 2013, a new employment status of 'employee shareholder' has also been an option. This allows employees to surrender certain statutory employment rights in exchange for shares in their employer which benefit from favourable tax treatment.

3.2 **Immigration and hiring foreign nationals**

Individuals employed in Scotland benefit from the rights and protections granted to employees under Scottish employment law regardless of their nationality. There are no nationality restrictions for company directors in the UK and there is no requirement that directors of companies registered in Scotland be resident in the UK.

To avoid civil and criminal liabilities, it is important to understand who can work in the UK without permission. There are a number of categories, but some common examples are:

- British citizens;
- Those who have the right of abode in the UK (with a right to live in the UK permanently and work here without any immigration restrictions);
- Those who have indefinite leave to remain in the UK (also known as 'settlement' or 'permanent residence');
- European Economic Area (EEA) nationals and those from Switzerland. Although restrictions apply to citizens of Croatia;
- Some overseas students can work part-time during term time and full-time during holidays.

If an individual does not fall within one of the relevant categories, they will need immigration permission to work in the UK under a points-based system or another work-related category.

Failure to identify those who require UK immigration permission and undertake prescribed document checks can result in criminal and civil penalties of imprisonment and/or fines. The maximum fine is £20,000 for each illegal worker.

3.3 **Terms of employment**

Whilst there is no legal requirement to enter into a written contract of employment, most employers in Scotland do so. In addition, all employees are legally entitled to receive a written statement setting out prescribed terms of their employment within two months of starting work. Failure to provide this can result in the employer having to pay the employee between two and four weeks' salary.

3.4 Pay

Most workers in the UK are entitled to be paid a National Minimum Wage depending on their age. In addition, workers over 25 are entitled to a new higher 'National Living Wage' from April 2016. Paying a qualifying worker less than the National Minimum Wage or, where a worker qualifies, the National Living Wage, is a criminal offence.

The Equality Act 2010 attempts to ensure that men and women are paid equally for performing the same job. It implies into all contracts of employment an 'equality clause' which takes effect when an employee is employed on:

- Like work (work which is the same or broadly similar);
- Work which has been rated as being equivalent under a job evaluation scheme; or
- Work which is of an equal value to that performed by a member of the opposite sex.

If one of these situations exist, any term in a woman's contract which is less favourable than a man's contract will be modified so as to be not less favourable, and any benefit in a man's contract shall be included in a woman's contract (or vice versa). An individual's remedy is to bring a claim for damages or arrears of pay in an employment tribunal either while they are in the job or within six months after leaving the job to which their claim relates.

3.5 Pensions and benefits

The UK operates a state pension system. In addition, employees may choose to make private pension arrangements. An automatic enrolment scheme is being phased in for employers in Scotland between 2012 and 2018. Under this regime, employers must put in place a qualifying pension scheme into which they must automatically enrol eligible jobholders and make mandatory minimum employer contributions.

The provision of other benefits (including health or medical benefits) is at the discretion of the employer. Common benefits in Scotland include private health insurance, life assurance, share options, subsidised catering, travel loans etc.

3.6 Collective agreements

In Scotland, collective bargaining is generally less developed than in other countries in Continental Europe. However, it is common in large organisations and throughout the public sector where many terms and conditions of employment are covered by collective agreements negotiated by trade unions.

3.7 Worker representation

There is no single structure for worker representation in the UK though trade unions remain the most common way that employees are represented. UK employees have the right to join a trade union and cannot be penalised by their employers for doing so, or indeed choosing not to.

Bodies of representatives may be set up to deal with particular issues, such as business transfers or collective redundancies.

Employers may have a duty to consult with appropriate employee representatives in a number of circumstances, the key ones being:

- Where employees are being transferred from one business to another
- In a collective redundancy situation i.e. where an employer proposes to dismiss 20 or more employees within 90 days
- On health and safety matters
- On certain changes to occupational or personal pension schemes (for employers with at least 50 employees in the UK)
- Under the Information and Consultation of Employees Regulations 2004 (which apply to undertakings whose principal place of business is in Great Britain and who have at least 50 employees in the UK)
- If a business is part of a multinational company with central management in the UK and at least 1,000 employees within the EU and at least 150 employees in each of 2 member states, then employees will have the right to a European Works Council (EWC). If a EWC is set up it will allow employees in different EU members states to be informed and consulted about transnational issues that affect the company.

3.8 Working time and holiday

Working hours in the UK are regulated by the Working Time Regulations 1998. The Regulations prohibit workers from working on average more than 48 hours per week (calculated over a 17-week reference period).

Employers can ask workers to 'opt out' of this limit, but workers have the right to refuse. If they agree, they can change their mind later and withdraw their opt out.

The Regulations also impose responsibilities on employers to ensure that workers receive certain minimum rest periods and place restrictions on the amount of night work that workers can perform. In addition, a worker is entitled to a minimum statutory paid holiday entitlement of 5.6 weeks a year (i.e. 28 days for an employee who works a standard 5-day week). This includes any public or local holidays observed by the employer.

3.9 Protection against dismissal

Employees have a statutory right not to be 'unfairly' dismissed. To bring an unfair dismissal claim, employees who commenced employment before 6 April 2012 need to have one year's continuous service, and employees who commenced employment on or after 6 April 2012 must have two years' continuous service (unless the dismissal falls within certain categories which are deemed to be automatically unfair or the reason for the dismissal is, or relates to, the employee's political opinions or affiliation - in which case no qualifying period of service is required).

An employee will be unfairly dismissed if their employer fails to dismiss them for one of five potentially 'fair' reasons or if the employer acts unreasonably in carrying out the dismissal. For an employer to act reasonably it must follow a fair procedure. The five potentially 'fair' reasons are:

- Capability
- Conduct
- Redundancy
- Statutory restriction (where an employee cannot legally continue in their job)
- Some other substantial reason (being another reason which could justify dismissal).

Compensation for unfair dismissal is based on the amount of money an employee can show they have lost as a result of being unfairly dismissed. For dismissals on or after 6 April 2014, compensation is capped at the lower of £78,962 or one year's salary, but there are certain situations where no limit applies, such as where the dismissal is related to unlawful discrimination.

In addition to unfair dismissal rights, most contracts of employment in Scotland set out how the contract can be terminated. If you terminate an employment contract in breach of its terms, for example, by failing to give the correct notice of termination set out in the agreement, then damages can be awarded.

Notwithstanding any notice rights in their contract of employment, employees have a statutory right to one week's notice if they have been continuously employed for between one month and two years. Where an employee has been employed for more than two years but less than 12, they are entitled to one week's statutory notice for each year of continuous employment. If someone has been employed for more than 12 years, they are entitled to 12 weeks' statutory notice. The statutory minimum periods of notice do not apply where the employer is entitled to terminate without notice because of the employee's conduct.

3.10 Redundancy and restructuring

'Redundancy' has a particular legal meaning covering the closure of part or all of a business, a workplace closure, or a reduced requirement for employees to carry out work of a particular kind. Redundancy is a potentially fair reason for dismissing an employee however, even if a dismissal is genuinely on grounds of redundancy, an employer must act reasonably in dismissing the employee in all the circumstances. Acting reasonably will include, for example, consulting with affected employees; considering suitable alternative employment where appropriate; following a fair procedure in relation to dismissals; and, if it is necessary to select employees from a pool, applying objective selection criteria to those in the pool.

Employees with at least two years' continuous employment will be entitled to a statutory redundancy payment.

Where there is a proposal to make 20 or more redundancies within 90 days, collective consultation must take place with 'appropriate representatives' with a view to reaching agreement about ways of avoiding the dismissals, reducing the number of employees to be dismissed, and mitigating the consequences of the

dismissals. Consultation must begin in good time and in relation to proposals to dismiss as redundant 100 or more employees it must begin at least 45 days before the first dismissal takes effect. In relation to proposals to dismiss between 20 and 99 employees within 90 days, consultation must begin at least 30 days before the first dismissal takes effect. Failure to carry out proper collective consultation risks a protective award of up to 90 days' gross pay per affected employee. The Department for Business Innovation and Skills (BIS) must also be notified of collective redundancies in writing within set timescales.

3.11 **Buying or selling a business in Scotland**

If you are buying or selling a business in Scotland, be aware of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (commonly referred to as 'TUPE'):

- All employees of the seller who are employed in the part of the business being sold immediately before the sale automatically become the employees of the buyer on their existing terms of employment without breaking their continuity of service
- The buyer can only make changes to the transferring employees' terms of employment in limited circumstances
- Any dismissal will be automatically unfair where the sole or principal reason for the dismissal is the transfer of the business, unless there is an economic, technical or organisational reason entailing changes in the workforce
- Employees may refuse to transfer to the buyer, but the effect is to terminate their employment without any right to compensation
- The seller must provide certain information to the buyer about the transferring employees at least 28 days before the transfer date
- There is a duty to inform employee representatives about the transfer and, where measures are proposed, consult with the representatives about these.

As TUPE can have significant financial consequences for both sellers and buyers, it is something that we would recommend you consider at the outset. It can influence the way in which deals are structured. TUPE does not generally apply to the purchase of shares in a company.

3.12 **Discrimination**

Throughout the UK, employees, job applicants and some other workers are protected from discrimination on the grounds of age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. The level of compensation that can be awarded for a breach of the discrimination laws is unlimited. In addition to compensation for financial losses suffered as a result of the discrimination, an award reflecting injury to feelings may be made.

3.13 Other statutory rights

UK law provides employees who satisfy certain eligibility criteria with a number of other rights. These include:

- Access to (a relatively low) Statutory Sick Pay (SSP) scheme for employees who are off work for up to 28 weeks due to illness or injury for at least four days in a row (including weekends). Many employers in Scotland offer more generous sickness benefits.
- All employees with 26 weeks' service have the right to request flexible working, for any reason. There will be no obligation on employers to agree to a request however, they must consider it; deal with it in a reasonable manner; decide on it within 3 months; and can only refuse an application for certain business reasons.
- Various family-friendly rights and entitlements including:
 - Statutory Maternity Leave and Pay.
 - Statutory Paternity Leave and Pay.
 - Statutory Adoption Leave and Pay.
 - Shared parental leave, whereby up to 50 weeks' leave and 37 weeks' pay can be shared between parents following the birth or adoption of a child.

3.14 Resolution of employment disputes

The law encourages employers to attempt to resolve employment disputes at an early stage and whilst an employee remains in employment. The ACAS Code of Practice on Discipline and Grievance provides employers with practical guidance on handling disciplinary and grievance situations. A failure to follow the ACAS Code does not, in itself, make a person or organisation liable to proceedings. However, Employment Tribunals will take the Code into account when considering relevant cases. Tribunals can adjust any financial awards made in relevant cases by up to 25% for unreasonable failure to comply with any provision of the Code.

When an employment dispute cannot be resolved informally, an employee may potentially bring a claim in the Employment Tribunal. Before raising a tribunal claim prospective claimants must submit an 'early conciliation form' to ACAS who then offer the employee and employer conciliation services for up to one month with a view to reaching an agreed resolution. However, neither employees nor employers are obliged to engage in the ACAS conciliation process. If either party does not wish to conciliate, or no settlement is reached, the employee may then proceed to submit an Employment Tribunal claim. Unless they qualify for fee remission, claimants to an Employment Tribunal must pay a fee to issue their claim and a further fee in advance of any final hearing. The amount of each fee depends on the type of claim: 'straightforward' claims (such as unpaid wages) attract an issue fee of £160, and hearing fee of £250, whilst others (such as unfair dismissal and discrimination) attract an issue fee of £250 and hearing fee of £950. The Scottish Parliament has recently been given power over Employment Tribunals and it is possible that the fees in Scotland will change in the near future.

Employment Tribunals are intended to be less formal than other courts – parties can represent themselves or be represented by solicitors, barristers, trade union representatives or non-legally-qualified consultants. Tribunals are governed by their own procedural rules.

Tribunal claims are generally heard in public by either an employment judge alone or a panel of three individuals: a legally qualified employment judge and two lay members.

In Scotland, penalties for failure to comply with employment law generally take the form of financial compensation awarded by the Tribunal.

4 ENTERING INTO CONTRACTS

Contracts are part of the day-to-day operations of most companies and making sure contracts are clear and binding is key to minimising commercial risk. In order for a valid contract to be formed in Scotland the following things are necessary:

- Agreement on all essential terms;
- Proper legal form – for example, contracts relating to land must be in writing;
- Parties must have the necessary legal capacity.



In Scotland commercial contracts do not require consideration and (other than some limited exceptions) they do not require to be in writing, however, it is prudent to have a written record of the terms agreed in case disputes arise. Failure to properly document a contract makes it very difficult to litigate to enforce performance and leaves many elements of the contract open to challenge therefore reducing the chances of success should litigation be required.

When contracting it is common for each party to want to conclude the contract on its own terms and conditions. It is important to be clear which terms and conditions apply to any arrangement and companies should make sure they have properly drafted terms and conditions in place along with the administrative processes to ensure that their terms are complied with.

If a contract is important in the context of the business, it is important to check the capacity of the contracting parties, and also to ensure that the contract itself is signed in such a way as to make it legally binding. In Scotland a director of the company automatically has power to bind it when the document is signed in the presence of a witness. If the contract is not being signed by a director it is always worth checking the authority of the relevant signatory to ensure that the contract can be enforced should the need arise.

4.1 What to include in a contract

Commercial contracts usually include the following terms:

- Names and addresses of the parties;
- Definitions and interpretations. Any defined terms in the contract should be set out clearly along with the assumptions being used in relation to interpretation;
- Description of goods/services to be provided along with specifications and timescales;
- Payment terms – the contract should state the price to be paid for the goods or services, the dates on which payments should be made and any interest payable on late payments. If the client is silent on interest then the UK Bank of England Base rate plus 8% will apply;
- Delivery provisions – the contract should clearly set out terms for delivery and return of goods if they do not meet any specification;
- Term of contract – the period of the contract should be specified and also whether or not it will be automatically renewable;
- Liability – the contract should normally include financial caps on liability and exclusions of certain types of liability, e.g. indirect and consequential loss. It should be noted that under Scots law (and the laws of the rest of the UK), it is not possible to exclude liability in certain circumstances, e.g. for losses caused by fraud, death or personal injury;
- Termination – if there are any circumstances in which parties are permitted to terminate the contract these should be clearly set out along with a notice procedure;
- Disputes – it should be made clear in the contract what the provisions are in relation to any dispute relating to the contract. It may be that parties are happy to go straight to litigation; however, they may wish to provide for either mediation or an internal dispute resolution procedure;
- Confidentiality – often contracts contain sensitive financial information and if parties are concerned that this be kept confidential the contract should specify this;
- Force majeure – a clause of this type will cover situations – for example, fire or other natural disaster – where the contractual performance becomes impossible and neither party is at fault;
- Assignment – if there is no right for any contracting party to assign the contract this should be specified. Equally if there is an ability to assign this should be specified;
- Contract law – the contract should clearly state which law it will be governed by in order to ensure any disputes are properly managed.

A variety of terms can be implied into contract in Scotland by law but these implied provisions are primarily for the purpose of consumer protection and, provided they are written in clear English, business to business contracts are not usually affected by this legislation.

4.2 Complying with contracts and seeking redress

Signing a contract is far from the end of the story – once contracts have been entered into it is important to ensure that they are complied with. Regular checks should be carried out to ensure the contract is operating properly and that payments/goods/services are being received – if not, appropriate steps can be taken to address any non performance issues.

If any one of the parties to the contract has failed to perform, a breach of contract has occurred and the aggrieved party can look for a remedy. These include:

- Specific implement – such an action asks the Court to require the person in breach to take specified actions to perform;
- Interdict– parties can be interdicted to prevent them from taking certain wrongful actions such as approaching clients or customers or entering premises;
- Actions for payment – actions can be brought to require parties to repay sums due;
- Damages – this is a monetary remedy whose purpose is to put the aggrieved party into the position they should have been in had the contract been properly performed.

We can guide clients through the contractual process and help minimise the chances of litigation. Good advice at an early stage is the key to risk management in this vital area.

5 PROTECTING INTELLECTUAL PROPERTY RIGHTS



5.1 International treaties

The law relating to intellectual property rights ('IPRs') is generally the same in Scotland as it is in the rest of the United Kingdom. The United Kingdom is a signatory to most international treaties on IP protection, and is a member of the European Union, thus the protections available in Scotland for IPRs are harmonised with other major western countries, and with all European countries.

5.2 IPRs available in Scotland

More specifically, the following IPRs are available in Scotland:

<p>Registered IPRs</p> <p>That is IPRs that are obtained by making an application to a government register.</p>	<p>Patents</p> <p>Patents can protect new inventions and/or new processes.</p> <p>Note: The UK does not generally grant patent protection for business methods or software although there are exceptions (this is largely the same throughout Europe).</p>
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	<p>Registered Design Rights</p> <p>Registered design rights offer up to 25 years' protection for a new design or parts of a design. However, only the external/visible aspects of the design can be protected.</p>
	<p>Registered Trade Marks</p> <p>Registered trade marks can be used to protect a brand name or a logo in relation to a specified class of goods or service. It is possible to apply for UK wide or EU wide protection.</p>
	<p>Plant Breeders' Rights</p> <p>This right can be used to protect new plant species.</p>
<p>Unregistered rights</p> <p>These rights arise automatically on creation of the relevant work.</p>	<p>Copyright</p> <p>Copyright can be used to protect a wide range of works including literary works, musical compositions and software.</p> <p>Subsets of copyright protection include (1) <i>performance rights</i> which protect performances such as musical concerts or plays by preventing their unauthorised recording, and (2) <i>moral rights</i> which allow the author/creator of the work to have the work attributed to them and to object to derogatory treatment of the work, even if they are not the copyright owner.</p>
	<p>Unregistered Trade Mark Rights (goodwill)/passing off</p> <p>These give a brand owner the right to prevent competitors offering imitation products or services or using similar brand or trading names, under the law of passing off. This is broadly the UK equivalent of the law of unfair competition.</p>
	<p>Database Right</p> <p>Database Rights can be used to protect the effort that has gone into collecting data for, and compiling, a database. This does not need to be an electronic database.</p>
	<p>Unregistered Design Rights</p> <p>These protect the shape or configuration of a novel design. In contrast to registered design rights the protection can be for non visible parts of the design, but the protection offered is shorter and lasts for a maximum of 15 years.</p>

<p>Quasi Intellectual Property Rights</p> <p>In addition to the above rights, there are certain legal rights that are regularly treated as intellectual property rights.</p>	<p>Confidential information</p> <p>The UK courts can prevent the unauthorised use of confidential information by competitors.</p> <p>Ideally before disclosing confidential information to a third party you should enter into a written non-disclosure agreement with them. The common law of implied confidentiality may offer less robust protection.</p>
	<p>Domain names</p> <p>Generally in the UK a domain name can be registered on a first to register basis. However brand owners can use either court action or domain name dispute procedures such as the ICANN procedure to prevent the use of and/or recover domain names which make unauthorised use of their brand.</p> <p>Notably .uk domain names do <u>not</u> have to be held by a UK domiciled entity/person.</p>

5.3 Some things to watch out for

Ownership of commissioned work

An aspect of UK law that some people find surprising is in relation to commissioned work. If you commission a copyright work then ownership of that work will not automatically transfer to you. So, for example, if your company commissioned a graphic designer to produce a new logo, but there was no formal contract transferring copyright in that logo to your organisation, then ownership of the copyright would remain with the graphic designer and you would simply have the right to use the logo in your business under licence from the designer. In order to get ownership you need a written transfer agreement.

Ownership of employee IPR

Generally, under UK law an IPR created by an employee in the course of his/her employment is owned by the employer. However, in terms of UK patent law, if an employee creates a patented invention that is of 'outstanding benefit' to the employer, then the employee is entitled to additional compensation over and above his/her salary. Although rare, there have been several UK cases where employee inventors have received significant payments under this provision.

Infringement and enforcement of IPR in Scotland

When there is an infringement of IPR occurring in the UK, there can often be a choice as to whether to sue the infringer in the Scottish or English courts, depending on the domicile of the infringer or where the infringement is taking or threatened to take place. Scottish courts can offer commercial and tactical advantages to IPR owners. For example there is no obligation to issue a letter before action in Scotland and interim injunctive proceedings can be brought very quickly to stop the infringement immediately.

We recommend that all businesses and IP owners doing business in or connected with Scotland should file protective measures, known as Caveats, in the relevant Scottish court(s) to provide notice of any interim injunctive application made without notice.

Securitisation of IP in Scotland

Where IP owned by a Scottish company – for instance the registered trade marks of a whisky company – are being used as security for a loan, a specific form of Scots law security will be required.

6 FUNDING YOUR BUSINESS

All businesses need to think about their funding requirements and cash is available from a range of sources in Scotland - equity funding from business angels (high net worth private investors) and venture capitalists (VCs), debt funding from banks and grant funding from a variety of public bodies.



Investors in Scotland have the same goals as those overseas – they want to structure their financial returns, limit potential losses and gain sufficient control over the companies' actions to allow them to be comfortable with the risks they are taking. They also want to make sure that there is an exit strategy in place to allow them to recoup their funding at a specified point.

6.1 Equity capital

The equity investment process, whether funds are coming either from angel investors, VCs or private equity houses, generally starts with preparation of a business plan and presentation to the potential funder. Assuming they like the proposition, this will be followed by a term sheet setting out the outline terms of the investment. Prior to making any financial commitment the investors will require a due diligence exercise to be carried out. The due diligence exercise comprises a review of all the activities of the company and all legal documentation relating to the company. During this stage it is common for investors to seek exclusivity arrangements preventing the company speaking to other potential funders whilst the diligence is completed.

It is very important to ensure that the term sheet properly reflects what is intended by both parties because once it is signed it is usually extremely difficult to move away from the position set out in that document.

Companies should seek advice on the structure of their deal at an early stage rather than leaving it until after the term sheet has been negotiated as this can seriously prejudice their position.

Investment can come into the company in a variety of shapes and sizes. It can be investment in ordinary shares which have full voting rights and carry a right to dividends, or preference shares which usually carry a fixed interest rate and have a specified redemption profile. In addition, preference shares sometimes have the right to convert into ordinary shares in certain circumstances. The other option is loan notes which are classified as debt, although once again these can, in certain circumstances, be drafted to be convertible into ordinary shares. The rights attaching to shares will be set out in the company's constitutional documents (which operate as its rule book), which will usually include provisions relating to voting rights, liquidation preferences, dividends, conversion, redemption, pre-emption rights and the rights of shareholders to secure an exit from the company. It is possible for shares to have extremely complex sets of rights attaching to them including anti-dilution provisions if required.

The day-to-day operation of the company is governed by its constitutional documents but may also be supplemented by a shareholders agreement. This will cover how the company is to be administered on a daily basis, what actions can only be taken with the consent of the investors, restrictive covenants preventing shareholders competing with the business, and provisions relating to production of information, convening board meetings and other administrative matters. The provisions in these documents can be complex and are vital to the company's ongoing development. It is important to take careful advice at an early stage as the company should not be accepting provisions that could hamper its long-term growth. For example, the company should try to avoid anti-dilution provisions that prevent it from raising funding at lower share valuations than in the current round as it is difficult to predict with certainty how the market will move forward and a lower share price may be necessary to allow vital funds for ongoing growth to be raised.

6.2 **Bank loans**

Scotland is home to a number of major banking institutions which offer commercial lending to international businesses. Brodies has extensive links with a wide range of financial institutions and can arrange introductions for clients who are seeking debt funding.

Bank loans are usually governed by a facility agreement which sets out the basic terms of the loan such as interest payable, dates of repayment, financial covenants and numerous warranties and indemnities in relation to the position of the business. Bank loans to companies are generally secured in Scotland by means of a 'bond and floating charge' and, in addition, by 'standard securities' over any land owned by the company. It is important for companies to be aware that if they grant charges over any assets located in the UK, these may require to be registered with the Registrar of Companies.

6.3 **Grant funding**

There is a wide variety of grant funding available in Scotland in order to encourage overseas investment in to the country. Brodies has contact with all the main grant awarding bodies and we can make appropriate introductions to help you ascertain what funding might be available for your project.

7 SELLING SHARES TO THE PUBLIC

The London financial markets are the most sophisticated in the world and companies from all over the globe come to the UK to raise finance. The London markets provide access to a huge amount of liquidity to a wide range of investors from both the UK and overseas. As in most other countries offering shares or other transferable securities for sale to the public is a heavily regulated area. The Financial Services and Markets Act 2000 (FSMA) is the key piece of legislation and the Financial Conduct Authority (FCA) has the responsibility for making and enforcing the rules relating to the documentation that allows shares or other securities to be offered to the public.

The two principal public markets are the Official List of the London Stock Exchange and the Alternative Investment Market (AIM). Key pieces of regulation in this area are as follows:

- The Prospectus Rules – these outline the circumstances in which a full Prospectus (see section 7.4 below) is required and the detailed guidance on information that must be contained in that document. Failure to comply is a criminal offence and also leaves directors open to fines;
- Listing Rules – these are complex and lengthy and every company in the UK on the full list will have a sponsor and a legal team to ensure compliance. The rules deal with issues such as what the continuing obligations of companies and directors are on an ongoing basis, when shareholders have to be consulted in relation to certain types of transactions;
- AIM Rules – the Alternative Investment Market is a market for young and fast growing companies and has, since its launch, been extremely successful. Companies in this market must comply with the AIM Rules, which are much less onerous than those for the official list. The cost of listing on AIM is significantly lower than for a full listing in the main market. In addition, there are tax incentives for investing in AIM securities which has led a number of companies to select this market;
- Disclosure and Transparency Rules ('DTRs') – DTRs set out in detail what information listed companies, their directors and shareholders are required to disclose to the public and how and when such disclosures are to be made. These cover everything from disclosures of directors' dealings in their companies shares to details of transactions carried out by the company.

To work out what documentation is needed to allow an offer of shares to be made, clients need to consider the following four questions:

7.1 Are the shares being offered to the public?

Under section 85(1) of FSMA, it is unlawful to offer transferable shares to the public without publishing an approved prospectus, except in very limited circumstances.

FSMA does not give us a clear answer as to what constitutes an offer to the public. If a person is offered shares on terms that enable him to decide to buy or subscribe for those shares then that constitutes an offer to the public. In theory an offer to one person that meets these criteria can be an offer to the public and even a verbal offer containing sufficient information could be caught by the prospectus regime.

It is also worth noting that private limited companies are prohibited from offering shares to the public under the Companies Act 2006. If a company did make such an offer, it would be subject to the same regulations that apply to a public limited company.

7.2 **Are there any exemptions available?**

Exemptions are available, in sections 85 and 86 of FSMA, and market practice has developed so that many offers are structured specifically to fall within those exemptions. The most important are as follows:

- The offer is made only to qualified investors – there is a detailed definition of qualified investor that requires to be carefully reviewed if this exemption is to be relied on but, in essence it covers professional investors and large organisations;
- The offer is made to fewer than 150 people (excluding qualified investors);
- The minimum investment is €100,000 per investor; total consideration is less than €5,000,000 aggregated over a twelve month period;
- The shares are not transferable.

7.3 **What is a prospectus?**

A prospectus is a detailed document that sets out the terms on which the shares are offered for sale and will include information about the company and its products/services, financial information and risk factors. It must be approved by the FCA prior to issue. It is a lengthy document and expensive and time consuming to prepare, which is why so many companies take advantage of the exemptions especially if they are not raising substantial sums. The big advantage of having a prospectus is that once approved it can be freely circulated to an unlimited number of people with no restrictions whatsoever.

7.4 **What happens if I don't need a prospectus?**

If the company is listing its shares on AIM then the offer document will have to comply with the AIM rules. These contain a list of the information required which mirrors some of that required for a prospectus. In all other cases, there is no specific list of information that must be included. However, s89 to 90 of the Financial Services Act 2012 makes it an offence to make misleading, false or deceptive statements or to dishonestly conceal material facts with a view to inducing a person to buy or sell shares.

The prudent approach is to include, as far as possible, the information people expect to find in a prospectus, only omitting information if there is a justifiable reason for doing so. There is also restriction in s21 of FSMA that requires any offer document to be approved by an authorised person, failing which it can only be sent to people who fall within certain exempt categories (such as investment professionals).

If you plan to raise money by issuing shares or other securities we recommend taking advice early in the process to minimise reputational and financial risk.

8 TAX & PAYROLL

Tax is a significant element of the cost of doing business in almost any jurisdiction and Scotland is no exception. A solid understanding of the tax regime is vital if a business is to thrive, and avoid penalties. With expert guidance, however, you can ensure that your tax liabilities are minimised as far as possible and your cash flow optimised.



National fiscal policy is for the most part reserved to the UK Government and, accordingly, Scottish taxation is largely governed by UK law, although there are a growing number of taxes which are devolved to the Scottish Parliament as well as a number of taxes where the Scottish Parliament can set the tax rates. UK tax law is passed by the UK Parliament in London and administered nationwide by HM Revenue & Customs (HMRC), the UK tax authority.

Two taxes have now been devolved to the Scottish Parliament. These are the Land and Buildings Transaction Tax (LBTT), which applies to transactions involving land in Scotland from April 2015, and the Scottish Landfill Tax which also applies from April 2015.

The devolved Scottish taxes are administered by Revenue Scotland, a new tax body established by the Scottish Government working with Registers of Scotland, the body which deals with registration of land in Scotland, in relation to LBTT and the Scottish Environment Protection Agency in relation to the Scottish Landfill Tax.

In addition a Scottish Rate of Income Tax (SRIT) applies from 6 April 2016 to 5 April 2017 to Scottish taxpayers (broadly, individuals resident in Scotland), regardless of where their employer or business is located. The SRIT applies to non-savings, non-dividend income, i.e., to income from employment, self-employment and pensions as well as to income from property. The rate of income tax payable by Scottish taxpayers is reduced by 10 pence, and the Scottish Parliament was required to set a Scottish rate which will apply instead. It has recently been announced that for the 2016/2017 tax year, the Scottish rate of income tax has been set at 10% so the tax payable by Scottish taxpayers will remain the same as for taxpayers in the rest of the UK for the current year. The SRIT is collected by HMRC, and Scottish taxpayers have been issued with special PAYE notices of coding (S – codes) indicating that they are Scottish taxpayers.

From April 2017 the Scottish Parliament will have increased powers in relation to income tax for Scottish taxpayers and will have control over setting the rates and bands of income tax for Scottish taxpayers, though not the personal allowance. The Scottish Government has recently announced (in March 2016) that the basic, higher and additional rates of income tax for Scottish taxpayers from April 2017 are intended to remain the same as in the rest of the UK. However, the threshold at which the higher rate of income tax starts to be payable will be higher than in the rest of the UK, as a planned increase in the threshold will not apply in Scotland.

It is also expected that Air Passenger Duty will be devolved to the Scottish Parliament from April 2018 as well as Aggregates Levy once certain legal issues have been addressed.

Council tax and business rates, being local taxes, are controlled by the Scottish Government and administered by local authorities. There are differences between council tax and business rates in Scotland and in the rest of

the UK. Following the publication in December 2015 of a report by the independent Commission on Local Tax Reform the Scottish Government has indicated that it intends to introduce changes to council tax and that it will consult on the possible introduction of a charge on vacant and undeveloped land.

If you plan to set up a business in Scotland, you must also consider the following:

8.1 Tax on business profits

The way in which your business profits are taxed will depend on the business medium you choose. All businesses must notify HMRC that they are trading within a stipulated time frame. A UK company, for example, must notify HMRC within three months of commencement of trading.

8.1.1 Companies

UK resident companies pay corporation tax on their chargeable profits, currently at a rate of 20%. The rate of corporation tax will reduce to 19% for the years starting 1 April 2017, 2018 and 2019 and to 17% for the year starting 1 April 2020. Chargeable profits include trading income, chargeable gains, rental income and investment income, from which allowable expenses are deducted. Profits for corporation tax purposes are generally based on the accounting profits, with some adjustments. Dividend income from other companies is potentially taxable, although there many exemptions.

If your UK company chooses to pay dividends to shareholders, any individual shareholders will be liable to pay income tax at an effective rate of up to 38.1% of the dividend paid. However, new rules from 6 April 2016 mean that an individual will not pay tax on the first £5,000 of dividends received. Taxing an individual on dividends received is sometimes referred to as ‘double taxation’, since the dividends are paid from profits that have already been subject to corporation tax. This double taxation may influence whether or not you choose to incorporate your business. Corporate shareholders may have to include dividend income in their chargeable profits for corporation tax purposes if the dividends do not satisfy one of the exempt categories.

8.1.2 UK permanent establishments

UK permanent establishments (e.g. branches) of overseas companies are also liable to pay UK corporation tax on their UK trading income and on the disposal of UK assets used in connection with the trade. The question of whether it is better to incorporate a UK subsidiary or establish a UK branch is complicated, both from a tax and general commercial point of view. Expert advice will be needed to identify the best option.

8.1.3 Partnerships

Scottish partnerships and Scottish limited partnerships, unlike their English counterparts, have a separate legal existence from their partners. Nonetheless, they are treated as being ‘transparent’ for income tax purposes, in the same way as English partnerships. In other words, the partnership itself does not pay tax but each individual partner is taxed on their share (determined according to their profit share) of the profits of the business. Although partnerships are generally free to allocate their

profits as they see fit, in terms of the partnership agreement, HMRC may view some allocations as 'abusive' and their sole purpose is to avoid tax. For example, if profits that would ordinarily be allocated to individuals are instead allocated to a corporate partner to take advantage of the lower corporate tax rate. In these cases, HMRC will seek to tax the partners according to the share of profits that they would have received had the 'abusive' arrangements not taken place.

Partners are treated as owning a fractional share in the underlying assets of the partnership for capital gains tax purposes.

So, an individual partner will pay income tax on their share of trading income (at rates of up to 45%) and capital gains tax (at rates of up to 20%) on the chargeable gain arising from the disposal of their share of any partnership asset. Partners who are Scottish tax payers will pay income tax on their share of trading income at the relevant Scottish rates. A corporate partner will pay corporation tax on their share of profits and on chargeable gains arising from the disposal of their share of partnership assets.

Although prevailing income tax rates are generally higher than corporation tax rates, partnerships do not suffer from the 'double taxation' problem faced by companies and their shareholders. Profits are taxed on the partners with no further tax charge when they are paid out from the business. Accordingly, in some cases, a partnership may in fact represent a more tax-efficient business medium than a company.

Moreover, the hybrid status of Scottish partnerships and limited partnerships, which combines tax transparency with separate legal existence, means that they are a very attractive vehicle for a range of international investment purposes.

Although partnerships are tax transparent in many ways there can be tax charges when assets are transferred into or out of partnerships which need to be considered.

8.1.4 Limited liability partnerships

Limited Liability Partnerships ('LLPs') are viewed as corporate entities for a range of purposes and they require to be registered at Companies House. However, for most tax purposes they are treated as being tax transparent in the same way as general and limited partnerships, provided they are 'carrying on a business'. Carrying on a business is interpreted quite broadly and may include active management of investments or running a property rental business.

In some cases, HMRC will look to treat LLP partners as employees for tax purposes. This means that the LLP would be responsible for administering that partner's income tax on their partnership profits through the PAYE system, and for paying employers' national insurance contributions on that partner's salary (see 8.3)

If an LLP is not carrying on a business, for example if it is passively holding investment assets, then it will be subject to corporation tax in the same way as a company.

8.2 Reliefs and allowances

There are a wide range of reliefs and allowances available which may significantly reduce a business's tax liability. To give just a few examples:

- Trading losses;
- Entrepreneur's relief can reduce capital gains tax to 10% on the disposal of (a) all or part of a business, (b) the assets of a business after it has ceased or (c) shares in a company up to a lifetime gains threshold of £10 million provided, of course, that the qualifying conditions are met;
- Research and development tax credits can reduce corporation tax for companies engaged in qualifying R&D activities by allowing them to deduct an amount greater than the actual cost of those activities from their taxable profits;
- The Patent Box rules allow that profits derived from patented inventions developed or owned by a UK company can be taxed at the rate of 10%.
- The Enterprise Investment Scheme offers income and capital gains tax discounts for investors in eligible businesses; and
- Capital allowances on qualifying fixtures, plant and machinery enable businesses to offset a portion of their capital expenditure on those assets against revenue tax liabilities.

8.3 Payroll taxes

Any UK business which takes on employees must operate a 'pay as you earn' ('PAYE') payroll system, through which income tax and national insurance contributions are deducted at source from salaries paid. Employers must also pay an additional employers' national insurance contribution for each employee at up to 13.8% of the salary paid.

You may view some of the people who will work for you as self-employed, freelance contractors, rather than employees. Employers are not required to operate PAYE for contractors. However, the rules which determine whether an individual is genuinely self-employed (as opposed to an employee) for tax purposes are complex and must be navigated with care.

If your business will be engaged in construction work, either as a contractor or sub-contractor, then you must also consider the application of the Construction Industry Scheme, which requires a form of withholding tax to be applied to payments made to construction sub-contractors unless certain they are registered with HMRC to allow gross payments to be made.

8.4 VAT

Value Added Tax ('VAT') is a UK indirect sales tax based on the model which applies to all EU states. However, the various EU VAT systems have not yet been fully harmonised and there remain a number of national idiosyncrasies. The rate of VAT is 20% as of April 2016.

Broadly speaking, UK VAT is charged on the supply of goods or services that take place in the UK in the course or furtherance of a business by a taxable person, unless a particular supply is exempt (for example, various supplies of financial services) or falls outside the scope of VAT (for example, the sale of a business and its assets as a going concern). A taxable person is any business which is VAT registered or required to be VAT registered on the basis that their taxable supplies exceed a specified threshold, currently £83,000.

There are three rates of UK VAT, which are charged according to the nature of the supply:

- Standard – currently 20%, which applies to most VATable supplies;
- Reduced – 5%, which applies to certain supplies such as utilities; and
- Zero – which applies to certain supplies such as books and children’s clothes as well as some supplies of residential buildings.

Unless your business is very small, you are likely to have to register for VAT. This has the advantage that, subject to certain caveats, you should be able to recover the VAT on expenses (input tax) you incur in running your business. However, you will also be required to charge VAT on the supplies you make to your own customers, and you must adhere to the strict administrative requirements of the UK VAT regime (including submitting quarterly VAT returns and keeping careful records). Any overseas business operating in the UK is required to register for VAT whatever the level of supplies made here.

8.5 Business rates

Business rates, also known as non-domestic rates, are levied in Scotland by the local authority in which the property on which they are levied is located. They are payable by the occupier of any ‘non-domestic property’, such as shops, offices, warehouses, factories and restaurants. If the property is vacant, the owner will still be required to pay business rates at a reduced percentage.

Business rates are determined by multiplying the ‘national poundage rate’, which is set each year by the Scottish Government, by the rateable value of the property in question. The rateable value of the property is generally set by reference to the value of the property.

An independent commission has recently been set up by the Scottish Government to consider the future of business rates in Scotland, and changes are expected in this area.

8.6 Property tax

Purchasers who acquire an interest in land and buildings in Scotland property (for example, by purchase or lease), are likely to be liable to pay Land and Buildings Transaction Tax (‘LBTT’) on the purchase price or the ‘net present value’ (a figure calculated on the basis of rental payments under a lease).

LBTT is a progressive tax with different rates applying to different slices of the consideration. The rates of LBTT vary from 0% to 4.5% for non-residential properties, depending on the value of the consideration, and from 0% to 12% for residential properties. In addition to those rates, an Additional Dwellings Supplement (ADS) of 3% of the purchase price applies to the purchase of second homes and some buy to let properties by individuals. The

ADS applies to all purchases of residential properties by companies and other entities unless 6 or more residential properties are purchased in a single transaction, in which case the ADS does not apply.

VAT is chargeable on some property transactions and where it is payable LBTT is charged on the plus-VAT consideration (for example, where a property is purchased for £1 million plus VAT, Stamp Duty Land Tax ('SDLT') will be charged on the £1,200,000 VAT-inclusive consideration.

LBTT replaced SDLT on transactions involving land in Scotland in April 2015. SDLT continues to apply to transactions involving land in the rest of the UK.

SDLT is similar to LBTT but there are a number of significant differences, including the fact that the rates are different.

8.7 Tax payable by private individuals

8.7.1 Income tax

At present, most UK income taxpayers have a personal allowance of £11,000 and they will only be taxed on income which exceeds this. The personal allowance is reduced by £1 for every £2 of income that an individual receives above £100,000. Income tax rates range from 0% (for small amounts of income from savings and investments) to 45% for income which exceeds £150,000.

As mentioned above a Scottish Rate of Income Tax (SRIT) applies from April 2016 to non-savings non-dividend income of Scottish taxpayers. The rate of income tax payable by Scottish taxpayers is reduced by 10 pence, and the Scottish Parliament has set a Scottish rate which will apply instead. For the 2016/17 tax year, the Scottish Rate of Income Tax has been set at 10% so the income tax paid by Scottish taxpayers will be the same as for taxpayers in the rest of the UK.

As mentioned above from April 2017 the Scottish Parliament will have increased powers in relation to income tax for Scottish taxpayers and will have control over setting the rates and bands of income tax for Scottish taxpayers, though not the personal allowance. The Scottish Government has recently announced (in March 2016) that the basic, higher and additional rates of income tax for Scottish taxpayers from April 2017 will remain the same as in the rest of the UK although the threshold at which the higher rate of income tax starts to be payable will be higher than in the rest of the UK. The UK rates apply, including the £5,000 exemption for dividend income.

The Scottish and UK income tax rates are as follows:

United Kingdom 2016/17 (inc. Scotland)

Bands	United Kingdom (inc Scotland)
Personal allowance	£11,000
Amount of income subject to allowance	£11,000
Basic Rate Band (20%)	£11,000 - £43,000
Amount of income subject to Basic Rate	£32,000
Higher Rate Band (40%)	£43,000 - £150,000
Amount of income subject to Higher Rate	£107,000
Additional Rate Band (45%)	Over £150,000
Amount of income subject to Additional Rate	-

United Kingdom v Scotland 2017/18

Bands	United Kingdom	Scotland (proposed)
Personal allowance	£11,200	£11,200
Amount of income subject to allowance	£11,200	£11,200
Zero Rate Band (0%)	N/A	N/A
Amount of income subject to allowance	N/A	N/A
Basic Rate Band (20%)	£11,200 - £45,000	£11,200 - £43,387
Amount of income subject to Basic Rate	£33,800	£32,187
Higher Rate Band (40%)	£45,000 - £150,000	£43,387 - £150,000
Amount of income subject to Higher Rate	£105,000	£106,613
Additional Rate Band (45%)	Over £150,000	Over £150,000
Amount of income subject to Additional Rate	-	-

8.7.2 Capital gains tax

UK capital gains tax is levied on the gain arising (after deduction of base cost and enhancement expenditure from sale proceeds) on the disposal or deemed disposal of a chargeable asset. From April 2016, capital gains tax is charged at 20% for higher rate taxpayers, depending on the asset being sold and the seller's taxable income for the year, although entrepreneur's relief may reduce this to 10% if the relevant conditions are met.

Individuals who are resident and domiciled in the UK are subject to UK tax on their worldwide income and chargeable gains. Individuals who have been resident in the UK for fewer than 6 out of the last 9 tax years and are not UK domiciled will be taxed only on income and gains which are remitted to the UK.

8.7.3 Non-residents and non-doms

More complex rules apply to those who have been UK resident for more than 7 out of the last 9 tax years but are not UK domiciled; they will be subject to UK tax on worldwide income and chargeable gains unless they opt to be taxed on a 'remittance basis' (i.e. subject to UK tax only on income or gains which are remitted to the UK), however this option requires payment of a sizeable annual charge.

From April 2015, non-resident individuals and corporate entities will be subject to capital gains tax on disposals of some UK residential property, regardless of their domicile, or the length of time they have been non-resident.

9 PROPERTY MATTERS

9.1 Choosing premises for your business

A business choosing to operate from, and have a physical presence in, Scotland will have to find premises to do so. The first choice to be made will be whether to buy or lease premises.

The law of property in Scotland is different from that applied in the rest of the UK. There are two forms of title to land in Scotland – ownership and leasehold. Ownership is the heritable title to land and buildings equivalent to the English freehold which will be granted to the new owner in return for payment of the price. Leasehold title is a real right to occupy and use land for a specified duration in return for payment of rent.

Unlike in some other jurisdictions (notably England and Wales), long leasehold is not favoured in Scotland as a form of title interest.

Legislation prohibits leases of commercial property in excess of 175 years duration and leases of residential property for a period longer than 20 years. The current trend for commercial properties is leases of up to 15 years' duration. Such leases could provide for earlier termination or indeed an extension of the term as we explain below.

In Scotland, deals to buy or lease commercial property are usually brokered through commercial surveyors, who will generally assist in the sourcing of suitable property, working closely with the client's other professional advisers to negotiate Heads of Terms. The commercial property solicitor will then take over to drive the deal to completion. The solicitor will negotiate the terms of the contract, carry out due diligence on the property and complete the purchase and transfer of title or lease, whilst at all times liaising with the buyer/tenant company and the other professional advisers involved in structuring and financing the deal.

Below we set out in more detail the different stages of a purchase and a lease transaction. If the property is to be acquired by purchase of the corporate vehicle that currently owns or leases the property, different terms would apply. Auction sales also have their own procedural rules.



9.2 Buying premises

9.2.1 Negotiating the contract to buy or sell property

A buyer company could purchase land for development, land with buildings already constructed on it, or part of a building. The process works as follows:

- The buyer's solicitor will draft the purchase contract in accordance with the Heads of Terms;
- The buyer and their solicitors will carry out their due diligence over the property;
- The buyer's solicitor and the seller's solicitor will then negotiate the final form of the contract in accordance with their client's instructions and their due diligence findings;
- The buyer's solicitor will issue the formal offer to purchase in the agreed terms and the seller's solicitor will issue a formal acceptance to conclude the contract (known as 'the missives') which will set a date for completion; and
- Completion will take place when monies have been paid in exchange for the items deliverable on completion.

9.2.2 Content of purchase/sale missives

Whilst the process by which a commercial property is bought and sold is relatively standardised, the contractual terms used may vary from transaction to transaction. There are no standard or national conditions which can be applied, amended or disapplied.

In general, the contract will contain: the buyer's and seller's details, the property details including any additional items which are to be purchased such as plant and equipment, the agreed price and how VAT is to be dealt with, search reports to be delivered, the documentation which has to be delivered at completion including the formal title transfer deed ('disposition') and any guarantees which are to be assigned. The contract will also generally provide that a buyer may walk away from the contract without penalty in the event of material damage or destruction of the property prior to completion, whether or not the property is insured.

9.2.3 Due diligence

The contract will generally contain limited warranties as to the condition and permitted use of the property and in relation to any leases granted out of the interest being acquired, as well as confirmation that nobody else has rights over it. There are no standard preliminary enquiries. Also, the principle of 'buyer-beware' (caveat emptor) applies in Scotland and owners/occupiers can become liable for matters relating to the property which occurred before they bought or occupied, and so due diligence is essential.

A buyer's solicitors will carry out the necessary due diligence, including examination of the legal title to the property and search reports in respect of title and local authority matters such as building and planning consents. What that due diligence will entail in legal terms will vary widely depending upon whether the seller's title is a Land Certificate (which will normally carry a state-backed guarantee of title), or has yet to be registered in the Land Register.

The buyer will also carry out physical due diligence by instructing land and, where required, environmental surveys (particular attention must be given to environmental warranties in the contract and the allocation of responsibilities for any environmental liabilities which may arise).

All of the due diligence will generally be undertaken at the buyer's risk and cost prior to concluding a purchase contract and without recourse against a seller for those costs if it withdraws from negotiations before a contract is concluded.

9.2.4 When is the contract binding?

The buyer will not be legally bound to buy property until a written contract has been signed and delivered. Where extensive due diligence is required, or where market conditions are volatile, a buyer may be advised to seek an early contractual commitment from a seller in the form of a Lock-Out or Exclusivity Agreement to avoid losing the property to another potential buyer and mitigating the risk of abortive diligence costs.

When terms are agreed, the contract usually will usually be entered into in missive form and thus be signed by solicitors acting as agents for their respective clients (only where duly authorised to do so) rather than by the parties themselves.

9.2.5 Completion of the purchase and sale

Conventionally, completion (financial close) will take place between 10 and 20 working days after conclusion of the missives. Increasingly, however, missives will be concluded just prior to completion.

The buyer will arrange for the completion monies which will include the price, any VAT and the Land and Buildings Transaction Tax (LBTT, being a Scottish stamp tax similar to SDLT in England) payable on the purchase to be placed under the control of their solicitors in time for completion. The purchase price and VAT will then be transferred to the seller's solicitors electronically within banking hours on the day of completion, in sufficient time to allow for same day transfer in cleared funds. In exchange for the completion monies, the seller will deliver the completion documentation which will include the disposition effecting the transfer of ownership to the buyer and keys to any building on the property.

Registration of the disposition is required to confer title upon the buyer which will be good against the world and must be done at the earliest opportunity to protect the buyer against competing claims and in any event within the period during which the buyer's title is protected by an advance notice registered on the title prior to completion. The disposition will be registered in the Land

Register following submission of the buyer's LBTT return and payment of any LBTT due on the purchase.

9.3 Leasing premises

9.3.1 Negotiating and agreeing the terms of a lease

A lease can be taken in respect of land and/or for the whole or part of a building. It is granted by the signing of a lease by or on behalf of the landlord and the tenant. The process works as follows:

- The tenant company or its agents will source a suitable property and carry out due diligence on the property;
- The tenant will conclude a contract (the missives) with the owner of the property to lease the property;
- The missives will set out the details of the landlord and the tenant, the property to be leased, the agreed rent and any premium payable on entry, the duration of the lease – when it is to begin and end – and, any agreement on the state of repair of the property;
- Attached to the missives will be a draft of the agreed lease and a draft of any licence for works for any fit-out or alteration works proposed by the tenant;
- The missives will be concluded with the agreed draft documentation attached and the tenant will be granted entry on the specified date; and
- The missives will oblige the parties to sign the agreed form of lease within a specified period after conclusion of the contract and to comply with the terms and conditions of the agreed lease pending its full signature.

Once validly constituted and (where applicable) registered, a lease confers upon the tenant company the right to possession of the property on payment of the rent to the landlord.

9.3.2 Due diligence

A tenant's solicitor will seek verification that the landlord owns the property, that there is nothing preventing the landlord granting a valid lease to the tenant or which requires a third party consent to this (such as from a charge holder) and that there are no title conditions or third party rights which would prevent or interfere with the proposed use of the property. The tenant company will also instruct surveys of the property to assess whether there are any concerns over its state of repair and condition, as a lease will generally require the tenant to keep the property in good condition and in a way that complies with statutory and local authority regulations.

9.3.3 Content of a lease

There is very little landlord and tenant-related legislation in Scotland. Broadly, the terms of the lease set out the whole rights and obligations of the parties.

- **Duration** – The lease document will set out the agreed duration of the lease. If a tenant company would like the opportunity to terminate the lease early, it is possible to agree a break option if the landlord is willing to grant one. In all cases (except retail premises) a tenant has no statutory right to renew their lease and no security of tenure after lease expiry but it is possible to agree an option to extend the term of the lease (up to a total duration of 175 years) after expiry of the original duration.
- **Tenant obligations** – The obligations assumed by a tenant company would typically include payment of local rates and taxes, repair of the property, observation of all legal requirements in relation to the property, compliance with building and planning laws, and insurance payments or payments to the landlord for insuring the property. The lease will also include a number of restrictions on the tenant's disposal rights (see below **Dealing with a lease**), the use to which the property could be put, and the tenant's right to alter or develop the property. The tenant will usually be obliged to pay interest on any sums, such as rent, which are due but which are paid late.
- **Dealing with a lease** – At common law, a tenant is free to assign (transfer) a commercial lease without first obtaining the landlord's consent. However, it is standard practice for the lease to qualify this freedom and thus to include a specific requirement for landlord's consent. There are no statutory rules in Scotland that require that landlord's consent cannot be unreasonably withheld or delayed and, unless a lease explicitly provides for that, the landlord has complete discretion whether or not to grant any consent provided for in the lease. A well advised tenant will ensure that appropriate amendments are made to the lease to introduce requirements for landlord's reasonableness.

Sub-leases are generally competent, subject to compliance with any restrictions upon sub-letting contained in superior leases. However, unlike in other jurisdictions, sub-tenants have no security of tenure as a sub-lease is vulnerable to termination or forfeiture of any lease which is above it in the lease chain. A sub-tenant company may be advised to protect itself by entering into a separate Forfeiture Protection Agreement direct with the superior landlord.

Only leases of more than 20 years can be registered in the Land Register and subject to the grant of a fixed security and so if the tenant company wishes to grant a fixed charge over its interest in a lease, it must take a lease of over 20 years in duration. Where the lease or sub-lease is so registered, the tenant's interest under the lease will normally benefit from a state-backed guarantee of title similar to that which applies to outright ownership.

9.3.4 Termination of a lease

To bring a lease to an end at the conclusion of the contractual term, a formal notice to quit is required. Failure to serve a notice in proper time will result in the lease continuing for a maximum of a further year, on the same terms and conditions (including rent).

Leases can also be brought to an end in the event of material default on the part of the tenant including non-payment of rent or failure to comply with a landlord's demand to make good wants of repair. If the tenant defaults, the landlord must serve notice on the tenant giving them the opportunity to remedy the default. Failure by the tenant to remedy the default will entitle the landlord to bring the lease to an end.

No statutory compensation is payable to the tenant once a lease has been terminated and there is no right to be compensated for improvements carried out by a tenant to the premises. Any right to compensation must be contained in the lease and such rights are unusual.

On termination or assignation of a lease, the outgoing tenant will generally be relieved of its obligations under the lease unless they have agreed otherwise, ongoing obligation is implied. However, prior to the end of a lease, a landlord is likely to arrange for a schedule of dilapidations to be prepared which will set out all the wants of repair for which the tenant is responsible in terms of the lease. A tenant company will be required to put the premises back into the agreed state of repair or pay damages to the landlord if they fail to do so. Such damages are not limited to the diminution in value of the landlord's interest in the property although it will be a factor for consideration.

9.4 Costs

Each party usually meets their own costs for a purchase or lease transaction. VAT (if applicable) and LBTT are payable by the buyer/tenant. The LBTT must be paid to the tax authority within 30 days after completion. Any VAT payable on the price or on the rent will be paid to the seller/landlord who will account for it to the tax authority.

10 NEXT STEPS

Brodies has developed a fixed price package designed to allow businesses to set up operations here in Scotland.

For more information, to discuss any of the issues raised here, or to arrange a meeting please contact:

Will McIntosh at Brodies LLP, direct line number +44 (0)131 656 0154, email will.mcintosh@brodies.com

11 About Brodies LLP

Brodies is Scotland's largest law firm, delivering services of the highest quality to Scottish, UK and global organisations.

With offices in Aberdeen, Edinburgh, Glasgow and Brussels, we offer legal advice to private and public sector clients in core areas such as mergers & acquisitions, business disputes, commercial property, banking & financial services, employment, pensions & benefits and trust & tax. Our clients include big companies, small and medium enterprises, entrepreneurs, business people and individuals from all backgrounds who are active in almost every sector of the Scottish economy. They come to us for different reasons but invariably stay with us for the same ones - relationships built on trust and galvanised by the quality of our legal advice, commercial know-how and shared appetite for success.

Brodies has more individual lawyers and practice areas ranked top tier in the independent legal directories than any other firm in Scotland and was named Scotland Law Firm of the Year at the Who's Who Legal Awards in 2016 for the fifth consecutive year.



Key contacts



William McIntosh
INTERNATIONAL PARTNER,
CORPORATE
+44 (0)131 656 0154
william.mcintosh@brodies.com



Rod Lambert
PARTNER, EU &
COMPETITION
+44 (0)131 656 3749
rod.lambert@brodies.com



Joan Cradden
PARTNER, EMPLOYMENT
+44 (0)131 656 0130
joan.cradden@brodies.com



Greg May
PARTNER, OIL & GAS
+44 (0)1224 392 255
greg.may@brodies.com



Grant Campbell
TECHNOLOGY &
OUTSOURCING
+44 (0)131 656 0115
grant.campbell@brodies.com



Christine O'Neill
PARTNER, PUBLIC LAW
& REGULATORY
+44 (0)131 656 0286
christine.oneill@brodies.com



Isobel d'Inverno
DIRECTOR OF CORPORATE TAX
+44 (0)131 656 0122
isobel.dinverno@brodies.com



James Roscoe
PARTNER, PROPERTY
+44 (0)131 656 3742
james.roscoe@brodies.com



Bruce Stephen
PARTNER, BANKING
+44 (0)131 656 0260
bruce.stephen@brodies.com



Gill Summers
PARTNER, CORPORATE
+44 (0)1224 392 268
gill.summers@brodies.com



Andrew Akintewe
PARTNER, FUNDS &
FINANCIAL SERVICES
+44 (0)131 656 0210
andrew.akintewe@brodies.com

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