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A guide to distributions by a Jersey company

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Jersey is a popular place to establish companies because the Companies (Jersey) Law 1991 (the **Law**) is modern, flexible and modelled on English companies legislation.

This guide looks at the key things you need to know about the payment of distributions by a Jersey company (a **company** that is not an open ended investment company).

Dividends and distributions in Jersey

Being modelled on English companies legislation, the Law used to include provisions which implemented the maintenance of capital rule. This rule required a Jersey company to maintain its paid up share capital for the benefit of its creditors and limited the sources from which dividends could be paid to shareholders.

As a result, dividends could only be paid from profits (whether earned in the current financial year or previous ones) or distributable reserves.

Today, the maintenance of capital rule has been considerably relaxed and the Law in Jersey allows dividends to be paid from a far wider range of sources. Consequently, the Law uses the term distribution rather than dividend to describe a payment of cash or a transfer of assets by a Jersey company to its shareholders. Despite this, the term dividend is still commonly used, including in the memorandum and articles of association (**M&A**) of many companies.

What is a distribution?

The Law defines a distribution in Jersey as any distribution (whether in cash or otherwise) of a Jersey company's assets to its shareholders in their capacity as shareholders other than any:

- issue of bonus shares;
- redemption or buyback of shares;
- reduction of capital; or
- distribution of assets on a winding up.

A distribution that is made in accordance with the Law does not amount to a reduction of capital under the Law, even if it is paid out of a capital account, such as share premium.

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A distribution of assets by a company to its shareholders will not be subject to the requirements of the Law relating to distributions in some limited circumstances. The most common of those is where the distribution does not reduce the net assets of the company. Therefore, for example, a transfer of an asset to a shareholder at market value is unlikely to be caught by the restriction. Similarly an upstream guarantee of a shareholder's liability, in respect of which no liability or potential is required to be recognised or noted in the accounts of the company, is unlikely to be subject to the restrictions and conversely, where a liability or potential liability is or would be recognised or noted in the accounts, giving a guarantee may be caught as a distribution.

Boards should also be aware of transactions which at first look may not seem to constitute a distribution but which should be sanctioned as one out of an abundance of caution, for example interest-free or uncommercial loans to a direct or indirect shareholder or the sale at an undervalue of an asset to a direct or indirect shareholder.

Requirements of Jersey law

Unlike legislation in other countries, the Law is not very prescriptive and allows a Jersey company considerable flexibility to make distributions. The Law has two main requirements.

Solvency statement

The Law states that a company may only make a distribution if the directors who are to authorise it make a statement that they have formed the opinion that:

- immediately following the date on which the distribution is proposed to be made, the company will be able to discharge its liabilities as they fall due; and
- having regard to:
  - the prospects of the company and to the intentions of the directors with respect to the management of the company's business; and
  - the amount and character of the financial resources that will in their view be available to the company,

the company will be able to:

  - continue to carry on business; and
  - discharge its liabilities as they fall due,

  until the first to occur of the expiry of the period of 12 months immediately following the date on which the distribution is proposed to be made or the company is wound up on a solvent basis.

The solvency statement is usually included in the minutes of the meeting of directors at which the distribution to be authorised. While sometimes the solvency statement is in a separate document that is signed by each director who is to authorise it, caselaw suggests that best practice is for it to be included in the minutes.

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Source of payment

The Law states a distribution may be debited to any account of the company other than:

- its nominal capital account if it is a par value company; or
- any capital redemption reserve.

Therefore, the Law does not require a distribution to be paid from profits or distributable reserves or even that the company has any profits or distributable reserves, as long as the directors have reasonable grounds for making the solvency statement. Consequently, a company may pay a distribution from its:

- share premium account if it is a par value company; or
- stated capital account if it is a no par value company.

Ratification of distributions

If:

- a company makes a distribution; and
- the directors who authorised the distribution did not make a solvency statement,

the company will have breached the Law and the distribution will be unlawful.

Where this happens, the Law allows the company to apply to the Jersey court for an order that the distribution be treated as having been made in accordance with the Law.

The court may make the order if it is satisfied that:

- immediately after the distribution was made, the company was able to discharge its liabilities as they fell due;
- at the time the application is made, the company is able to discharge its liabilities as they fall due;
- (if the distribution was made less than 12 months before the application was made) the company will be able to:
  - carry on business; and
  - discharge its liabilities as they fall due,

  until the end of the 12 month period beginning on the date on which the distribution was made; and
- it would not be contrary to the interests of justice to do so.

In addition, following changes to the Law introduced in 2026, where a distribution has been made without the necessary solvency statement, the directors may ratify the distribution without a court order and confirm that it is to be treated for all purposes as if it had been made in accordance with the Law. The directors who are to ratify the distribution must make a statement that:

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- immediately after the distribution was made the company was able to discharge its liabilities as they fell due;
- at the time when the statement is made the company is able to discharge its liabilities as they fall due; and
- if the distribution was made less than 12 months before the date on which the statement is made, the company will be able to carry on business, and discharge its liabilities as they fall due, until the end of the period of 12 months beginning with the date on which the distribution was made.

Memorandum and articles of association

General

In addition to the requirements in the Law, a company's M&A will usually contain provisions relating to the payment of distributions. The directors of the company must make sure they are familiar with these provisions and comply with them.

Sometimes the distribution provisions in the company's M&A will be more restrictive than the requirements of the Law (for example they may permit distributions only out of distributable profits), especially if the M&A have not kept pace with changes to the Law. Where this is the case, the directors may want to amend these provisions so that the company can enjoy the flexibility allowed by the Law, otherwise the more restrictive provisions will apply, in addition to the requirements under the Law.

Interim and final distributions

The Law does not distinguish between interim and final distributions. However, the M&A of most companies continue to do so.

A final distribution is a distribution that is recommended by the directors and declared by the shareholders after the company's financial statements have been prepared. Once a final distribution is declared, it is a debt due by the company to its shareholders.

In contrast, an interim distribution is a distribution that is declared and paid by the directors during a financial period before the company's financial performance for that financial period is known. Unlike a final distribution, the declaration of an interim distribution does not create a debt that may be enforced against the company because it may be rescinded by the directors before the payment date.

Distributions in kind

A company will generally pay distributions in cash. However, if its M&A allow it to do so, it may also pay a distribution (in whole or part) by transferring specific assets (for example shares or bonds or real estate) to its shareholders. This is called a distribution in kind or an in specie distribution.

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Where a company's M&A allow it pay distributions in kind, they usually require the shareholders to approve the distribution in kind.

Typical distribution provisions in M&A

A company's M&A typically have provisions relating to distributions which address the following points.

- Subject to the Law, the:
  - shareholders may declare a final distribution and the amount may not exceed the amount recommended by the directors; and
  - directors may pay an interim dividend at any time in an amount they think appropriate.
- A distribution is to be paid proportionately according to the amount paid up on shares. Some M&A state that a distribution is to be paid proportionately according to the number of shares held.
- The shareholders may, on the recommendation of the directors, direct that a distribution is to be satisfied in assets rather than cash (ie a distribution in kind).

Potential liability of directors

Solvency statement

A director who makes a solvency statement without having reasonable grounds for the opinion expressed in it is guilty of an offence and, upon conviction, is liable to a fine, imprisonment for up to two years or both.

Breach of duty

If:

- a director authorises a distribution;
- the company subsequently becomes insolvent; and
- the Jersey court finds that the director breached the director's duties to act in the best interests of the company and to exercise the necessary care, diligence and skill,

the director will be liable to the company for any damage suffered by it.

Relief

If an action is brought against a director alleging a breach of the director's duties to the company, the director may apply to the Jersey court to be relieved from any liability.

The Law allows the court to relieve the director (in whole or part) from liability for negligence, default or breach of duty or trust on any terms the court thinks fit if it appears to the court that:

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- the director acted honestly; and
- having regard to all the circumstances, the director ought fairly to be excused from liability.

In practice, however, the court is only likely to exercise these powers in favour of a director in rare cases.

Potential liability of shareholders

If:

- a company makes a distribution to a shareholder;
- at the time the distribution is made, the shareholder knows, or has reasonable grounds for believing, that the distribution (or part of it) is made in breach of the Law; and
- the company has not applied to the Jersey court for an order that the distribution be treated as having been made in accordance with the Law,

the shareholder is liable to repay the distribution (or part of it) to the company.

If the distribution was a non-cash distribution, the shareholder is liable to pay to the company a sum equal to the value of distribution (or part of it) at the time at which the unlawful distribution was made.

Characterisation of distributions

The characterisation of a payment by a Jersey company to its shareholders as an income payment or a capital payment is often relevant to shareholders, depending on their tax residence or status, or if they are a trustee.

Jersey law does not characterise payments by companies in this way. The relevant distinction in Jersey law is between a distribution on the one hand (being payments made in accordance with the procedures set out in the Law relating to distributions) and returns of capital on the other hand (being payments made in accordance with the procedures for returning capital, such as the redemption or repurchase of shares, reduction of capital or payment in a winding up). Whilst the latter has always been a return of capital, it has been considered that a distribution could be either.

However, the UK case of *Beard v HMRC [2024]* in relation to a Jersey company indicates that, at least where you have a UK recipient, the relevant factor will be the mechanics used, so not what was distributed, but how it was distributed. Therefore a distribution made in accordance with the distribution provisions of the Law will usually be treated as income, regardless of the source or whether it is a cash distribution or a distribution of assets in specie.

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