

**Guernsey and English Company laws: a comparative note**

Guernsey adopted new company legislation on 1 July 2008: The Companies (Guernsey) Law, 2008 (**Company Law**). Various transitional regulations have been passed, the effect of which is to extend the period to allow companies to comply with the new provisions. Generally all companies must comply by 1 January 2010 unless specifically provided otherwise.

This note highlights some of the principal differences between Guernsey and English Company law. It also includes references to a number of provisions which are not set out in the Company Law.

<p><b>Corporate structures</b></p>	<p>Non-cellular companies or cellular companies</p> <p><i>Types of "liability"</i></p> <ul style="list-style-type: none"> <li>• Companies limited by shares or by guarantee</li> <li>• Mixed liability companies</li> <li>• Unlimited liability companies</li> </ul> <p><i>Cellular companies</i></p> <ul style="list-style-type: none"> <li>• Protected cell companies<sup>1</sup></li> <li>• Incorporated cell companies<sup>2</sup></li> </ul> <p>There is no concept of a <i>PLC</i>.</p>
<p><b>Incorporation process</b></p>	<p>Time to incorporate: 24 hours, 2 hours or 15 minutes</p> <p>Registry fees: £100, £350 or £750 (depending on speed of registration)</p> <p>Incorporation is undertaken by licensed corporate service providers (<b>CSPs</b>) who perform the necessary due diligence on the ultimate owners. CSPs are generally trust companies in Guernsey regulated by the Guernsey Financial Services Commission (<b>GFSC</b>). Collas Day has a wholly owned trust company, Guernsey Trust Company, which can provide this service.</p>
<p><b>Beneficial ownership</b></p>	<p>Every company (with some exceptions<sup>3</sup>) must have a resident agent. It is the agent's duty to take reasonable steps to ascertain the identity of beneficial owners and to maintain a register of beneficial owners if different from the legal owners.</p> <p>A member who does not comply with a disclosure notice may have restrictions placed on his rights by the company.</p> <p>Disclosure of beneficial ownership may be required by H.M. Procureur<sup>4</sup>, the GFSC, police or customs officers, if required in connection with criminal or regulatory investigations in Guernsey or elsewhere. Other persons do not generally have a right to this information.</p>
<p><b>Members' resolutions</b></p>	<p>In addition to ordinary and special resolutions, the Company Law introduced:</p> <ul style="list-style-type: none"> <li>• <i>Waiver resolutions</i>: (requiring 90% of eligible votes) to enable an eligible company to be exempt from audit<sup>5</sup>, and to dispense with the need for annual general meetings</li> <li>• <i>Unanimous resolutions</i>: to entrench certain rights of shareholders in the articles, and to convert a company into a mixed liability or unlimited liability company</li> </ul>

<sup>1</sup> Separate notes are available on Cell Structures

<sup>2</sup> Separate notes are available on Cell Structures

<sup>3</sup> Companies listed on recognised stock exchanges, their subsidiaries, closed or open-ended investment companies, supervised companies and States of Guernsey trading companies

<sup>4</sup> Equivalent to Attorney General

<sup>5</sup> See section on Audit below

<p><b>Share capital</b></p>	<p><i>Authorised share capital:</i> Companies incorporated on or after 1 July 2008 do not require an authorised share capital.</p> <p>Companies incorporated prior to that date have until 1 July 2011 to abolish their authorised share capital. Until such date, any increase in share capital will continue to be subject to ordinary resolutions.</p> <p><i>Authority to issue shares:</i> Directors must have authority (lasting up to a maximum of 5 years) to issue shares in the case of companies with more than one class of share capital. Companies incorporated before 1 July 2008 are not subject to the authorisation regime until 1 July 2011.</p> <p><i>Consideration for issue of shares:</i> there are detailed provisions governing the determination of the value of the consideration as being fair and reasonable to the company and all existing members.</p> <p><i>Pre-emption rights:</i> There are no statutory pre-emption rights on issue or transfer of shares.</p>
<p><b>Raising capital and borrowing</b></p>	<p>The Control of Borrowing (Bailiwick of Guernsey) Ordinance, 1959, as amended (<b>COBO</b>)<sup>6</sup> applies to borrowing by a Guernsey company:</p> <ul style="list-style-type: none"> <li>• in any 12 month period</li> <li>• of at least £500,000.</li> </ul> <p>Consent under COBO must be obtained from the GFSC if the above conditions are met, unless the monies are borrowed:</p> <ul style="list-style-type: none"> <li>• from a bank or similar entity <i>and</i></li> <li>• the borrowing is in the ordinary course of the company's business.</li> </ul> <p>COBO consent is also required if:</p> <ul style="list-style-type: none"> <li>• the company proposes to issue shares for non-cash consideration; or</li> <li>• the shares to be issued are to discharge any capital liability; or</li> <li>• redeemable shares are to be issued for the purpose of or involves the capitalisation of profits and reserves.</li> </ul> <p>The Prospectus Rules, 2008 apply, inter alia, to offers made to members of the public by Guernsey entities in certain circumstances. These rules set out certain disclosure requirements.<sup>7</sup></p>
<p><b>Accounts</b></p>	<p>Consolidated accounts are not a legal requirement for groups.</p> <p>An incorporated cell company (<b>ICC</b>) may prepare consolidated accounts for itself and its incorporated cells (<b>ICs</b>) as if it were a holding company and the ICs were its subsidiaries.</p> <p>A protected cell company (<b>PCC</b>) may restrict the information available between cells, i.e. shareholders of a particular cell are not entitled to information relating to other cells. Shareholders of the core may similarly be restricted to core information only.</p>

<sup>6</sup> COBO was previously the legislative basis on which closed-ended funds were approved in Guernsey by the GFSC. With effect from 15 December 2008, closed-ended funds fall under a new regulatory regime. See our note on Investment Funds.

<sup>7</sup> The Rules also apply to funds registered under the Registered Collective Investment Scheme Rules, 2008

<p><b>Audit</b></p>	<p>A company may be exempt from audit requirements provided:</p> <p>(1) It falls within no more than one of the following:</p> <ul style="list-style-type: none"> <li>• Annual turnover of at least £6.5m</li> <li>• Net balance sheet of at least £3.26m</li> <li>• Average number of employees of at least 50</li> </ul> <p><b>or</b></p> <p>(2) It is a dormant or asset holding company or has no more than 10 members</p> <p>An eligible company wishing to take advantage of this exemption must pass a waiver resolution in the year prior to the financial year to which the audit exemption is to relate, or in the case of a new company, in its first financial year.</p>
<p><b>Dividends and other Distributions</b></p>	<p>A distribution is the direct or indirect transfer of money or property (other than the company's own shares) or the incurring of a debt to or for the benefit of the member in respect of the member's interests.</p> <p>A dividend is a form of distribution. This is no longer restricted by reference to the "profits available for the purpose".</p> <p>Non-dividend distributions include the following:</p> <ul style="list-style-type: none"> <li>• Reduction of capital (no longer a court sanctioned process)</li> <li>• Share buy-backs</li> <li>• Redemption of shares</li> <li>• Financial assistance for purchase of own shares</li> </ul> <p>which may be authorised by the board if the company satisfies:</p> <ul style="list-style-type: none"> <li>• the Solvency Test immediately following the distribution; and</li> <li>• any other requirement in its memorandum or articles.</li> </ul> <p>A directors' certificate is required, except in the case of share redemptions by open-ended investment companies.</p> <p>Companies incorporated before 1 July 2008 may have articles which restrict dividends to only being made from "profits available for the purpose" and hence such companies will need to comply with both tests.</p>
<p><b>Solvency Test</b></p>	<p>This concept is based on the New Zealand Companies Act, 1993, the US Revised Model Business Corporation Act and the Ontario Business Corporations Act, 1982.</p> <p>Apart from the making of distributions, certain other corporate actions require satisfaction of the Solvency Test (namely amalgamations, migrations and conversions).</p> <p>Key elements of Solvency Test:</p> <ul style="list-style-type: none"> <li>• The company must be able to pay debts as they fall due - cash flow test</li> <li>• Its assets must exceed liabilities - asset test</li> <li>• In the case of a supervised company, it must satisfy other solvency requirements imposed by the GFSC.</li> </ul>
<p><b>Directors</b></p>	<p>Their powers and duties remain largely drawn from common law principles.</p> <p>Directors of PCCs and ICCs have specific duties in relation to the segregation of assets and liabilities of cells (and in the case of PCCs, the core).</p> <p>Codes of conduct issued by the GFSC in respect of supervised companies are relevant to the scope of directors' duties.</p>

<b>Reorganisations and Reconstructions</b>	<ul style="list-style-type: none"> <li>• Amalgamation</li> <li>• Migration</li> <li>• Company conversions (PCCs: ICCs: stand alone companies)</li> <li>• Schemes of arrangement<sup>8</sup></li> <li>• Takeover and squeeze-out provisions<sup>9</sup></li> </ul> <p><i>City Code on Takeovers and Mergers</i>: there was previously some uncertainty as to whether the Code applied to Guernsey companies. In 2009, an ordinance was introduced under powers conferred by the Company Law, conferring functions on the Panel on Takeovers and Mergers enabling it to supervise takeovers and mergers involving publicly listed Guernsey companies. The Code will not apply to open-ended investment companies.</p>
<b>Insolvent Winding up</b>	<ul style="list-style-type: none"> <li>• Liquidation</li> <li>• Administration</li> <li>• Receivership - this applies to cells of PCCs only and operates as a form of winding-up process for insolvent cells (cells have no separate legal personality and are not therefore subject to formal company liquidation).</li> </ul> <p>Quasi-insolvency provisions largely derived from Guernsey customary law include: <i>saisie</i> (enforcement against real property), <i>désastre</i> (enforcement against personal property) and <i>renunciation</i> (informal bankruptcy but without any financial sanctions).</p>
<b>Taxation</b>	<p>All companies are taxed at zero percent, with limited exceptions. Investment funds may continue to apply for exemption from tax on an annual basis upon payment of a fee of £600.<sup>10</sup></p>

<sup>8</sup> Broadly similar to English law

<sup>9</sup> Broadly similar to English law with the exception that there are no *sell-out* provisions

<sup>10</sup> Separate notes are available on taxation of Guernsey companies

Please do not hesitate to contact us if you would like to know more.

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