

Consultation response and policy paper:

Secondary legislation under the Limited Liability Companies (Jersey) Law 2018

MARCH 2021

BACKGROUND

The States Assembly adopted the Limited Liability Companies (Jersey) Law 2018 (the “LLC Law”) in September 2018. Since that date there has been significant work across Government, the Jersey Financial Services Commission (the “Commission”), Jersey Finance Limited (“JFL”) and the finance industry in the development of the necessary secondary legislation and regulatory framework to ensure the successful launch of limited liability companies (“LLCs”) in Jersey.

JFL has kindly supported the Government of Jersey through its LLC working group (the “LLC Working Group”), made up of representatives from the finance industry with specialist interest and knowledge in LLCs, together with policy representatives from the Commission.

On 2 September 2020 the Government of Jersey launched a public consultation on secondary legislation under the LLC Law. Three sets of draft Regulations were published together with the consultation paper:

1. The Limited Liability Companies (Consequential Amendments) (Jersey) Regulations 202- (the “Consequential Regulations”);
2. The Limited Liability Companies (Winding Up and Dissolution) (Jersey) Regulations 202- (the “Winding Up Regulations”); and
3. The Limited Liability Companies (General Provisions) (Jersey) Regulations 202- (the “General Provisions Regulations”), together the “draft Regulations”.

Feedback was sought on the content of the draft Regulations, the policy positions adopted and the proposals to introduce LLCs more general.

During the consultation period, Government has continued to work with the JFL working group to ensure the introduction of an appropriate legislative and regulatory framework.

The consultation period closed on 2 October 2020. The Government of Jersey received two responses to the consultation. One from JFL, containing comments from four respondents and one from a Jersey Society of Chartered and Certified Accountants (the “JSCCA”). The JSCCA limited its responses to the audit and accounting provisions of the General Provisions Regulations. Responses are summarised below, and the Government of Jersey has stated its policy position, where appropriate.

During the consultation period, the Government has continued to work closely with the LLC Working Group and the Commission to identify any outstanding amendments required and to ensure the appropriate legislative and regulatory treatment of LLCs is adopted.

Further questions or comments relating to this consultation response and policy paper can be directed to:

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PART ONE: THE CONSEQUENTIAL AMENDMENTS

1. Please provide any general comments in relation to the Consequential Regulations.

1. One respondent questioned whether an LLC may be a recognized fund. Recognized funds are subject to the highest level of regulation and there are very few established in the jurisdiction. It was not considered necessary to expressly prohibit LLCs being used as recognized funds as the [Collective Investment Funds \(Recognized Funds\) \(Rules\) \(Jersey\) Order 2003](#) only contemplates applications in respect of a unit trust or a company.
2. The same respondent queried whether the list of functionaries in the Schedule to the Collective Investment Funds (Jersey) Law 1998 should be updated to reflect the amendment to Article 5(2) of the Law. The schedule of functionaries does not need to be amended because the LLC would be acting as one of the types of functionaries in the Schedule. However, the recognized fund rules impose requirements on the manager and depository (custodian/trustee) to be Jersey companies. Even if an application was made by an LLC the JFSC has the ability to refuse such application.
3. This respondent also noted that the provision in the Financial Services (Jersey) Law 1998 prohibiting the carrying on of financial services business by a company incorporated in Jersey should be extended to an LLC registered in Jersey. As noted in the table below at question 3, amendments have been requested to the Financial Services Law to ensure consistent treatment of LLCs.
4. No further responses were received to this question.

2. Do you consider any further consequential amendments are required to ensure the successful launch of the Jersey LLC? If yes, please provide details.

5. One respondent emphasised the importance of permitting an LLC manager to conduct alternative investment fund services business (“AIFSB”). The purpose of the inclusion of the question about AIFSB in the consultation paper was to try to ascertain the demand for this use type, while balancing the significant time and effort involved in making such further amendments.
6. The same respondent made the following comments in relation to AIFSB:
 - What happens if the manager steps outside the sub-threshold landscape and is not capable of registering as an AIFSB?
 - AIFSB would be an essential component as the overall strategy should be to allow a clear ability to market to EU investors.
7. Another respondent noted that not being able to use an LLC as a manager to an AIF would be a further restriction that would limit its usefulness and appeal in the marketplace. It was considered that using a Jersey LLC as an AIFM when marketing into Europe would be one of its key advantages.
8. One respondent queried the rationale for prohibiting LLCs from being regulated for AIFSB.

9. The final respondent to this question and did not consider further consequential amendments were required.
10. It should be noted that it was not the intention to prohibit the use of LLCs for AIFSB, the purpose of the consultation question was to gauge demand for the use and to balance this against the need to introduce provisions now.
11. On balance, and following further discussion with the Commission, the Government of Jersey agrees that there is merit in including these amendments now to permit an LLC manager to conduct AIFSB (but not Fund Services Business). This will allow Jersey’s LLC to be used to more widely facilitate access to the EU market, which we anticipate will be a key consideration for the US. Government has continued to work closely with the LLC working group and the Commission to ensure that all relevant legislation has been identified and appropriately amended. Further changes to the Consequential Regulations have therefore been requested to enable an LLC manager to conduct AIFSB.
12. Following further consideration of the Consequential Regulations together with the LLC Working Group and the Commission, additional provisions were noted as necessary to facilitate the successful launch of LLCs. The Legislative Drafting Office has been asked to consider including these changes to ensure the functionality and appropriate regulatory treatment of LLCs. In addition to tidying up provisions, the following more substantive changes have also been requested:

Legislation	Amendments
Bankruptcy (Désastre) (Jersey) Law 1990	<ul style="list-style-type: none"> • Extension of Article 10(6) to transfers of LLC interests; • Extension of wrongful trading provisions to LLCs (Article 44); • Amendment to draft Regulation 6(17) to reflect the provisions of Article 37 LLC Law.
Financial Services (Jersey) Law 1998	<ul style="list-style-type: none"> • Amending the definition of “group” to include mixed groups comprised of LLCs and companies; • Introduction of definitions of “holding LLC” and “subsidiary”; • Amending the definition of LLC to reflect that the corresponding definition of a company under the Financial Services (Jersey) Law 1998 includes a body corporate registered anywhere in the world. This will ensure consistency of treatment; • Extension of Part 3A to LLCs.
Proceeds of Crime (Jersey) Law 1999:	<ul style="list-style-type: none"> • Extension of Articles 37 and 43 (offence provisions).
Money Laundering (Jersey) Order 2008	<ul style="list-style-type: none"> • Amending the reference to a Jersey LLC instead to an LLC registered anywhere, to reflect the approach currently taken in relation to body corporates.

Criminal Offences (Jersey) Law 2009	<ul style="list-style-type: none"> • Extension of the offence provisions to cover offences capable of being committed by the secretary of an LLC.
Limited Liability Companies (Jersey) Law 2018	<ul style="list-style-type: none"> • Amending the definition of LLC interest to align the existing provisions of the LLC Law. As a more-Cayman style definition was originally adopted, certain provisions of the LLC Law do not quite work. To address this, it is proposed that the definition is amended to emphasise that an LLC interest may or may not include economic rights; • Amending Article 21 of the LLC Law to emphasise that a managing member would be caught as a “manager” and the same duties apply to those acting as managing members as do apply to managers; • Clarifying the amendment made to Article 47 to put it beyond doubt that a baseline duty of good faith applies to managers of LLCs. This is consistent with the US approach.

3. Have you received any enquiries into an LLC manager conducting AIFSB?

13. The responses of two of the respondents commented on AIFSB in their responses to question two, above.
14. Another respondent reported that they had not received any enquiries and explained that they had not been publicising LLCs at this time. It further commented that it would be a mistake not to allow LLCs to seek AIFSB registration.
15. No further responses were received to this question. The Government of Jersey acknowledges that Jersey LLCs and their usage has not been actively promoted by the finance industry. It is recognised that once the LLC Law and draft Regulations are brought into force, interest will likely increase and that it would be beneficial to have a complete regime in place in readiness for the launch.

PART TWO: THE WINDING UP REGULATIONS

4. Do you agree with the commercial approach adopted in respect of the winding up and dissolution of Jersey LLCs? If not, please provide further comment.

16. One respondent agreed with the approach on winding up. Other respondents did not comment on this question.

17. The approach to winding up of LLCs was given significant thought by Government, the LLC Working Group and the Commission during the drafting. Government considers that the appropriate approach to winding up has been adopted here, subject to the additional matters set out at question six, below, being adopted to the draft.

5. Do you consider it necessary and/or appropriate to extend the full inspector regime of the Companies Law to LLCs? Please provide details.

18. One respondent did not consider it necessary and/or appropriate to extend the full inspector regime of the Companies Law to LLC but did not expand further on its response. The Government did not receive any further responses to this question.

19. Government has continued to consider this issue together with the Working Group and the Commission and on balance considers it appropriate to include the regime to ensure adequate protections are in place to allow, if appropriate, full investigations into LLCs. It was noted anecdotally that there was limited use of the inspector regime and therefore, on balance, the benefit of including the provisions outweighs any potential negative perception.

6. Please provide any general comments in relation to the Winding Up Regulations

20. Only one response was received to this question. The respondent suggested that it was sensible to follow the familiar and well understood corporate model.

21. The Government, together with the JFL working group and the Commission has identified further amendments required to the Winding Up Regulations to ensure they fully contemplate the winding up of an LLC. These include:

- Provision for the automatic winding up of an LLC on the expiry of a fixed period of time or on the happening of a specified event;
- A requirement for notice of a creditors' winding up to be filed with the registrar to ensure a creditors' winding up is searchable;
- Tidying up amendments to ensure consistency between the Winding Up Regulations and corresponding provisions in the Companies Law.

22. Once these provisions have been included, Government considers the winding up framework for LLCs will be complete.

PART THREE: THE GENERAL PROVISIONS REGULATIONS

7. Please provide any general comments in relation to the General Provisions Regulations.

23. The JSCCA noted that the proposed definition of “market traded limited liability company” was consistent with the definition of “market traded company” under the Companies (Jersey) Law 1991 (the “Companies Law”) and that the Companies Law also defined a “regulated market”. The JSCCA emphasised the need to include an equivalent definition within the General Provisions Regulations. Government agrees with this suggestion and has requested that an equivalent definition is introduced in a revised draft.
24. The JSCCA also noted that the market traded company regime was introduced as a result of the European Union’s (“EU”) Statutory Audit Directive (the “SAD”) and included an auditor oversight regime. This raised the question of whether the SAD could apply to LLCs. Following further investigation and discussion with the JSCCA and its Technical Sub-Committee, it was considered that the SAD could apply to LLCs and therefore it was appropriate to extend the relevant auditor oversight provisions of the Companies Law to LLCs. Government has requested these changes be made by the Legislative Drafting Office.
25. The JSCCA further noted that although the General Provisions Regulations set out the accounting framework, there was no explicit requirement for LLCs to prepare accounts. Government agrees and has requested that a provision be inserted to address this.
26. The JSCCA also suggested that a provision equivalent to Article 105(11) of the Companies Law be introduced to explain that consolidated accounts are sufficient and entity only accounts are not necessary.
27. Following the JSCCA’s review of the accounting and audit provisions, Government has also requested that auditor resignation and associated provisions be included, to reflect the position under the Companies Law.
28. One respondent combined its answer to this question with question 8, below. We have set out those comments below due to their nature.
29. No further responses were received to this question.

8. Please provide comments on the requirement that if a body corporate is to be a manager of an LLC, it must be registered under the Financial Services Law.

30. One respondent queried the current approach adopted under the General Provisions Regulations, which requires a body corporate to be regulated under the Financial Services (Jersey) Law 1998 (the “Financial Services Law”) if it is to act as a manager of an LLC by way of business.
31. The same respondent suggested that it would be more appropriate to draw comparisons with limited partnerships and their treatment of general or managing partners. It was considered that additional regulatory restrictions would make the LLC an unattractive product. Reference was made to the intended market for LLCs and that while some divergences from local

legislation would be acceptable, it is important that legislation closely aligns to the expectations of the market.

32. It was emphasised by this respondent that the LLC as a product is not targeted at members of the public and that if there were concerns about the mis-selling of LLCs that these could be addressed directly and not through regulation of the product itself.
33. Another respondent also commented that a requirement for managers of LLCs to be regulated if they were a body corporate would make structuring unappealing from a cost and compliance perspective. This respondent considered that within the funds space, LLCs would be used in sophisticated arrangements with appropriate governance requirements in place.
34. One respondent considered it appropriate to apply the same regulatory provisions to body corporates as managers of LLCs as applies to corporate directors of companies.
35. The JSCCA did not have any specific comments in relation to this question.
36. The Government of Jersey and the Commission accepts the concerns expressed here and have worked together to achieve a solution that protects the commercial viability of the product while operating within the appropriate regulatory framework and affording the appropriate levels of consumer protection. The requirements for LLCs have been carefully considered against similar vehicles including LLPs, LPs and companies. It has been possible to reach the position that a corporate manager of an LLC will not be required by the LLC Law to be registered as a TCB, however, certain COBO conditions will be imposed on registration to ensure the appropriate levels of oversight remain. The proposed conditions are that administration services to an LLC must be provided (on establishment and on an ongoing basis) by a person registered by the Commission under the Financial Services (Jersey) Law 1998 and that the LLC agreement must be in writing.
37. Where a manager of an LLC is acting “by way of business” and is providing specified TCB services, it will still be required to be registered under the Financial Services (Jersey) Law 1998 (as amended by the Consequential Regulations).

9. Do you consider it appropriate to limit the merging or demerging of a Jersey LLC in any way? Please provide details.

38. One respondent did not consider it necessary to limit the merging and demerging of LLCs.
39. The JSCCA noted that it would be helpful to identify the differences between the General Provisions Regulations and the treatment of merging and demerging companies under the Companies Law.
40. The Government of Jersey did not receive any other responses to this question.
41. We have instructed the legislative drafter that it would be appropriate to mirror the provisions in the Companies Law in respect of mergers and demergers of LLCs. This reflects the need for consistency, where appropriate, of treatment of other vehicles.

10. Do you consider it appropriate to limit the continuance of LLCs into or out of Jersey in any way? Please provide details.

42. One respondent did not consider it necessary to limit the continuance of LLCs into or out of Jersey in any way.

43. The JSCCA again noted the relevance of the equivalent provisions in the Companies Law.

44. No further responses were received to this question.

45. The Government of Jersey has reviewed the continuance provisions for LLCs against the Companies Law provisions and is satisfied that there is consistency of treatment.

11. Have you received any enquiries into the continuance of LLCs in Jersey? Please provide any details.

46. One respondent reported that it had not received any continuance enquiries in relation to LLCs.

47. The JSCCA has not received any enquiries into the continuance of LLCs in Jersey, but Government of Jersey notes that any enquiries are likely to be directed at law firms as intermediaries.

48. No further responses were received to this question.

49. The Government of Jersey recognises that the finance industry has not been actively marketing LLCs and that this is likely to be a material factor affecting the levels of enquiries generated. The Government of Jersey anticipates that once the appropriate legislative and regulatory framework has been finalised and the LLC Law brought into force, marketing of LLCs will increase, and further interest will be generated.

12. Do you consider any further provisions should be extended to LLCs? Please provide details.

50. One respondent advised that it did not consider it necessary to extend any further provisions to LLCs.

51. The JSCCA repeated its comments in relation to question 7.

52. No additional responses were received to this question.

53. Government has continued to review the General Provisions Regulations with the LLC Working Group and the Commission to ensure the regulations are appropriate. In doing so, the following substantive changes (in addition to those set out above) were identified as appropriate:

Legislation	Amendments
Companies (Audit) (Jersey) Order 2010	Replication of the provisions for LLCs.

Companies (Designated Body) (Jersey) Order 2012	Extension of the provisions to LLCs.
Companies (Exemptions) (Jersey) Order 2014	Extension of the provisions to LLCs.

PART FOUR: GENERAL

13. Have you received any enquiries into establishing LLCs?

54. One respondent reported the following work in relation to demand for LLCs:

- Industry representatives expressed a consensus view that there remains a business case for LLCs when the issue was re-visited in August 2020;
- During 2019, trade associations agreed that the full implementation of the LLC Law and draft Regulations remained a priority;
- JFL regularly receives feedback from members on demand for LLCs;
- JFL's LLC implementation working group have given extensive consideration to the use case for LLCs, to ensure it meets market expectations;
- JFL has sense-checked the development of LLCs regularly, including with US intermediaries.

55. Another respondent reported that it had not received any enquiries into establishing LLCs.

56. No further comments were received in response to this question.

57. As stated throughout, the Government of Jersey acknowledges that there has been little, if any, marketing of LLCs at this stage. Government appreciates that interest levels will likely increase once the legislation is in force.

14. If yes, are you able to provide details of the number of enquiries and nature? Please provide any further information in respect of such enquiries.

58. The Government of Jersey did not receive any responses to this question. The legislative and regulatory treatment of LLCs has been developed based on informed discussions with the LLC Working Group, JFL's Fiscal Strategy Group and the Commission. Jersey Finance has also liaised with contacts in the US to understand the anticipated use of a Jersey LLC.

59. On this basis, we are satisfied that the appropriate legislative provisions have been adopted (subject to the additional amendments highlighted in this response paper).

OTHER

60. The Government of Jersey received the following additional comments, which did not directly respond to questions posed.
61. One respondent noted that further work was required in relation to taxation and substance legislation. We continue to work closely with the Revenue Jersey team on the necessary amendments and these issues are being addressed.
62. The LLC Law was amended by the Limited Liability Companies (Amendment) (Jersey) 2020 (the "Amendment Law"). The Amendment to Article 47 sought to align the position with other jurisdictions, where the duty of good faith was a baseline duty. It is clear from the Explanatory Note to the Proposition, that the intention was that the baseline duty would be required, however, on reflection, we do not consider this to be entirely clear through the drafting. As such, Government has sought an amendment to the Amendment Law to address this and put it beyond doubt that a baseline duty of good faith applies to managers of an LLC.
63. Another respondent commented that a baseline duty of good faith with the ability for members to ratify possible breaches on a case by case basis was a familiar approach for the US market.
64. A further respondent commented that regulating members of an LLC will make the product unattractive. It should be noted that this will only apply where acting as a member is done by way of business. Government does not consider this to be detrimental to the successful launch of the product.

NEXT STEPS

65. We await revised versions of the draft Regulations from the Legislative Drafting Office which we will consider carefully with the LLC working group and Commission to ensure the appropriate commercial and regulatory treatment of the LLC is achieved.
66. Once finalised, we would hope to lodge the draft Regulations for debate by the States Assembly in the first half of 2021.
67. The Law and draft Regulations will be brought into force by Appointed Day Act. At this stage Article 12 of the LLC Law will not be brought into force due to the levels of complexity. Government, together with the Commission, will continue to investigate how this may be introduced appropriately, with a view to bringing the provision into force at a later date.

CONCLUSION

68. Government would like to take this opportunity to thank consultation respondents, the LLC Working Group and the Commission for their invaluable input into this process. We look forward to continuing to work with stakeholders to see the successful launch of the Jersey LLC during 2021.