

## Demerger of companies

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### Demerger of Jersey companies: a guide to the new regime

#### What's new?

The Companies (Demerger) (Jersey) Regulations 2018 (the **Regulations**) are now in force. The Regulations introduce a new demerger regime for Jersey companies. In addition to the new regime, a demerger by way of a court sanctioned scheme of arrangement is still possible as an alternative under the Companies (Jersey) Law 1991 (the **Companies Law**).

#### Flexible structuring

The new demerger regime will be of particular interest to those who use, or are considering using, Jersey companies in their structures. It brings further flexibility to using a Jersey company and has a range of potential uses, such as:

- implementing a pre-sale reorganisation
- modifying a group structure to separate existing businesses and risks
- restructuring a portfolio of assets

As there is no requirement to go to court for approval, the new demerger regime may result in significant cost and time savings for those looking to divide the undertaking, property, rights and/or liabilities of a company among two or more companies.

#### Demerger overview

The Regulations introduce a new simple way for a relevant Jersey company (a **demerging company**) to demerge into two or more relevant Jersey companies (each a **demerged company**). One of the demerged companies will be a "survivor company" (if the demerging

company continues to exist on completion of the demerger) or all of the demerged companies can be new companies.

The following companies will not be able to demerge or become a demerged company using the new procedure:

- any Jersey company that is a cell company or a cell
- any Jersey company that has unlimited shares or guarantor shareholders
- any Jersey company that is registered under the Banking Business (Jersey) Law 1991 (ie it carries on a banking business in or from within Jersey)
- any Jersey company that is a permit holder under the Insurance Business (Jersey) Law 1996 (ie it carries on an insurance business in or from within Jersey)
- any Jersey company that is under investigation in relation to an offence or has been charged with an offence and against which there is a criminal prosecution pending (until the outcome of the proceedings)

For the time being, the new regime will also not be available to Jersey companies that are liable to pay tax in Jersey at the company or shareholder level. This includes (among others):

- any Jersey company that is a financial services company within the meaning given in Article 3(1) of the Income Tax (Jersey) Law 1961 (the **Income Tax Law**) that is subject to tax under Article 123D of that law
- any Jersey company that is a utility company within the meaning given in Article 123C(3) of the Income Tax Law
- any Jersey company to which Article 123C of the Income Tax Law applies where ultimately a Jersey resident individual owns (whether directly or indirectly) more than 2% of the ordinary share capital of the company
- any “large corporate retailer” within the meaning given by Article 123I of the Income Tax Law
- any Jersey company registered under Part 3 of the Goods and Services Tax (Jersey) Law 2007 (ie it is a local company paying GST)

However, for all international (non-Jersey resident owned) clients, it is very unlikely that these restrictions will apply.

### **Demerger process**

The demerging company must apply to the registrar of companies in Jersey (the **Registrar**) to complete the demerger. The application must include the following:

## Demerger instrument

There are no restrictions on what may go into the demerger agreement and it need not be very detailed but it must include:

- whether the demerging company will be a survivor company or a new company
- details of the directors of the demerging company and the demerged company (if a new company) or any board changes (if a survivor company)
- details of any arrangements necessary to complete the demerger
- details of any payment to be made to a shareholder or director of the demerging company
- 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 (except that a liability attached to any property of a demerging company must not be separated from that property)
- the proposed memorandum and articles of association of the demerged company (if a new company) or any amendments to the memorandum and articles of association of the demerging company (if a survivor company)
- the demerged company's registered office
- in relation to any securities of a demerging company, the manner in which the securities of a demerging company will be converted into securities of a demerged company or confirmation of the kind of the payment that the holders will instead receive and how and when they will receive it

The demerger instrument may also provide for circumstances in which the demerger may be revoked prior to its completion.

## Board and shareholder approvals and confirmations

- Resolutions of the directors of the demerging company that, in their opinion, the demerger is in the best interests of the demerging company
- Certificate of solvency given by each director who voted in favour of the demerger 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. If the demerging company is insolvent and the directors cannot make the solvency certification, the Royal Court of Jersey (the **Court**) must approve the demerger. To approve the demerger the Court must be satisfied that the demerger would not be unfairly prejudicial to the interests of any creditors or shareholders of the demerging company

- Certificate of confirmation given by each proposed director of each demerged company that the demerged company will be able to continue to carry on business and discharge its liabilities as they fall due for the 12 months after the signing of the certificate. If none of the directors of the demerging company will be directors of any demerged company, then at least one of the directors who voted in favour of the demerger must also sign the confirmation certificate
- Special resolutions of the shareholders of the demerging company (and, where there is more than one class of shareholders, by a special resolution of each class of shareholders) approving the demerger instrument and altering the demerging company's memorandum and/or articles of association (if required)

### **Information rights**

Creditors, shareholders and employees are entitled to certain information so that they can make informed decisions about the demerger. The demerging company must make available for inspection by its shareholders and creditors (a) the demerger instrument and (b) the proposed memorandum and articles of association of each demerged company. The demerging company may remove commercially sensitive information from these documents before making them available for inspection.

### **Notice to tax authority**

The demerging company must give notice of the demerger to the Comptroller of Taxes in Jersey by way of electronic self-certification. The certification must confirm that the demerging company is a Jersey company that is not liable to pay Jersey tax (ie investor tax resident elsewhere or is a zero rated company for tax purposes) and does not have any shareholders who are liable to pay Jersey tax. Following notification the Comptroller of Taxes will 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.

### **Shareholders and creditors**

Similar to the merger procedure under the Companies Law, a shareholder has the right to object to a demerger within 21 days of shareholders having approved the demerger instrument.

A shareholder who has not voted in favour of the demerger has a further 21 days after notifying his objection to the demerging company to apply to the Court on the ground that the demerger would unfairly prejudice the shareholder's 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 complaint.

### **Notice to creditors**

The demerging company must also give written notice of the proposed demerger to all creditors with claims of over £5,000 (of whom the directors are aware after making reasonable enquiries) within 21 days of shareholder approval of the demerger and publish such notice in a Jersey newspaper (or other approved method of publication).

If the demerging company is solvent, the notice must state that the creditor has the right to object to the demerger and may give notice that it objects to the demerging company within 21 days of the date of publication of the notice. A creditor has a further 21 days following such objection to apply to the Court for any order that the Court thinks fit in the circumstances. If the creditor's claim has not been discharged, this may include restraining the demerger from proceeding or modifying the demerger instrument.

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

## **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 and make the demerger instrument available for inspection (the company may first remove any commercially sensitive information from the document).

Any employee may object in writing to the transfer of his contract of employment under a demerger. (See *Employees, employment contracts and pensions* below).

## **Consents required**

If the Registrar is satisfied that the application complies with the provisions of the Regulations, it will register the notices relating to the demerger.

A demerger will not need the Court's consent unless it involves an insolvent company or an objecting creditor or shareholder makes an application to the Court.

As with a merger between Jersey companies, the Jersey Financial Services Commission will not need to consent to a demerger, save where it has issued a licence or consent to a demerging company requiring transfer. (See *Licences, authorisations and other permissions* below).

## **Completion and effect of demerger**

### **Incorporation**

Following completion of a demerger, if the demerging company is a survivor company, it will

continue as a demerged company together with one or more demerged companies that are new Jersey incorporated companies. If the demerging company is not a survivor company, it will cease to be incorporated as a separate company and will continue as two or more demerged companies that are new Jersey incorporated companies. The Registrar will issue the relevant certificates on demerger.

### **Property, rights and contracts**

The property, rights, civil liabilities, contracts, debts and other obligations to which the demerging company was subject immediately before the demerger was completed will pass to the demerged company in the parts stated in the demerger instrument. If not stated, the default position is that:

- all property and rights will be held jointly in common in equal parts by the demerged companies
- all civil liabilities, contracts, debts and other obligations will be held jointly and severally by the demerged companies

If a Jersey company has non-Jersey assets, we recommend that local advisors check for any additional requirements for their transfer.

### **Actions, legal proceedings and financial penalties**

Subject to an order of the Court:

- all actions and other legal proceedings which were pending by or against the demerging company immediately before the demerger was completed may be continued by or against all or any of the demerged companies
- the demerged companies will be jointly and severally subject to all financial penalties which the demerging company was subject to immediately before the demerger was completed

### **Licences, authorisations and other permissions**

Any licence (which includes an authorisation, a certificate, consent, permit, registration or any other permission) held by a demerging company will not transfer to a demerged company on completion of the demerger unless the authority that granted the licence has consented to the transfer.

### **Employees, employment contracts and pensions**

Contracts of employment between the demerging company and its employees will automatically transfer to the relevant demerged company with no change in terms and conditions, unless (a) otherwise stated in the demerger instrument or (b) an employee objects

to a transfer of his rights and/or liabilities under an employment contract and gives notice of objection in writing before the completion date of the demerger.

If the employee does not withdraw his objection before completion of the demerger, the employment contract will not transfer to the relevant demerged company. The contract will be treated as having terminated on the later of (a) the completion date of the demerger or (b) the expiry of any notice period applying to the employee's employment contract immediately before the completion date of the demerger and the demerging company may make a payment to the employee in lieu of notice in respect of all or part of the relevant unexpired notice period.

Subject to the above, the demerger will not terminate employment contracts and will have effect from the date of completion of the demerger as if between the employee and the relevant demerged company. In addition, any collective agreements in force immediately before the demerger and which apply to employees will continue to have effect.

The Regulations contain further provisions relating to employees, including the transfer to a demerged company of information concerning an employee of the demerging company and changes to an employee's employment terms and conditions following completion of the demerger.

If, immediately before the completion date of a demerger, the demerging company provides a pension scheme and has a contractual obligation to pay a contribution, the obligation to pay contributions will transfer to the new employer company on the completion date of the demerger. The general rule under the demerger regime is that the new employer company must provide something broadly equivalent to the arrangements in place prior to the demerger. The Regulations do not set out any detail relating to pensions and so the demerger instrument should set out any provisions that may be required if the demerging company has any retirement schemes in place.

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