

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

THE COMMITTEE *FOR* ECONOMIC DEVELOPMENT

INTRODUCTION OF LIMITED LIABILITY COMPANIES LEGISLATION

The States are asked to decide:-

Whether, after consideration of the Policy Letter entitled 'introduction of limited liability companies legislation' dated 14th January 2021 of the Committee *for* Economic Development, they are of the opinion:-

1. To approve the introduction of Limited Liability Companies as set out in that Policy Letter.
2. To agree that LLCs should be treated in the same way as partnerships for the purposes of taxation, by default, but should have the option of making an irrevocable election at the point of establishment to be taxed as a company instead.
3. To direct the preparation of such legislation as may be necessary to give effect to the above decision.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

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The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

14th January 2021

Dear Sir

1 Executive Summary

- 1.1 This Policy Letter recommends the introduction of Limited Liability Companies (“**LLCs**”) legislation in Guernsey.
- 1.2 LLCs are commonly used in the United States (“**US**”) for trading businesses, holding vehicles and special purpose vehicles in finance and investment structures. Whilst there are variations within the legislation enacted in different States, in general terms the US LLC is recognised as providing a flexible hybrid structure combining features of both corporations and partnerships. They offer legal personality, and limited liability, in a tax transparent structure with, in many jurisdictions, the opportunity to elect to be taxed in the same way as a corporation.
- 1.3 The Committee *for* Economic Development (the “**Committee**”) believes that the introduction of LLC legislation would be attractive to the local finance sector, in particular the funds sector, and will add to the existing range of commercial legislation that supports the growth of the finance industry, such as legislation for companies, partnerships, limited partnerships, limited liability partnerships and foundations.
- 1.4 The introduction of LLC legislation would ensure that Guernsey can compete with other jurisdictions to support the US market, by providing a vehicle familiar to US funds, fund managers and lenders. The proposal to introduce LLCs would support the States of Guernsey’s Revive and Thrive Strategy, and assist in attracting investment into the Island. This policy letter details the key proposed features of Guernsey LLC legislation.

2 Background

- 2.1 LLC legislation (or equivalent) exists in a number of jurisdictions. For example the Isle of Man enacted its Limited Liability Companies Act in 1996, based on US LLC

legislation. This was with a view to attracting more business from the US. In Luxembourg the closest equivalent structure to LLCs is the Société à Responsabilité Limitée (SARL).

- 2.2 Many common law jurisdictions have not enacted LLC legislation, although in recent years some, including both Bermuda and the Cayman Islands, have done so.
- 2.3 The Committee has reviewed legislation from other jurisdictions in preparing these proposals.

3 Difference between LLCs and LLPs

- 3.1 In Guernsey, and some other common law jurisdictions, including the United Kingdom ("UK"), Limited Liability Partnerships ("LLPs") are utilised, and offer some of the same key features as LLCs. There are many similarities between LLCs and the existing Guernsey LLP product.
- 3.2 The Limited Liability Partnerships (Guernsey) Law, 2013 created a hybrid structure which is a body corporate, with limited liability, and also tax transparent as a matter of Guernsey Law.
- 3.3 LLPs share some of the features of companies, such as limited liability for their members and separate legal personality, whilst still retaining their status as a form of partnership, governed by a member's agreement rather than a memorandum and articles of incorporation. LLCs can also be described as a hybrid structure with characteristics of both a company and a partnership.
- 3.4 An LLC structure can be owned, and managed, by one or more persons. The LLC agreement will set out whether decisions are made by voting, or whether responsibilities are delegated to different owners. In a "manager managed" LLC, one person, who may be someone other than a member, is designated to manage the LLC and to make the decisions. With an LLP, each partner has the authority to represent the business, to sign contracts and to make binding decisions.
- 3.5 While one person can form an LLC, at least two are required to form an LLP, given that it is a partnership structure.

4 Reputational issues

Introduction

- 4.1 In recommending the introduction of LLC legislation, the Committee has been conscious of the importance of balancing economic development with ensuring that there is no detrimental impact on the Bailiwick's international reputation and status as a leading, compliant and trustworthy financial jurisdiction. Equally, it is essential to ensure that Guernsey LLC legislation fits within the Island's existing legislative, regulatory and tax framework.

Beneficial Ownership

- 4.2 In 2017, Guernsey introduced a requirement to register beneficial ownership information, relating to all legal persons established in Guernsey, in a central private register accessible by law enforcement. It will be necessary to extend those registration requirements to LLCs.

Anti-Money Laundering and Countering the Financing of Terrorism (“AML/CFT”)

- 4.3 It is proposed that the formation of a Guernsey LLC could only be undertaken by a Bailiwick of Guernsey corporate services provider. This would mean that the Bailiwick’s AML/CFT framework would apply to the formation of LLCs. To effect the above, amendments would be required to the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 (the “**Fiduciaries Law**”).

Financial Services Regulation

- 4.4 It is likely that the activities of some LLCs would require them to be licensed by the Guernsey Financial Services Commission (“**GFSC**”), under one of Guernsey’s financial services regulatory laws. The Committee anticipates that LLCs would fit within the regulatory regime in a similar manner to LLPs.
- 4.5 It is anticipated that the provision of corporate services to LLCs (i.e. formation, management or administration, advice relating to the same and the provision of individuals to act as officers) would be restricted activities, under the Fiduciaries, Law, to be performed by a licensed fiduciary.
- 4.6 Consideration will be given to whether LLCs should be permitted to engage in all forms of regulated financial services business (including being Collective Investment Schemes), or whether there should be any restrictions on the regulated activities which they can undertake and the Committee anticipates that other, minor, consequential amendments to financial services legislation will be required to accommodate LLCs within the existing regulatory framework.

Amendments to other legislation

- 4.7 Amendments to other areas of Guernsey legislation will be required to accommodate LLC legislation. In addition to the regime under the Beneficial Ownership of Legal Persons (Bailiwick of Guernsey) Law, 2017, there will also need to be amendments to the Income Tax (Guernsey) Law, 1975 to make appropriate provision for the taxation of LLCs and economic substance requirements.

5 Key features of Guernsey LLCs

Terminology

- 5.1 In order to utilise the benefit of familiarity for the US market the Committee proposes that LLC legislation in Guernsey should align, as far as is possible, with the most frequently used and recognisable LLC structure, namely that of Delaware.

Body Corporate/Legal Personality

- 5.2 In Guernsey, most existing business structures are bodies corporate with legal personality, for example companies, LLPs, and limited partnerships which have elected to have legal personality. Foundations have legal personality but are not bodies corporate.
- 5.3 It is proposed that a Guernsey LLC should be expressly stated to be a body corporate with legal personality, notwithstanding that the intention is that it would not, by default, be taxed in the same way as a company. This would be consistent with the status of Guernsey LLPs, which are the most comparable structure currently available. It is noted that some jurisdictions have provided for an LLC to have legal personality, without being a body corporate¹, whilst in others LLCs are expressly bodies corporate².

LLC Agreement

- 5.4 It is proposed that the key constitutional document, which all LLCs would be required to have, would be the LLC Agreement. This is the approach taken in Bermuda, Cayman and Jersey, and is most common across jurisdictions with LLC legislation in place.
- 5.5 It is proposed that the LLC Agreement would set out (i) the rights and duties of the members, (ii) administrative procedures, (iii) contributions, (iv) allocation of profits and losses, (v) distributions and (vi) the overall operation of the LLC.
- 5.6 The LLC Agreement could also address other operational and administrative aspects of the LLC. In circumstances where the LLC Agreement does not provide for certain matters, a default position would prevail.
- 5.7 A member or manager of an LLC should be bound by, and entitled to enforce, the LLC Agreement and provision should be made, in the legislation, ensuring that the LLC members are not liable for the debts, obligations or liabilities of the LLC.

¹ For example, Jersey, where an LLC will have legal personality but will explicitly not be a body corporate. See section 2(2) of the Limited Liabilities Company (Jersey) Law, 2019. This is consistent with the status of a Jersey LLP.

² For example, the Cayman Islands, where section 9(3) of the Limited Liability Companies Law, 2016 provides that, "From the date of registration, a limited liability company shall be a body corporate (with legal personality separate from that of its members from time to time)...".

Membership

5.8 It is proposed that:

- (i) a person could be admitted as a member when the LLC is formed, or subsequently;
- (ii) the LLC could have one or more members;
- (iii) subject to the LLC Agreement, a member may, or may not, receive an interest in the LLC; and
- (iv) a person may be admitted as a member whether or not they have made a contribution.

Managers

5.9 It is proposed that, where the LLC Agreement provides, it should be possible to appoint a manager, or group of managers. Subject to the LLC Agreement, an LLC should be able to have an unlimited number of managers. A member should also be able to be a manager.

5.10 The LLC Agreement would define, and delineate, the extent of a manager's powers and would be able to stipulate the roles, responsibilities and limitations on any authority granted.³

5.11 A manager should be able to make contributions to the LLC and share in the profits of the LLC, as a member. It is proposed that LLCs could be member or manager managed.

Management Powers

5.12 As in most other jurisdictions, it is proposed that, subject to the provisions of the LLC Agreement, all management powers should vest in the members unless managers are separately appointed. Managers may, but need not, be members.

Fiduciary Duties

5.13 It is proposed that managers would be under fiduciary duties to (i) act in good faith in the performance of their management duties, in the interests of the LLC, and (ii) exercise reasonable care, diligence and skill, although the LLC Agreement may expand those duties. Subject to the LLC Agreement, a manager would not owe any other fiduciary duties to the LLC, any member or any other person.

5.14 Subject to any specific duties under the proposed legislation, the rights and duties of members as between themselves would be determined by the LLC Agreement.

Membership Classes

5.15 It is proposed that an LLC should be able to have different classes of membership ("**Membership Classes**"). Membership Classes would be similar to different classes of

³ As part of this process, consideration will be given to permitting different classes of managers.

shareholders in a company, for example shareholders who hold ordinary and/or preference shares. Membership Classes could be used to distinguish different groups within the LLC membership via their rights and obligations. Membership Classes could, by way of example, provide for members who have no voting rights.

Name

- 5.16 In most jurisdictions, it is compulsory for an LLC to have the words 'Limited Liability Company' or 'LLC' at the end of its name.
- 5.17 In order to avoid potential confusion with companies (with limited liability) governed by the Companies (Guernsey) Law, 2008, it is proposed that, Guernsey LLC legislation should require the name of a limited liability company to end with the abbreviation "LLC" or "L.L.C.". There should be provisions permitting reservation, and changes of name, similar to those found in the Companies (Guernsey) Law, 2008.

Contributions

- 5.18 It is proposed that contributions to the LLC could be in the form of cash, property, services or an undertaking to provide the same. Unless otherwise provided for in the LLC Agreement, a person should be able to be admitted to an LLC as a member, and receive an interest in the LLC, without making a contribution or being obligated to make a contribution to the LLC.

Liability for Debts, Obligations and Liabilities

- 5.19 It is proposed that Guernsey LLC legislation should provide that the debts, obligations and liabilities of an LLC, howsoever arising, would be solely the debts, obligations and liabilities of the LLC. No member or manager of an LLC should be personally liable for any debt, obligation or liability of the LLC, solely by reason of being a member or a manager of the same. Notwithstanding this, a member or manager of an LLC may agree to be personally liable for all, a proportion of, or an agreed amount of, the debts, obligations or liabilities of the LLC.

LLC Interests

- 5.20 It is proposed that Guernsey LLC legislation should require that the profits and losses of an LLC are allocated among the members, and among classes or groups of members, in the manner provided for in the LLC Agreement. If the LLC Agreement is silent in this regard, then profits and losses should be allocated on the basis of the agreed value of the contributions made by each member, to the extent they have been received by the LLC and have not been returned. The agreed value would be identified in the records of the LLC. The LLC Agreement may provide for the payment of distributions and specify the manner, time and form of any such payment.

Registration

- 5.21 It is proposed that LLCs would be created upon registration and would register by submitting an application and filing a declaration with the Registrar of LLCs. The legislation should therefore establish a new statutory Office of the Registrar of LLCs which should be held by the Registrar of Companies (the “**Registrar**”).
- 5.22 It is proposed that the Registrar of LLCs would maintain a public register of basic information relating to the LLC, as well as copies of all applications, declarations and returns filed pursuant to the requirements of the LLC legislation.
- 5.23 It is proposed that appropriate provision should be made to enable (i) the migration of LLCs into, and out of, Guernsey, and (ii) the amalgamation of LLCs. Industry have confirmed that the ability to migrate LLCs would be attractive to business, and several enquires had already been received in this regard.
- 5.24 Fees could be set by the Registrar, payable pursuant to the exercise of his, or her, functions. The Committee anticipates that provisions relating to the office, functions and powers of the Registrar of LLCs would be similar to equivalent provisions in legislation governing other existing Guernsey entities with legal personality and/or limited liability.
- 5.25 All current business structures with legal personality and/or limited liability are required to provide certain particulars in order to register. Proposed particulars for inclusion in an LLC application would be:
- (i) the name;
 - (ii) the address of the registered office;
 - (iii) the full name and address of each founder member;
 - (iv) capital contribution by each founder member;
 - (v) the ability to admit additional members;
 - (vi) whether the LLC includes managers;
 - (vii) ability to appoint managers;
 - (viii) for manager managed LLCs, the full name and address of each manager; and
 - (ix) the name and address of the corporate services provider submitting the application. It is envisaged that the application for registration would be signed by the corporate service provider.

Disqualification

- 5.26 It is important to protect Guernsey’s international reputation, as a well-regulated financial centre. This will include ensuring that there is a mechanism to disqualify individuals who are unfit to be members or managers of an LLC from acting as such.
- 5.27 It is therefore proposed that appropriate provision should be made to enable the disqualification of persons from being members or managers of LLCs.

Registered Office/Resident Agent

- 5.28 It is proposed that an LLC would be required to maintain a registered office in Guernsey at which certain documents (such as accounting records, returns, register of members, etc.) would be kept, and at which documents could be served. This should be modelled on provisions applying to other Guernsey entities.
- 5.29 The Committee proposes that there should be a requirement for an LLC to have a resident agent, similar to the requirement for companies found in Part XXIX of the Companies (Guernsey) Law, 2008, in respect of Beneficial Ownership.

Series of Members, Managers, LLC Interests or Assets ('Series')

- 5.30 In some US States, LLC legislation has evolved to permit the creation of "Series" of Members, managers or LLC interests, which can have separate rights, powers or duties with respect to (i) specified property or obligations of the LLC or (ii) profits and losses associated with specified property or obligations of the LLC.
- 5.31 Series share some of the features of cells of incorporated cell companies under the Companies (Guernsey) Law, 2008 such as the liabilities of the Series only being enforceable against the assets of the Series. A Series would have separate legal personality, rights, powers or duties with respect to specified property or liabilities of the LLC. It would therefore be possible for them to enter into contracts, sue and be sued. It should be noted that whilst each Series would be treated as a separate entity, and whilst an application to the Registrar would be required to create a new Series, each Series would not be required to be independently registered.
- 5.32 Series LLC are a relatively new extension to limited liability company structures and, consequently, they are not yet commonplace amongst US States or other jurisdictions that have enacted LLC legislation. The novelty of the concept means that there is relatively little case law in the US regarding the concept. Jersey has chosen to make provision for Series in its legislation, whereas both Bermuda and Cayman have not.
- 5.33 It is proposed that Guernsey LLC legislation would make provision for Series and the detail of this will be developed as the legislation is drafted. The legislation should permit the making of further provision in respect of Series by Ordinance, to allow for future amendment and fine tuning given the novelty of this concept.
- 5.34 Such provision should reflect the key features of Series in other jurisdictions to the extent appropriate.

Tax transparency

- 5.35 A key feature of LLCs is that they are designed to be tax transparent by default, i.e. the LLC itself is not subject to taxation. Instead profits fall to be taxed in the hands of members, in much the same way as the profits of a partnership. Whilst taxation of LLCs, in Guernsey, going forward will ultimately be a matter for the Policy & Resources

Committee, the Committee's recommendation, supported by the Policy & Resources Committee, is that LLCs should be treated in the same way as partnerships for the purpose of taxation, by default, but should have the option of making an irrevocable election at the point of establishment to be taxed as a company instead. Under the current provisions of the Income Tax (Guernsey) Law, 1975, a "body of persons" not being a "partnership" is a company for the purposes of the Income Tax (Guernsey) Law, 1973⁴, and so an LLC would be taxed as a company without legislative provision being made. Amendment of Guernsey's income tax law is therefore required to give effect to these proposals.

- 5.36 The tax treatment of LLCs in other jurisdictions will ultimately depend on the laws of each jurisdiction, following an analysis of the substantive nature of the structure, although it is possible that some relevance may be attached to the tax treatment of the entity in Guernsey. It is understood that the default position, in the UK, is that LLCs are considered to be companies for tax purposes, although case law⁵ in respect of a Delaware LLC, suggests that they may be considered to be tax transparent on a case by case basis. The provisions of each individual LLC Agreement will therefore be of importance in determining how an LLC is categorised, for tax purposes, in another jurisdiction.

Substance Requirements

- 5.37 In 2018, the States enacted the Income Tax (Guernsey) (Substance Requirements) (Amendment) Ordinance, 2018, under which the Policy & Resources Committee have issued regulations specifying substance requirements that must be met by Guernsey companies engaged in certain, specified, core income generating activities, to assist in ensuring that companies are taxed on their profits in the jurisdiction in which the real economic activity is being carried on or undertaken.
- 5.38 It is proposed that if an LLC carries on a relevant activity, then it should be subject to the same economic substance requirements as companies.

Other Key Features

- 5.39 Without prejudice to the specific proposals outlined above, LLC legislation should make necessary provision relating to:
- (i) the Office and powers of the Registrar of LLCs;
 - (ii) formation and registration of LLCs;
 - (iii) members and LLC interests (including assignment of interests);
 - (iv) managers;
 - (v) financial provisions and distributions;
 - (vi) series;
 - (vii) record keeping;

⁴ See the definition of company in section 209(1) of the Income Tax (Guernsey) Law, 1975: "company" means anybody of persons corporate or unincorporate, not being a partnership.

⁵ *George Anson v HMRC* [2015] UKSC 44.

- (viii) registered office;
- (ix) resident agents;
- (x) fees, charges, etc.;
- (xi) offences and sanctions for non-compliance with requirements of the Law; and
- (xii) winding up and dissolution of LLCs.

5.40 In keeping with the general policy intention set out above, it is proposed that LLC legislation should also, to the extent possible, reflect the principal features of equivalent legislation in key competitor jurisdictions, and other jurisdictions where LLCs are well established, to ensure that Guernsey's legislation is attractive and contributes to the competitiveness of the local finance sector in the international market.

6 Resources and Implementation

6.1 The introduction of LLC legislation will create a new work stream for the Guernsey Registry. In addition to a registration fee, the Committee is proposing that all LLCs will be obliged to file annual validations and pay an annual fee which will be set at a level broadly equivalent to that which applies to companies. The Registrar will consult with the financial services industry and the Committee when setting the fees under the legislation.

6.2 The introduction of LLCs is intended to create an additional revenue stream for the States, as the Registrar will be required to pay all fees and sums received to the Committee for the general revenue account of the States. The extent of this revenue stream will be dependent on the level of demand for LLC registration, and the fees charged, and would not be limited to cost recovery. It is difficult to estimate the likely demand for LLCs in Guernsey.

6.3 The Registrar has advised that additional resourcing, including staffing and IT systems, would be required to administer the new legislation. The Registrar will work with the Committee to develop an appropriate business case.

7 Engagement and Consultation

7.1 The Committee issued a consultation paper, on 28th August 2019, to seek feedback from industry on the merits and potential economic benefits, of enacting LLC legislation in Guernsey.

7.2 Four responses were received to the consultation, including from 3 industry associations. Comments were also provided by the GFSC. The information gathered over the engagement and consultation process showed that there was unanimous support from respondents for the enactment of LLC legislation. It was highlighted by the responses that the introduction of an LLC would offer a flexible structure which would allow Guernsey to attract business from the US as well as help Guernsey compete with other jurisdictions that have introduced similar legislation.

- 7.3 The GFSC has been consulted on the proposals and their comments have been taken into account.

8 Conclusion

- 8.1 The introduction of LLC legislation will allow Guernsey's finance sector to compete with similar regimes in other jurisdictions. The proposal will support the Economic Development Strategy and assist in attracting investment into the Island, especially from the US market.

9 Compliance with Rule 4

- 9.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.
- 9.2 In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications. She has advised that there is no reason in law why the Propositions should not be put into effect.
- 9.3 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.
- 9.4 In accordance with Rule 4(5), the Propositions relate to the duties of the Committee. The introduction of LLC legislation in Guernsey would be consistent with the Committee's purpose, responsibilities and Economic Development Strategy.
- 9.5 Also in accordance with Rule 4(5), the Committee consulted with the Policy & Resources Committee in the preparation of the propositions.

Yours faithfully

N Inder
President

S Falla
Vice-president

S A Kazantseva-Miller
N Moakes
S Vermeulen