



States of Guernsey  
Finance Sector  
Development

# CONSULTATION ON THE POTENTIAL ENACTMENT OF LIMITED LIABILITY COMPANIES (LLC) LEGISLATION IN GUERNSEY

19<sup>th</sup> August 2019

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## 1. Executive Summary

Limited Liability Companies (“**LLC**”) are commonly used in the United States of America (“**US**”) as structures for trading businesses, holding vehicles and special purpose vehicles in finance and investment structures. The US LLC is recognised as providing a flexible hybrid structure, combining features of both US corporations and partnerships. A LLC may be formed for any lawful business purpose, or activity, whether or not for profit.

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.

This consultation paper is being issued to seek feedback on the merits, and potential economic benefits, of enacting LLC legislation in Guernsey (the “**Proposal**”).

The Committee *for* Economic Development (the “**Committee**”) is launching this consultation in order to:

- i) understand the level of demand for LLC legislation in Guernsey;
- ii) seek to identify the potential economic benefits to the island, in respect of the introduction of LLC’s to Guernsey;
- iii) gather information, views and evidence, which will allow an informed decision to be made regarding potential policy proposals; and
- iv) seek feedback on the core features that should be included, if such legislation were to be enacted.

The Committee invites comments from all businesses, stakeholders, consumers, industry associations, practitioners and any other interested parties in respect of the Proposal. Recipients are invited to respond to all, or some, of the questions at their discretion.

Responses will be considered, by the Committee, with a view to further developing the Proposal.

Closing date: **18<sup>th</sup> September 2019**

## 2. Introduction

LLC legislation was first enacted in the US State of Wyoming in 1977 as an alternative to the general corporate structure which was available in the US at that time. The new structure was inspired by mainland European structures and combined certain features of US corporations and partnerships, in particular, (i) the limited liability of corporations and (ii) the pass-through taxation (tax transparency) of partnerships. The US State of Delaware's LLC legislation came into force in 1992, building on the Wyoming model and following an Inland Revenue Service ruling on the 'pass-through' income tax status of LLCs. Since the early 1990s the LLC has become one of the predominant business structures in the US.

LLCs are commonly used in the US for trading businesses, holding vehicles and special purpose vehicles in finance and investment structures. 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.

In the UK, and some other common law jurisdictions, the Limited Liability Partnership ("LLP") offers some of the same key features as LLCs. In Guernsey, the Limited Liability Partnerships (Guernsey) Law, 2013 created a hybrid structure offering an LLP which is a body corporate with limited liability, which is also tax transparent i.e. the entity is not taxed as a company, but rather the profits are taxed in the hands of members in much the same way as the profits of a partnership.

In terms of other common law jurisdictions, of those geographically nearest to Guernsey, the Isle of Man enacted its Limited Liability Companies Act in 1996, based on US LLC legislation, with a view to attracting more business from the US. According to statistics published on the Isle of Man government website, there have been between 1 and 8 LLCs registered per annum in the Isle of Man for the five-year period between 2013 and 2017.<sup>1</sup>

In Luxembourg the closest equivalent structure to LLCs is known as the Société à Responsabilité Limitée (SARL). A SARL is a cross between a corporation and a partnership. Members' liabilities are limited to their contributions. Approximately 2/3 of the companies in Luxembourg are SARLs.<sup>2</sup>

The States of Jersey, (which already has LLP legislation) has also approved, but not enacted, LLC legislation, the Limited Liability Companies (Jersey) Law, 2018. This is with the intention of increasing market attractiveness to US and European based business, through familiarity with the legislative vehicle, and general global appeal.

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<sup>1</sup><https://www.gov.im/about-the-government/departments/enterprise/central-registry/companies-registry/statistics/>

<sup>2</sup> <https://guichet.public.lu/en/entreprises/creation-developpement/forme-juridique/societe-capitiaux/sarl.html>

The United Kingdom does not have LLC legislation. In respect of common law jurisdictions which are farther afield, most jurisdictions have not enacted LLC legislation, but in recent years some, including both Bermuda and the Cayman Islands, have done so.

### 3. Demand and Economic Benefit

The Committee's purpose is 'to secure prosperity through the generation of wealth and the creation of the greatest number and widest range of employment opportunities possible by promoting and developing business, commerce and industry in all sectors of the economy.'

The Committee's responsibilities include 'the promotion and development of all sectors of business including financial services', 'the reputation of the Island as a centre for commerce and industry', and 'competition innovation, diversification and regulation in the economy'.

The Economic Development Strategy, approved by the States of Guernsey in June 2018 under the Policy & Resource Plan, sets out the Committee's vision for Guernsey's economy and how it intends to deliver its mandate.

This consultation has arisen as a result of feedback, received from members of the Guernsey Bar, that the enactment of LLC legislation would provide an opportunity for economic development, through increased competitiveness, in attracting international finance business from the US.

The Committee wishes to identify the level of demand for the enactment of such legislation, as well as the potential economic benefit to local industry, the States of Guernsey and the wider community. This information will help the Committee decide whether to put forward a policy proposal to the States of Guernsey.

#### 4. Consultation Paper Comment

The objective of this consultation is to explore, and gauge, the demand and appetite for developing and implementing Guernsey LLC legislation. The absence of such legislation in the Bailiwick's legislative framework has the potential to put Guernsey at a commercial disadvantage.

Whilst this consultation includes an outline of possible LLC features, these should not be interpreted as proposals. Outline suggestions are included purely for indicative purposes in order to inform respondents and elicit feedback. For the purposes of this consultation the descriptions, and features described, are based primarily upon equivalents from various jurisdictions.

The suggestions included are intended to provide a basis for consideration, and to provoke thought, on whether there are areas for addition or expansion, consistent with new and evolving business opportunities as perceived by stakeholders. There is also an opportunity to explore features not prescribed elsewhere, thus bolstering the attractiveness of a Guernsey LLC.

Notwithstanding the above, it is important to balance business development ambitions 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 any Guernsey LLC legislation, if enacted, fits within the Island's existing legislative, regulatory and tax framework.

It is on this basis that comment is invited, not just upon the Proposal and content of this consultation paper, but also on the basis of practical experience. Respondents are requested to consider, and include, in their replies what business opportunities are available and where, in their opinion, it might be possible to add economic value. Comment is also welcome on whether change is actually necessary, or whether alternative structures are available within the existing legislative framework to adequately meet demand.

## 5. International Standards and Reputational Matters

### **Beneficial Ownership**

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. If LLC legislation were to be enacted, it would be necessary to extend those registration requirements to LLCs.

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

It is envisaged that the formation of a Guernsey LLC could only be undertaken by a Bailiwick of Guernsey corporate services provider. In this manner, coupled with the requirement for a local resident agent, the Bailiwick’s AML/CFT framework would apply.

To effect the above, amendments would be required to the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 and the Handbook for Financial Services Businesses on Countering Financial Crime and Terrorist Financing.

### **Guernsey Financial Services Commission (“GFSC”) Regulation**

It is likely that the activities of some LLCs would fall within the regulatory scope of the GFSC. Expectations are that LLCs would fit within the regulatory regime in a similar manner to LLPs.

Consideration would be given to prohibiting LLCs from being Collective Investment Schemes.

## 6. Terminology

As previously commented, one of the key drivers for enacting LLC legislation is familiarity for the US market, which would suggest that the alignment of terminology, and other concepts, with that in US legislation would be sensible, other than where instances necessitate an alternative description.

## 7. Potential Guernsey LLC Structure

It is envisaged that a Guernsey LLC would have the following characteristics.

### **Body Corporate/Legal Personality**

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.

An LLC may, most naturally, fall to be described as a body corporate with legal personality, notwithstanding that the intention is that it would not, by default, be taxed as a company. This would be consistent with the status of Guernsey LLPs, which are the most analogous structures currently available. It is noted that some jurisdictions have provided for an LLC to have legal personality, without being a body corporate<sup>3</sup>. It is thought that this may be to assist in determining domestic tax treatment and/or to strengthen the argument that other jurisdictions should not treat LLCs (or at least those which have not elected to be taxed as companies) as companies for tax purposes in those jurisdictions. Based on current legislation, classification as a body corporate in Guernsey means that an LLC would be taxed as a company, unless amendments are made to the Income Tax (Guernsey) Law, 1975.<sup>4</sup> This area will be considered as part of this process.

### **LLC Agreement**

The most common term used for the constitutional document, which sets out the LLC powers and structure, is an LLC Agreement. This is the format used in Bermuda, Cayman and Jersey. By way of contrast, some jurisdictions, such as the Isle of Man, instead of an LLC Agreement, have Articles of Organisation and an Operating Agreement.

In other jurisdictions, it is not common for there to be a prescribed format for the LLC Agreement, however there is commonality in respect of content.

The LLC Agreement is pivotal to the structure setting out the rights and duties of the Members, the administrative procedures, contributions, allocation of profits and losses,

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<sup>3</sup> Delaware's LLC Act provides that a Delaware LLC is a legal entity with status governed by its Laws.

A Bermuda LLC has separate legal personality and the liability of its members is limited. Bermuda Limited Liability Company Act 2016 provides for an Exempted LLC, so called because they are exempt from the provision of the Act.

A Jersey LLC will have legal personality but will not be a body corporate. See section 2(2) of the Limited Liabilities Company (Jersey) Law, 2019.

Section 9(3) of the Cayman Islands 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)...".

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



distributions and overall operation of the LLC. Despite the flexibility in what the LLC Agreement can provide for, it is imperative that minimum requirements are expressed in legislation. It is further recommended that there should be specific terms which must be required to be included in a Guernsey LLC Agreement.

A Member or manager of an LLC is bound by, and entitled to enforce the LLC Agreement whether or not the Member or manager executes the LLC Agreement. With regard to a Member's liability to third parties, it is common practice in other jurisdictions, which have LLC legislation, to exclude Members from being liable for the debts, obligations or liabilities of the LLC.<sup>5</sup>

The LLC Agreement is a contract within a statutory framework. Matters that could be addressed in an LLC Agreement may include, inter-alia, formation, purpose, term, principal office, management, capitalisation, profits and distributed losses, books and records, liability of managers and Members, rights and limitations of Members, powers and authority of managers, meetings, voting rights, transfers and assignments, changes to managers, dissolution and winding up.

In circumstances where the LLC Agreement does not provide for certain matters, a default position would prevail.

In keeping with other jurisdictions, if LLC legislation were enacted, it is considered that an LLC Agreement should be entered into (or otherwise exist) before, after, or at the time of, filing a declaration to the Company Registrar.<sup>6</sup> The LLC agreement will be effective from the date of issue of its certificate of formation, as will the registration of the same.

## **Membership**

If LLC legislation is enacted, it is envisaged that:

- i) A person could be admitted as a Member when the LLC is formed, or subsequently, following formation.
- ii) The LLC could consist of one or more persons who are the Members. The preliminary view is that LLC legislation should reflect the requirement, in most other jurisdictions, that an LLC only requires a minimum of one Member.

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<sup>5</sup> Bermuda, Limited Liability Company Act 2016, Article 48.  
Cayman Islands, Limited Liability Companies Law, 2016, Part 5 Article 20.  
<sup>6</sup> Limited Liability Companies (Jersey) Law 2011- Article 3.  
Bermuda, Limited Liability Company Act 2016, Article 5.

- iii) Subject to the LLC Agreement, a person may be admitted to an LLC as a Member and may, or may not, receive an interest in the LLC<sup>7</sup> whether or not they have, or have not, made a contribution to the LLC.
- iv) A Member may be admitted as a Member whether or not they have made a contribution.
- v) Members are admitted:
  - (a) at the formation of the LLC;
  - (b) at a time provided in, and upon, compliance with the LLC agreement; or
  - (c) if, where the LLC Agreement does not otherwise provide, when the person's name is entered in the Register of Members.

### **Managers**

If the LLC Agreement provides, it should be possible to appoint a manager or groups 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.

To define, and control, the extent of any category of a manager's powers the LLC Agreement should stipulate the roles, responsibilities and limitations on any authority granted.<sup>8</sup>

A manager should be able to make contributions to the LLC and should be able to share in the profits of the LLC. If enacted it is suggested that LLCs can be Member or manager managed. If manager managed this could be on the basis that they have no financial interest in the Company.

The Committee's preliminary view is that an LLC Agreement should include whether the LLC is managed by (i) Members, (ii) Members & managers or (iii) managers.

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<sup>7</sup> For the definition of "LLC interest" in Jersey, see Article 1(1) of the Limited Liability Companies (Jersey) Law 2018, "LLC interest", means a Member's share of the profits and losses of a LLC, a Member's right to receive distributions of the LLC's assets, and any other rights, benefits and obligations conferred upon a member by the LLC Agreement or this Law.

For the definition of "LLC interest" in Bermuda, see section 2 of the Limited Liability Company Act 2016, "LLC interest" means a Member's share of the profits and losses of a LLC and a Member's right to receive distributions of the LLC's assets.

For the definition of "LLC interest" in Cayman, see section 2 of the Limited Liability Companies Law, 2016, "LLC interest" means the interest of a Member in a LLC; including a Member's share of the profits and losses of that LLC, a Member's right to receive distributions of the LCC's assets and a Member's voting or other rights, benefits and obligations to which the Member is entitled or subject pursuant to the LLC Agreement or this Law.

<sup>8</sup> As part of this process, consideration will be given to permitting different classes of managers, as a way to assign specific rights and obligations to different managers.

### **Management Powers**

In most other jurisdictions, subject to the provisions of an LLC Agreement, all management powers vest in the Members unless managers are separately appointed. Managers may, but need not, be Members.

The LLC Agreement can provide for the management of an LLC by a manager, or more than one, and state the appointment of the person or persons as manager of the LLC. Where the LLC Agreement does not provide for the management of an LLC by a manager, the management of the LLC is vested in its Members.

The appointment of managers and determining their respective powers is an example of emphasising the criticality of the LLC Agreement. It is therefore expected that Guernsey LLC legislation would require that the LLC Agreement includes all powers and restrictions applicable to managers, including the termination of their position as a manager.

### **Fiduciary Duties**

It is anticipated that managers would be under a duty to act in good faith in the performance of their management duties although the LLC Agreement may expand, or restrict, that duty and, subject to the LLC legislation and the LLC Agreement, a manager would not owe any other fiduciary duties to the LLC, any Member or any other person.

Subject to any proposed legislation and the LLC Agreement, Members would not owe any fiduciary duties to (i) the LLC; or (ii) any other Member in exercising rights or performing obligations.

### **Membership Classes**

In other jurisdictions, it is possible for an LLC to have different forms of memberships, known as '*Membership Classes*'.

Membership Classes are similar to different categories of shareholders in a company, for example shareholders who hold ordinary and preference shares. Membership Classes are used to distinguish different groups within the LLC membership via their rights and obligations.<sup>9</sup> Membership classes can, by way of example, provide for Members who have a vested interest but no voting rights.

Therefore, in other jurisdictions, subject to the LLC Agreement, Members (and managers) may be divided into classes for the purposes of voting and entitlement to distributions/payments and may hold meetings (or provide written consent) on LLC matters.

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<sup>9</sup> As part of this process, consideration will be given to distinguishing factors such as, for example, economic interest, voting rights, information rights and the ability to appoint managers.

## **Name**

In most jurisdictions, it is compulsory for an LLC to have the words 'Limited Liability Company' or 'LLC' at the end.

In Guernsey, a company limited by shares must have the words 'Limited', 'With limited liability', 'Ltd.', 'Avec responsabilité limitée' or 'ARL' after its name.<sup>10</sup>

The expectation is that, if enacted, Guernsey LLC legislation would require the name of a limited liability company to end with the abbreviation LLC or L.L.C. in order to clearly distinguish it from a company limited by shares.

It is envisaged that there would be provisions permitting reservation, and changes of name, reflecting those found in the Companies (Guernsey) Law, 2008.

## **Contributions**

It is anticipated that contributions<sup>11</sup> to the LLC could be in the form of cash, property, services or an undertaking to provide the same.

In other jurisdictions, unless otherwise provided in the LLC Agreement a person may 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 & Liabilities**

Consistent with other LLC legislation it is proposed that, if enacted, Guernsey LLC legislation would stipulate that the debts, obligations and liabilities of an LLC, whether arising in contract, tort or otherwise, would be the debts, obligations and liabilities of the LLC and no Member or manager of an LLC would be obligated personally for any such debt, obligation or liability of the LLC solely by reason of being a Member or a manager of the same. Notwithstanding the previous provision, a Member or manager of an LLC may agree to be

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<sup>10</sup> As part of this process, consideration will be given to the appropriateness of allowing LLCs to have 'société à responsabilité limitée' or 'SARL' after their name.

<sup>11</sup> For the definition of "contribution" in Jersey, see section 1(1) of the Limited Liability Companies (Jersey) Law 2018, "contribution" means any cash, property, other assets, services rendered or other obligation to contribute cash, property, other assets or to perform services, which a person contributes to a LLC in the person's capacity as a Member, but does not include any monies lent or agreed to be lent to a LLC.

For the definition of "contribution" in Bermuda, see section 2 of the Limited Liability Company Act 2016, "contribution" means any cash, property, services rendered or a promissory note or other obligation to contribute cash or property or to perform services, which a person contributes to a LLC, in the person's capacity as a Member.

For the definition of "contribution" in Cayman, see section 2 of the Limited Liability Company Law, 2016, "contribution" means any cash, property, other assets, services rendered or other obligation to contribute cash, property or other assets or to perform services, which a person contributes to a LLC in the person's capacity as a Member, but does not include any monies lent or agreed to be lent to a LLC.

obligated personally for all, a proportion of, or an agreed amount of, the debts, obligations or liabilities of the LLC.

### **LLC Interests**

In other jurisdictions the LLC legislation requires 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 are 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 will 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.

## **8. Formation**

### **Registration**

All current business structures with legal personality and/or limited liability are required to register certain particulars. The expectation would be that LLCs would be required to register by submitting an application and filing a declaration (the equivalents in Bermuda being a Certificate of Formation, in Cayman a Registration Statement and in the Isle of Man, the Articles of Association, consent from the Registered Agent and a statement of the intended registered office), with a Registrar of LLCs and that the Office of the Registrar of LLCs would be held by the Registrar of Companies (the “**Registrar**”).

It is anticipated that the Registrar would maintain a public register of basic information relating to the LLC as well as copies of all declarations and returns filed pursuant to the requirements of the proposed LLC legislation.

Fees would be set by the Committee and any fees would be payable to the Registrar pursuant to the exercise of his, or her, functions. The Committee would anticipate that provisions relating to the office, functions and powers of the Registrar of LLCs would reflect equivalent provisions in legislation governing other existing Guernsey entities with legal personality and/or limited liability.

Anticipated particulars for inclusion in an LLC Declaration would be:

- i) the LLC name;
- ii) the address of the registered office of the LLC;
- iii) the full name and address of each founder Member;
- iv) capital contribution by each founder Member;

- v) rights of the Members to admit additional Members;
- vi) ability to appoint managers;
- vii) whether the LLC includes managers;
- viii) for manager managed LLC's 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.

It is also envisaged that the submission of an application for registration would be treated as a precursory step to the formation of the LLC. It would be the act of registration by the Registrar and/or the certificate of formation, which would verify the LLC's existence.

The Isle of Man requires submission of the LLC's agreement (known in that jurisdiction as Articles of Organisation) and the LLC's Operating Agreement. The Operating Agreement is for the LLC's internal use and includes details in respect of the operational functions of the LLC. The Operating Agreement can record Member ownership and voting rights.

An Operating Agreement is advantageous for single-member LLCs, because, as its title suggests, it describes the internal operational processes. This can provide confirmation that the LLC structure is separate from that of the individual owner and thus the owner has documentation to prove independence from the LLC.

Consideration will be given, as part of this process, to allowing for the continuance and discontinuance of LLCs in Guernsey.

#### **Registered Office/Resident Agent**

A feature of US vehicles is that they include the position of a registered agent, based in the state of formation, and each state where the LLC transacts business. In the US the registered agent can be an individual, the LLC itself, an alternative LLC, or foreign entity.

Despite basing legislation on the US model, jurisdictions that have subsequently enacted LLC legislation have implemented differing requirements in respect of the use of a resident agent. The Isle of Man requires that a LLC shall at all times maintain a registered agent in the Island who holds the appropriate prescribed qualifications.<sup>12</sup> The Bermuda Limited Liability Company Act, 2016 does not appear to require a registered agent. Cayman requires that a Cayman corporate service provider maintains an adequate, accurate and current beneficial ownership register for the LLC at their registered office.

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<sup>12</sup> Isle of Man Limited Liability Companies Act 1996, section 5 (1).

The common theme is that there is a registered office where records are maintained and are available for inspection. It is therefore anticipated 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. The Committee's preliminary view is that this should be modeled on provisions applying to other Guernsey entities.

Should LLC legislation be enacted in Guernsey, the Committee would envisage a requirement for an LLC to have a resident agent modeled on the requirement for companies found in Part XXIX of the Companies (Guernsey) Law, 2008, in respect of Beneficial Ownership, with appropriate modifications.

## 9. Series of Members, Managers, LLC Interests or Assets ("Series")

In the US, 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.

Series share some of the features of cells of incorporated cell companies under the Companies (Guernsey) Law, 2008 such as (i) the liabilities of the Series only being enforceable against the assets of the Series and (ii) the liabilities of the LLC, or a Series, not being enforceable against the assets of another Series. Series may have separate legal personality, rights, powers or duties with respect to specified property or liabilities of the LLC and separate from that of any other Series. It is therefore possible for them to enter into contracts, sue and be sued. It should be noted that whilst each Series is treated as a separate entity, each Series is not independently registered.

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 newness of the concept means that it is legally untested in the US prompting doubts about acceptance of the legality relating to separation. As an indication of differing opinions and doubts in respect of the Series concept, Jersey has chosen to include them in their legislation whereas both Bermuda and Cayman have not.

Jersey has provided, in its LLC Law, that in the event that an LLC Agreement provides for the establishment of one or more Series, and there is a clear recorded segregation of debts, liabilities and expense incurred or contracted for, then none of the debts, liabilities and expenses incurred by a Series shall be enforceable against the assets of the LLC or any other

Series. This is subject to a provision preventing an LLC Agreement from prescribing to the contrary.<sup>13</sup>

If enacted it would be expected that Guernsey LLC legislation would make specific provision for Series.

It would be expected that a Series would reflect many of the features of an LLC in other jurisdictions:

- a) An LLC Agreement can provide for the establishment of one or more designated Series of Members, managers, or LLC interests each with their own legal personality.
- b) The name of the Series would be the LLC name followed by the Series, followed by a numerical identifier.
- c) The Registered Office would be the same as the LLC.
- d) An LLC Series would have the power to contract in its own right.

An LLC series should be able to carry on any lawful business, purpose or activity, whether or not for profit. Each Series could hold title to assets, conduct its own activities and pursue different business interests. A Series would remain distinct and shielded from any claims regarding assets of another series or the LLC.

- e) Subject to the LLC Agreement a Series shall have specific powers. For example a capacity to contract, hold title to assets and sue or be sued in its own name. A Series could have separate powers and authorities specific to the LLC Series.
- f) Where an LLC Agreement provides for the establishment of one, or more Series, the assets associated with the Series should be recorded separately from other assets of the LLC. The LLC Agreement will require the debts and liabilities incurred by a Series to be enforceable against that Series only.
- g) Assets associated with a Series may be held directly, or indirectly, including in the name of such Series, in the name of the LLC, through a nominee or otherwise.

The Committee would welcome comment from respondents on the commercial advantages and/or disadvantages of including Series.

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<sup>13</sup> Limited Liability Companies (Jersey) Law 2018, Article 12, Series of members, managers, LLC interests or assets.



## 10. Taxation

### **Tax transparency**

It is a key feature of LLCs that they are designed to be tax transparent by default, i.e. the LLC itself is not subject to taxation, rather the profits fall to be taxed in the hands of its Members in much the same way as the profits of a partnership. Whilst taxation of LLCs, in Guernsey, is ultimately a matter for the Policy & Resources Committee, it is understood that industry would be supportive of the position that LLCs should be treated 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.<sup>14</sup>

The tax treatment of LLCs in other jurisdictions will ultimately depend on the laws of that 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 traditional position, in the UK, is that LLCs are considered to be companies for tax purposes, although case law,<sup>15</sup> in respect of a Delaware LLC, now suggests that they may be considered to be tax transparent on a case by case basis. The provisions of the LLC Agreement will therefore be of great importance in determining how an LLC is categorised, for tax purposes, in another jurisdiction.

### **Substance Requirements**

The States of Guernsey has recently 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.

If enacted, the intention is that LLCs that irrevocably elect to be taxed as a company, and any corporate members, would be subject to the economic substance requirements in respect of the activities of the LLC.

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<sup>14</sup> It is understood that adopting this position would require amendment to Guernsey's income tax law, since currently, a "body of persons" not being a "partnership" is a company under the income tax law.

<sup>15</sup> *George Anson v HMRC* [2015] UKSC 44.

## 11. Consequential Amendments

### **Financial Services Regulation**

If the Committee were to recommend the enactment of LLC legislation, it would be necessary to identify consequential amendments to other areas of Guernsey legislation.

In addition to the Income Tax (Guernsey) Law, 1973, and the regime under the Beneficial Ownership of Legal Persons (Bailiwick of Guernsey) Law, 2017, the Committee is conscious that there may need to be amendments to the Bailiwick's regulatory framework.

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 Regulation of Fiduciaries, Administration Businesses and Company Directors, etc. (Bailiwick of Guernsey) Law, 2000 (the "**Fiduciaries Law**"). This would mean that a fiduciary licence, in order to provide such services, would be required, that the provision of such services would be subject to the supervision and oversight of the GFSC, and that the Bailiwick's anti-money laundering and countering the financing of terrorism framework would also apply.

Consideration would also need to be given as to whether LLCs should be permitted to engage in all forms of regulated financial services business, or whether there should be any restrictions on the regulated activities which they can undertake.

## 12. Next Steps

The Committee is asking for feedback on the consultation questions by **18<sup>th</sup> September 2019** with a view to ascertaining the merits of enacting LLC legislation in Guernsey.

The consultation period closes on the **18<sup>th</sup> September 2019**. Following closure, feedback and comments received will be analysed by the Finance Sector Development team and the Committee.

## 13. Responding to the Consultation

Unless specifically requested otherwise, any responses received may be published either in part or in their entirety. Please mark your response clearly if you wish your response and/or name to be kept confidential. Responses may be included in any anonymised summary of comments received.

When submitting your views please indicate whether you are responding on behalf of an organisation.

Please provide your comments by **18<sup>th</sup> September 2019**.

### Electronic responses

The easiest way for many to respond, to this consultation, is to fill in the on-line questionnaire at <https://www.surveymonkey.com/r/KJFBHG9>.

Responses can also be submitted in a format that can be read by Microsoft Word and emailed to **financesectordevelopment@gov.gg**.

### Hard copy responses

Alternatively you may print out the questionnaire, complete manually and post your response to:

Finance Sector Development  
Committee *for* Economic Development  
Market Building  
PO Box 451  
Fountain Street  
St Peter Port  
Guernsey  
GY1 3GX

**Data protection**

Your personal data will be used for the purpose of dealing with this consultation only. We will only keep your personal data for as long as is necessary for the purpose for which it was collected, and your data will not be passed on to any other third party without your prior consent. For further information on how your personal data will be used, please refer to the [Committee for Economic Development's Fair Processing Notice](#).

## Annex 1 List of Questions

**Q1:** *What is your name?*

**Q2:** *What is your email address?*

**Q3:** *What is the name of your organisation?*

### **Economic Benefit**

**Q4:** *How strongly do you support the principle of introducing LLC Legislation in Guernsey?*

Strongly  
support

Somewhat  
support

No opinion

Somewhat  
against

Strongly  
against

*Please provide reasons for your response.*

**Q5:** *What benefits to the wider economy and the States of Guernsey do you believe there would be from the introduction of LLC legislation in Guernsey?*

**Q6:** *If introduced, do you believe that the existence of an LLC product in Guernsey would be attractive?*

Yes     No     No view

**Q7:** *If introduced, what volume of business do you anticipate would be generated for your business by the availability of LLCs in Guernsey? Please give an estimate of how many LLCs you think it might be possible to establish per annum.*

**Business Drivers**

**Q8:** *In your opinion, would the existence of a registration requirement in respect of the Bailiwick's private beneficial ownership register, and/or requirements under the Bailiwick's economic substance regime, affect the appeal or operational aspects of Guernsey LLCs?*

Strong positive affect	Some positive affect	No opinion	Some negative affect	Strong negative affect
<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

*Please provide reasons for your response.*

**Q9:** *In the past 12 months, how many requests have you received, either from clients or potential clients, as to whether it is possible to establish an LLC in Guernsey?*

**Q10:** In the past 12 months have you established an LLC in any of the following jurisdictions (please tick all that apply):

- |   |                                     |
|---|-------------------------------------|
| <input type="checkbox"/> Isle of Man                      | <input type="checkbox"/> Jersey     |
| <input type="checkbox"/> Delaware                         | <input type="checkbox"/> Bermuda    |
| <input type="checkbox"/> Cayman Islands                   | <input type="checkbox"/> Luxembourg |
| <input type="checkbox"/> Other (If other, please specify) |                                     |
- 

**Q11:** *If you have established an LLC in another jurisdiction, please advise what the reasons were for choosing an LLC over other structures.*

**Q12:** *If you considered, but did not establish an LLC, please advise what the reasons were for not doing so.*

**Formation/Core Features**

**Q13:** *If LLC legislation were to be developed in the Bailiwick, which of the following features do you consider should be included:*

<b>Features</b>	<b><i>Include</i></b>	<b><i>Do not include</i></b>	<b><i>No view</i></b>
LLCs should be deemed effective at the point the Registrar issues a certificate of formation.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLCs should be permitted to engage in all forms of regulated financial services business.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLCs should require a resident agent, modelled on the requirements of Part XXIX of the Companies (Guernsey) Law, 2008.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLC legislation should replicate the provisions permitting reservation and changes of name, based on provisions in the Companies (Guernsey) Law, 2008.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLC legislation should include a requirement for specific particulars to be included in an LLC Agreement.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLC legislation should permit an LLC to consist of one or more Members.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The LLC Agreement should be included with an application for registration to the Registrar.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The LLC Agreement should not be a public document.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>



The LLC should be required to have an Operating Agreement similar to those used in other jurisdictions.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLC legislation should provide that, unless specified differently in the LLC Agreement, the management of the LLC is vested in the Members.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLCs should have a default tax treatment similar to partnerships for the purpose of income tax.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLCs should be able to elect whether they wish to be taxed as companies.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLCs should only be able to make a tax election at the time of establishment of the LLC, and that once made it is irrevocable.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLCs should be a body corporate with legal personality.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLC legislation should require each member to contribute to the capital of the LLC.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLC legislation should enable contribution to the capital of the LLC on an optional basis, subject to the LLC Agreement.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLC legislation should include provision regarding dissolution and winding-up.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
LLC legislation should provide that the voting position for Members should be in proportion to their interest in the profits of the LLC.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Liability of members to make contributions to the LLC should be limited to the amounts agreed in the LLC Agreement.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

*Please provide any comments on your above responses.*

**Policy Issues**

**Q14:** *What, if any, innovative features could Guernsey introduce which would differentiate Guernsey LLCs from existing LLC structures in other jurisdictions?*

**Q15:** *Should the legislation include provision to allow for 'migration' of an LLC?*

Include                      Don't include                      No view

*Please provide reasons for your response.*

**Q16:** *Would you be in favour of permitting the creation of a series LLC?*

Include                      Don't include                      No view

*Please provide reasons for your response.*

**Q17:** *Please identify any reputational issues related to LLCs which you think the Committee should be aware:*

**Q18:** *Please identify any issues related to taxation that you think the Committee should be aware:*

**Q19:** *Please identify any other issues that you think the Committee should be aware of in developing policy proposals relating to LLCs:*