

Demergers in Jersey



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Introduction

This briefing note is intended as an overview of some of the legal issues which should be considered on a demerger following the implementation of the The Companies (Demerger) (Jersey) Regulations 2018 (the Regulations).

The merger procedure under the Companies (Jersey) Law 1991 (the Companies Law) has not been discussed in this note. More detailed advice on a demerger under the Regulations or on the merger procedure under the Companies Law is available on request.

Overview

The Regulations come into force on 01 September 2018 and introduce a new, more simplified, way for a Jersey company that wishes to segregate its business activities (or 'demerge') by transferring distinct businesses into two or more Jersey companies without the need to obtain court approval.

Following a demerger, the original 'demerging' company's property, rights and liabilities will be apportioned between the new 'demerged' companies. As a result, the new demerger process brings greater flexibility and cost-efficiency to the use of a Jersey company and has a range of potential uses such as: effecting a reorganisation to prepare for an acquisition; unbundling a group following acquisition of the parent (or holding) company (so reducing the number of companies in the new group); modifying an existing group structure to separate existing businesses or brands, for example (a) if the companies do not share a common strategy; or (b) where one part of the group is placing financial or regulatory restrictions on the other;

or facilitating a material change in strategic focus, to eliminate an under-performing division or to maximise investment opportunities.

Demerger under the Regulations will not initially be available to all Jersey companies. Excluded companies include: cell companies; companies with unlimited shares or guarantor shareholders; utility companies; and companies that are liable to pay tax in Jersey at a company or shareholder level (amongst others).

This briefing only examines the new demerger process for those companies permitted to demerge under the Regulations as enacted in July 2018 and will be of particular interest to those who already use, or are considering using, Jersey companies in their group structures.

What is the demerger process?

Although court approval is not required, the demerging company must formally apply to the Registrar of Companies in Jersey (the Registrar) to complete a demerger. The application to the Registrar must include the following:

Demerger Instrument

There are no restrictions on what you can put in a demerger instrument but, as a minimum, it must contain the following details:

whether the demerging company will be a survivor company or a new company;

- details of any arrangements necessary to complete the demerger;
- details of any payment to be made to a shareholder or director;
- details of the undertaking, property and liabilities of the demerging company and, in respect of each demerged company, which part(s) of the undertaking, property and liabilities of the demerging company are to become the undertaking, property and liabilities of each demerged company; and
- (if applicable) the matter in which the securities of the demerging company will be converted into securities of the demerged companies or confirmation of the kind of payment that the holders will receive instead and how and when they will receive it.

There are also some further details required, depending on whether the demerging company will be a 'survivor company' or a 'new company'.

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- any changes to the board;
- any change to the registered office address;
- any amendments to the memorandum and articles of association.

If the demerging company will be a new company, you also need to confirm:

- details of the new company;
- the directors' details;
- the new company's registered office address;
- the proposed memorandum and articles of association.

A demerger instrument can also set out the circumstances in which the demerger may be revoked prior to its completion.

Board and Shareholder Approvals

Resolutions of the board of the demerging company: confirming that, in the board's opinion, the demerger is in the best interests of the demerging company.

A certificate of solvency: given by each director who votes in favour of the demerger, confirming that such director is satisfied on reasonable grounds that the demerging company is, and will remain until the demerger is complete, able to discharge its liabilities as they fall due.

A certificate of confirmation: signed by each proposed director of each demerged company confirming that each of the demerged companies will be able to continue to carry on business and discharge its liabilities as they fall due for a period of 12 months after the certificate has been signed.

Special resolutions of the shareholders of the demerging company: to approve the Demerger Instrument and, if required, the alterations to the demerging company's memorandum and/or articles of association.

Rights to information

Shareholders, employees and creditors of the demerging company are entitled to certain information so they can make informed decisions about the demerger. We have set out further details of the information that the shareholders, employees and creditors are entitled to on a demerger, under the headings below.

Shareholders' Objection

A shareholder who has not voted in favour of the demerger has the right to object to a demerger by serving notice on the demerging company within 21 days of shareholder approval of the Demerger Instrument.

An objecting shareholder has a further 21 days after notifying his or her objection to the demerging company, to apply to the court on the ground that the demerger would unfairly prejudice his or her interests. If the court is satisfied that the objecting shareholder's application is well founded, it may make such order as it thinks fit to give relief to the matters complained of.

Employees

The demerging company must give written notice of the proposed demerger to each of its employees within 21 days of shareholder approval of the Demerger Instrument. This notice should be published at least once in a newspaper circulating in Jersey (or any other method approved by the Registrar) and should state:

- that the demerging company intends to demerge, in accordance with the Regulations into two or more Jersey companies specified in the notice;
- that a copy of the Demerger Instrument is available to employees of the demerging company, on request, free of charge.

Any employee wishing to object to the transfer of his or her contract of employment under a demerger must do so in writing prior to the completion date of the demerger and that employee's contract of employment shall terminate on the completion date of the demerger.

Notice to Creditors

Within 21 days of shareholder approval of the Demerger Instrument, the demerging company must also give written notice of the proposed demerger to each of its creditors who, after its directors have made reasonable enquiries, is known to the directors to have a claim against the demerging company of over £5,000.00.

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This notice should be published at least once in a newspaper circulating in Jersey (or any other method approved by the Registrar) and should state:

- that the demerging company intends to demerge, in accordance with the Regulations into two or more Jersey companies (details of the companies should be specified in the notice);
- that a copy of the Demerger Instrument is available to creditors from the demerging company, on request, free of charge; and if the demerging company is solvent*, that the creditor has the right to:
 - a) object to the demerger by giving notice to the demerging company within 21 days of the date of publication of the notice and apply to the court for an order restraining the demerger or modifying the demerger instrument; and
 - b) requiring the demerging company to notify the creditor if any other creditor makes such an application to the court.

Notice to the Comptroller of Taxes

In addition to the notices to the demerging company's shareholders, employees and creditors, the demerging company is required to make a declaration confirming its eligibility to demerge to the Comptroller of Taxes in Jersey.

This declaration is made by way of electronic self-certification and must confirm the matters set out in Regulation 2(3). Following receipt of the declaration, the Comptroller of Taxes will either issue a tax certificate (showing a lodgement number) to the demerging company or advise the Registrar that the demerging company is not eligible to demerge.

Filing the application for demerger

Once the creditor notice period has expired or if all of the shareholders and creditors consent to the demerger, provided the directors have complied with the Regulations and the demerging company is solvent, the demerging company can submit its application to the Registrar to complete the demerger.

If the Registrar is satisfied that the application complies with the Regulations, it will register notices relating to the demerger in the registers of the relevant companies stating:

for a survivor company, that the company has demerged and has been continued as a survivor company together with the new company or companies specified in the notice.

For a non-survivor company, that the company has ceased to be incorporated as a separate company because it has demerged into the demerged companies specified in the notice; or for a new demerged company, that the new company is the result of a completed demerger of the demerging company specified in the notice.

The Jersey Financial Services Commission (JFSC) will not need to provide its prior consent to a demerger, save where it has issued a licence or consent to a demerging company. However, please note that there are likely to be JFSC filings required if there is change of beneficial ownership or control of the demerging company.

As mentioned above, a demerger will not require consent from the court unless it involves an insolvent company or an objecting creditor or shareholder makes an application to the Court.

This briefing is only intended to give a summary of the subject matter. It does not constitute legal advice.

If you would like legal advice or further information, please contact us using the contact details below:

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*If the demerging company is insolvent, the notice requirements are slightly different.