

Consultation: Limited Liability
Companies (Amendment)
Regulations – Enabling
Election for ‘Body Corporate’
and the Limited Liability
Companies (Winding Up and
Dissolution) (Amendment)
(Jersey) Regulations

Summary:

Under the Limited Liability Companies (Jersey) Law 2018, which came into force on 1 September 2022, a company registered under the law have separate legal personality but are not a body corporate. The Government of Jersey is consulting on amending the law to allow for the election at time of registration that the company be a Body Corporate. Alongside this consultation, which is being circulated to members by Jersey Finance Limited, the Government is working closely with representatives from the financial services and legal industries to address the requirements of the proposal.

In addition, since the coming into force of the Limited Liability Companies (Winding Up and Dissolution) Regulations 2022 (“LLC WU Regulations”), subsequent amendments to the Companies (Jersey) Law 1991 permitting a creditor with debt of £3000 or more to apply to the court for a company to be wound up and a liquidator appointed. It is now proposed that the LLC WU Regulations be amended to provide similar relief for creditors of an LLC.

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14 November 2022

Closing date:

28 November 2022

How we will use your information

The information you provide will be processed in compliance with the Data Protection (Jersey) Law 2018 for the purposes of this consultation. For more information, please read our privacy notice at the end of this document.

All information provided as part of this Consultation will be collected by Jersey Finance Limited and anonymised before being shared with the Government of Jersey. No personal data will be collected by the Government of Jersey.

Ways to respond

Responses may be submitted in writing as follows:

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Subject heading: "Limited Liability Companies – Body Corporate",

Responses sent to Jersey Finance will be anonymised before sharing with Government.

Background

1. On 1 September 2022, the Limited Liability Companies (Jersey) Law 2018 (LLC Law) came into force as amended by the Limited Liability Companies (Amendment) (Jersey) Law 2020 and the Limited Liability Companies (Amendment No. 2) (Jersey) Law 2022.
2. Under the LLC Law as enacted, a limited liability company registered would have separate legal personality, but would not be a body corporate
3. The Limited Liability Companies (Amendment No. 2) (Jersey) Law 2022 added Article 2A to the Limited Liability Companies (Jersey) Law 2018, granting the States Assembly the authority to amend the LLC Law to permit the registration of a limited liability company as a body corporate.
4. The Government now seeks to amend the LLC Law to create the option of electing at time of registration that a limited liability company be a body corporate. Such an election will be irrevocable.

Rationale and Benefits of offering a Body Corporate Limited Liability Company Option

5. Jersey is the only jurisdiction where the law specifically provides that LLCs are not bodies corporate. Jersey, after consultation, decided that it could be helpful for the purposes of tax transparent treatment in the UK if LLCs were not a body corporate. At the time, it was believed that this provision could provide a USP to our LLC product. Tax lawyers had confirmed that it could be helpful but that it was by no means a prerequisite since the *Anson* case.
6. In Jersey, the Income Tax Law will prescribe a specific course of action. Other jurisdictions' tax authorities will not be particularly swayed by Jersey's tax treatment, they will rather try and match the legal aspects of LLCs to their own tax law. In part this means that any statement in the Law that an entity is not a body corporate has to be consistent with the treatment under the Law.
7. UK Tax law has a peculiarity as to how it describes a company for Tax purposes being: "any body corporate or unincorporated association, but does not include a partnership, a co-ownership scheme as defined by FSMA00/S235A, a local authority or a local authority association' (CTA10/S1121(1))." Based on this definition it would be very difficult for an LLC to be considered anything other than a company under UK Tax Law except in very specific circumstances.
8. Under US tax law, the Internal Revenue Service allows LLCs to elect to be treated as corporations for Federal tax purposes only, allowing greater flexibility there for any LLC's US tax position notwithstanding what is in our Laws.
9. In summary, Revenue Jersey's view is that nothing in terms of the direct tax treatment seems to hang on the phrase being used, and all options not a corporate body, being a corporate body, or silence lead in the main to a similar place for tax.

The Importance of Alignment with a Familiar LLC Form

10. Advice received from tax partner in a London-based US law firm stated that there were difficulties with the decision to state that a Jersey LLC is not a body corporate.
11. The main difficulty is that the implications of being an entity that has separate legal personality, but which is not a body corporate, are not fully understood in a regulatory context and, importantly, have not been fully explored by the court. Furthermore, our approach is different from Cayman, which could make a switch to Jersey LLCs for current Cayman LLC clients difficult.

12. When looking at the main competitors, we see that Cayman and Guernsey specifically state that an LLC is a body corporate in their statute. While the reasoning for this choice is unclear, this choice may have been influenced by a desire to leverage English case-law to guide its courts when determining issues in respect of Cayman LLCs.
13. Other competitive LLC jurisdictions are silent on body corporate status e.g., Bermuda, the Isle of Man, and the US states of Delaware and Wyoming.
14. A key driver for establishing a Jersey LLC was its familiarity to practitioners in the international arena. It is for this reason that the option of registering a Jersey LLC as a body corporate is seen as important.
15. In UK regulation, the definition of a Collective Investment scheme (CIS) is widely drawn and covers a broad variety of investment arrangements, not just traditional investment funds. As such, it is possible for a CIS to arise inadvertently. We understand that this only impacts activity conducted from within the UK, and several use cases for Jersey LLCs would fall within that territorial scope.

Potential Classification as a Collective Investment Scheme Under UK Regulations

16. In setting up any sort of joint investment, co-ownership, profit share or other collective investment arrangement, consideration should be given to whether or not such arrangements amount to a CIS, to ensure that the activity of establishing, operating, or winding up a CIS is not unwittingly carried on without appropriate authorisation under FSMA. A CIS is an arrangement that involves the participants collectively investing in property (of any description) and sharing any resulting profits or income. To qualify as a CIS for the purposes of the regulated activity of establishing, operating, or winding up a CIS, the scheme must fall within the definition at section 235 of FSMA. Similarly, section 236 defines open-ended investment company.
17. In certain respects, some activity may be considered to have characteristics similar to those of a fund.
18. If it includes the following elements:
 19. There are multiple parties investing in an entity.
 20. That entity pools the cash received from the investors and uses it to buy financial assets.
 21. The return to the investors may depend, at least to some extent, on the performance of the underlying assets.
 22. For several reasons, the parties to a wide range of transactions will generally wish to ensure that the arrangement is not characterised as a fund and the objective will be that the issuer should not constitute a CIS.
 23. There are specific exemptions from the CIS regulations that apply only to a body corporate, and for this reason it is seen as desirable to offer an LLC that is a body corporate in order to benefit from these exemptions.
 24. The Financial Services and Markets Act 2000 (Collective Investment Schemes) Order 2001 (CIS Order) includes an exemption, such that arrangements do not amount to a CIS if two conditions are satisfied: (a) the rights or interests of the participants in the arrangement are represented only by instruments creating or acknowledging indebtedness within the meaning of article 77 of the FSMA 2000 (Regulated Activities) Order 2001; and (b) such instruments are issued by a single body corporate other than an open-ended investment company. Although the scope of the definition of an open-ended investment company may be uncertain to some extent, it is not likely to include the issuer in a typical securitisation.

25. The AIFM Regulations provide expressly that a securitisation special purpose entity is not an AIF. The meaning of the term "securitisation special purpose entity" is not the same as in the UK Securitisation Regulation, but it is defined broadly and should generally include the issuer in a typical securitisation. In addition, the FCA's guidance in PERG 16.2G (see Question 2.44) states that, where an SPV issues debt securities and applies the issue proceeds to acquire financial assets, the return on which is channelled back to the holders of the securities, the FCA will assume that the SPV is not an AIF so long as the arrangements fall within the exclusion for debt securities under the CIS Order (as described above).
26. The above exemptions were cited as a reason why a Jersey LLC which is not a body corporate would be discarded in certain use cases

International Developments

27. In 2016, the Cayman Islands introduced a Limited Liability Companies Law 2016 (the "Cayman LLC") with the feature that companies so registered under would be considered bodies corporate. It was intended that the Cayman Islands LLC would closely resemble a Delaware LLC, the latter being the entity of choice among US-based fund managers.
28. Since coming into force, the Cayman LLC has proved popular with US-based fund managers looking to attract offshore investment precisely because of its familiarity. To date over 3500 Cayman LLCs have been registered.

Proposal

29. It is envisaged the introduction of this US-familiar vehicle in Jersey would contribute to Jersey being an increasingly attractive jurisdiction for US (and equivalent European) business, as well as catering to our growing US market generally.
30. The addition of LLCs to Jersey (which innovatively combine various features of Jersey limited companies and statutory partnerships) also provide a new corporate tool for the finance industry.
31. Under the proposed amendments, those seeking to register a limited liability company in Jersey will have the opportunity to elect that the company either be a non-body corporate with separate legal personality, or a body corporate.
32. This election will be one time only, and irrevocable.
33. The body corporate limited liability company will only be available for companies the majority of whose activity takes place outside of Jersey, and thus will have little or no impact on Jersey residents.
34. The proposed draft regulations approved by the LLC Working Group make only such changes as are strictly necessary to allow for the registration of a limited liability company.
35. Notwithstanding that the amendments are narrow in scope and only go so far as to create this alternate form of limited liability company as contemplated by Article 2A of the LLC Law, it is desirable that industry have the opportunity to review and comment prior to their being lodged. To this end, we are asking Jersey Finance Limited to circulate the draft regulations to the appropriate interested parties within their membership for comment. This consultation

36. will be open for two weeks.

Question one: Do you believe the creation of a body corporate limited liability company option upon registration is desirable for the reasons stated? If not, please explain.

Question two: Are there other potential benefits of making available a body corporate limited liability company option upon registration for Jersey?

Question three: Do you believe the proposed amendments will achieve the goal of creating a body corporate limited liability company option? If not, please explain.

Question four: Do you agree that making the election of the form of limited liability company at the time of registration irrevocable is desirable? Please explain.

Conclusion

Government seeks to ensure that Jersey remains competitive in the international arena. The amendment of the LLC Law to include the option to register a limited liability company as a body corporate will serve to maintain and enhance Jersey's to continue to attract international business of high quality.

Question five: Please provide any general comments regarding the proposal.

Amendment of the Limited Liability Companies (Winding Up and Dissolution) (Jersey) Regulations 2022

37. Since the commencement of the Limited Liability Companies (Winding Up and Dissolution) (Jersey) Regulations 2022 (the "LLC WU Regulations"), amendments have been made to the Companies (Jersey) Law 1991 to (in brief) permit a creditor with a debt of £3,000 or more to apply to the court for a company to be wound up and for a liquidator to be appointed.

38. It is now proposed that the LLC WU Regulations be amended to reflect those changes so that similar provisions (with appropriate adjustments to allow for the characteristics of a LLC) be available to LLCs.

39. Certain minor changes have been proposed in relation to the Companies Law reflecting operational experience since the commencement of the amendments. These proposed changes are reflected in the amendments but will be subject to further consideration.

Question 6: Do you agree that these changes should be made to the LLC WU Regs?

Question 7: Are there any peculiarities of the LLC that need to be addressed in the amendments and have not been?

Question 8: Please provide any general comments.