



## **Why?**

The Companies (demerger) (Jersey) Regulations 2018 came into force on the 1st September 2018.

It is widely believed that the introduction of demerger rules will further strengthen and simplify the corporate law offering already available in Jersey. In addition, such an offering will provide additional flexibility and cost-efficiency to those using Jersey companies.

## **Purpose of a demerger**

The introduction of such a regime is intended to enable the undertakings, property, rights and liabilities of a Jersey company to be divided amongst two or more companies with the assets and liabilities being transferred by operation of law.

## **When would a company demerge?**

There are various examples of when a company may wish to demerge, such as:

- restructuring in anticipation of a sale;
- family business wishing to divide assets for succession planning;
- a demerger may interest fund managers who could warehouse certain (illiquid) assets of a fund near the end of its life into an SPV and reduce the costs of the fund while it is being wound down;
- a company may wish to separate activities that are no longer compatible into separate vehicles;
- to more fully recognise the value of an underlying business/activity in its share price following a demerger; and
- in order to enable investors to more easily identify and analyse the profitability and risks of a particular part of a business once it becomes a separate entity.

## **What are the demerger provisions?**

The demerger provisions, in as far as possible and where it is relevant, mirror the approach taken in the merger provisions set out in the Companies Law.

It is currently envisaged that the demerger regime will only be applicable to Jersey companies demerging into other Jersey companies which in summary are not liable to pay tax in Jersey at company or shareholder level (it is intended, however, to extend the demerger regime to other entities following certain amendments to Jersey's tax legislation). Banking and insurance businesses are specifically excluded from the demerger regulations as specific procedures governing transfers exist already.

In addition, any Jersey company that is a cell company or a cell or that has unlimited shares or guarantor shareholders may not use the new demerger regime.

The principal proposals are as follows:



- no JFSC consent required: as is the case for a merger involving only Jersey companies, no specific JFSC consent will be required for a demerger, except that a licence or consent (or similar) issued by the JFSC to a Demerging Company can only be transferred with the JFSC's permission;
- no court sanction required: unless the proposed demerger involves potential insolvency or a court application has been made by a dissenting creditor or shareholder (please see further below regarding this point);
- notice must be given to the Comptroller of Taxes: it is proposed that this will initially be done by way of electronic self-certification;
- member approval: a Demerging Company must seek approval from its members. The Demerger Instrument must be approved by way of special resolution by the Demerging Company (different classes of members will necessitate a special resolution to be passed at a separate meeting of each class of members). Members may serve by way of notice an objection on the Demerging Company and may also apply to the Royal Court for relief (unfair prejudice). Notice must be served within 21 days after the date the demerger is approved. The court application may be made within 21 days after the date of the notice of an objection is served on the Demerging Company;
- publication: notice of the demerger must be published in a local newspaper (or published in an alternative approved manner) (the Demerging Company may redact commercially sensitive information from the Demerger Instrument);
- solvency statement: each director of a Demerging Company who votes in favour of a demerger must sign a certificate stating that (a) in their opinion the demerger is in the best interests of the Demerging Company and (b) they are satisfied on reasonable grounds that they can make the solvency statement (saying that the Demerging Company is, and will remain until after the demerger is complete, able to discharge its liabilities as they fall due) or there is a reasonable prospect of obtaining the permission of the court to the demerger (court approval will be required where declarations of solvency are not possible). The proposed directors of the Demerged Company must sign a similar certificate regarding the expected solvency of the Demerged Company for the twelve month period following the demerger. It is important to note that if none of the existing directors are to be directors of the Demerged Company then at least one of the existing directors who signed the certificate in relation to the Demerging Company must also sign the post demerger certificates;
- shareholder protection: shareholders may approve or oppose the proposed demerger at an extraordinary general meeting. They must also be provided with access to sufficient information in order to make an informed decision. A shareholder can notify an entity of its objection or opposition to the demerger and make a court application;
- creditor protection: a Demerging Company must give notice to its creditors (who are known following reasonable enquiries by the directors to have a claim of over £5,000). A relevant creditor may serve notice of objection on the Demerging Company and may (if the claim remains unsatisfied) make a court application;
- employee protection: unless express provision is made to the contrary, contracts of employment are automatically transferred (with no amendments to their terms and conditions) across from the Demerging Company to the Demerged Company. An employee's period of continuous employment remains unaffected and any existing collective agreements continue to have effect. Written notice of the demerger together with a copy of the Demerger Instrument must be provided to the employees of the Demerging Company (the Demerging Company may redact commercially sensitive



information from the Demerger Instrument). Such an employee may object (in writing) to the demerger and such objection serves to prevent any transfer of the employee's contract of employment so that the relevant employee is considered as having resigned from the Demerging Company (from the date of the demerger) and never having been employed by the Demerged Company;

- ownership of assets and responsibility for liabilities: the Regulations propose, with certain limitations, to permit the Demerging Company to freely determine the destination of its assets and liabilities subject to such destination being specified in the Demerger Instrument. The Demerger Instrument should include a "sweep up" provision stating what will happen to the Omitted Assets and Omitted Liabilities. It is currently envisaged that Omitted Assets would be held jointly in common in equal parts between the Demerged Companies and that Omitted Liabilities of a civil nature would be apportioned jointly and severally equally between the Demerged Companies. A company under investigation or charged with a criminal offence will not be allowed to demerge pending the outcome of the proceedings. A financial penalty will be treated as a joint and several liability on each Demerged Company;
- tax: the introduction of a new demerger regime is intended to support a restructuring transaction which clearly has a dominant commercial purpose rather than providing a method for an entity or its shareholders to avoid tax. Therefore, the general anti-avoidance rule found in the Income Tax (Jersey) Law 1961 should be noted;
- date of the demerger: the specified date on the register is conclusive evidence of the completion date of the demerger; and
- types of demerger: Spin Off Demerger and Split Up Demerger.

## What documents need to be filed?

- The following documents must be filed with the Registrar:
- copy of the Demerger Instrument;
- any proposed amendments to the memorandum and articles of association of the Survivor Company;
- proposed memorandum and articles of association of a new Company;
- statement of solvency or a court order (as applicable);
- proof of notice of shareholder(s) meeting(s) to approve the demerger;
- special resolutions;
- declaration (certificate showing lodgement number) made to Comptroller of Taxes;
- certificate containing either a statement of solvency or a statements that the director is satisfied on reasonable grounds that there is a reasonable prospect of obtaining the permission of the court;
- a new company must submit a completed C2A or C2B form (as applicable).

It must be noted that the registration cannot complete the demerger until all shareholder applications objecting to the demerger have been disposed of and all creditor objections and objection applications periods have expired. The demerger becomes effective when all necessary registrations have been made on the public register by the registrar.



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### End Result

All property, rights, contracts, debts and other obligations of the Demerging Company will pass to the Demerged Company pursuant to proportions set out in the Demerger Instrument.

If the Demerger Instrument is silent, then:

- All property and rights will be held in common in equal parts by the Demerged Companies, and
- All liabilities, debts, contracts and other obligations will be held joint and separately by the Demerged Companies.

### Glossary

*Companies Law*: Companies (Jersey) Law, 1991;

*Demerged Company*: the entity resulting from the demerger;

*Demerger Instrument*: a mandatory instrument in the event of a demerger stating the terms and means of effecting the demerger, notably:

- if the Demerging Company will be a Survivor Company;
- details of the following: directors (name and address) of the Demerging Company, any arrangements necessary to complete the demerger, any payments to be made to a member or director of the Demerging Company, any securities of the Demerging Company being converted into securities of a Demerged Company;
- if the Demerged Company is to be a New Company, the Demerger Instrument must set out the following: proposed memorandum and articles of association (the “Memorandum and Articles”) of the Demerged Company, details (name and address) of any person to become a director of the Demerged Company and any other particulars required by Part 2 of the Companies Law to be delivered to the registrar if the Demerged Company was being incorporated under the Companies Law otherwise than by demerger;
- in the event that the Demerging Company will be a Survivor Company, the Demerger Instrument must indicate whether any amendments to the Memorandum and Articles are proposed to take effect on the demerger date and set out those amendments; and
- the Demerger Instrument must indicate the undertaking, property and liabilities of the Demerging Company and which are to become the undertaking, property and liabilities of each Demerged Company (a liability attached to any property of a Demerging Company must not be separated from that property);

*Demerging Company*: the entity that is demerging;

*JFSC*: Jersey Financial Services Commission;

*New Company*: a company incorporated as a result of a demerger;



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*Omitted Assets and Omitted Liabilities:* assets and liabilities omitted (inadvertently or deliberately) from the Demerger Instrument;

*Regulations:* Companies (Demerger) (Jersey) Regulations 2018;

*Spin Off Demerger:* the original entity continues to exist alongside one or more new entities;

*Split Up Demerger:* the original entity ceases to exist with the business being continued by two or more entities; and

*Survivor Company:* a Demerging Company which, upon completion of a demerger, continues as a Demerged Company.

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We are passionate about our work and strive for excellence in everything we do.

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