STATES OF JERSEY

DRAFT COMPANIES (DEMERGER) (JERSEY) REGULATIONS 201- (P.59/2018): COMMENTS

Presented to the States on 9th July 2018
by the Economic Affairs Scrutiny Panel

STATES GREFFE

COMMENTS

Background

The Draft Companies (Demerger) (Jersey) Regulations 201- (P.59/2018) (the "draft Regulations") were lodged on 21st May 2018 when the Economic Affairs Scrutiny Panel had not yet been constituted. The Panel's main priority immediately after its constitution was to assess which Propositions had been lodged within its remit. Subsequently, the Panel received a briefing on P.59/2018 (and several other Propositions) from Officers of the Chief Minister's Department on 21st June.

The Panel identified several questions on the draft Regulations, which were discussed during the briefing with Officers. In order to obtain a formal record, Officers were asked to provide written responses to the questions, which can be found in the Appendix to these Comments.

The draft Regulations

P.59/2018 essentially permits the demerger of Jersey companies. The introduction of a demerger regime is intended to enable the undertaking, property, rights and liabilities of a Jersey company to be divided amongst 2 or more companies[1].

The current proposal allows the demerger regime to be applicable only to Jersey companies demerging into other Jersey companies. In the first instance, the regime will not be available to Jersey companies which are liable to pay taxes in Jersey, or Jersey companies which are ultimately owned by individuals resident in Jersey. However, in the future, it is intended that the regime will be extended to these companies once the consequential amendments to tax legislation have been developed[2].

Regulation 14 – Effect of demerger on employment

In addition to the questions raised by the Panel (as set out in the Appendix), one of the Panel's main concerns was in relation to Regulation 14 "Effect of demerger on employment", which relates to matters regarding the treatment of employees, their employment agreements, records and retirement schemes. In this regard, the Panel was concerned about what impact a demerger could have on an employee.

During the briefing with Officers it was advised that various organisations had been consulted on the draft Regulations. Unfortunately, written submissions/evidence to this consultation could not be provided to the Panel as no formal records were taken. Therefore the Panel contacted the following organisations to ask for their views on the Regulations, and in particular Regulation 14 –

- Citizen's Advice Bureau
- Jersey Advisory and Conciliation Service ("JACS")
- Jersey Chamber of Commerce
- Jersey Pensions Association.

[1] Scrutiny Briefing Paper – P.59/2018
[2] Scrutiny Briefing Paper – P.59/2018

The Citizen's Advice Bureau was unable to comment on the draft Regulations. JACS advised that they, along with a Policy Principal from the Social Security Department, had met Officers to discuss the draft Regulations. It was agreed that a change to the Employment (Jersey) Law 2003 was required, so that the proposed protections on continuous service under P.59/2018 could be applied. It is understood that an amendment to the Employment Law will be made in due course.

The Jersey Chamber of Commerce is expected to comment on P.59/2018 before the debate, and any submission received will be circulated to Members.

Conclusion

The Panel advised Officers on 5th July that its concerns had been addressed, and that it would not ask for the debate to be deferred or seek a referral under Standing Order 72.

APPENDIX

1. With regard to the directors' "self-assessment" of company solvency, has the option of insisting on a third party opinion of current and future solvency been considered?

This option has been considered. For example, there could be a requirement that audited accounts are prepared or that there be oversight by the court – which is what happens when there is a scheme of arrangement (which is another way of achieving a re-arrangement of company affairs).

However, when we look at the Jersey company law – the Companies (Jersey) Law 1991 ("the **Law**") – the theme is to rely on statements of solvency for various purposes, such as before a reduction in capital [Article 61A inserted by Amendment No. 11 to the Companies Law and prior to which application had to be made to the Royal Court for approval of all proposals for the reduction of capital]; before a merger [Article 127E]; before a continuance [Article 127W]; before a solvent winding up [Article 146]; before a distribution is made to shareholders [Article 115]. The concept is also found in the English insolvency legislation. We therefore achieve consistency in the Law by using a solvency statement mechanism.

As will be noted in relation to the statement of solvency, the requirement is for the directors to make 'full enquiry into the affairs of the demerging company'.

There is a balance to be struck between offering a flexible and cost-effective option for a company, against the need to protect shareholders, creditors and other third parties. As such, there are several layers of protections in the Law and the Regulations. The Law also includes headline director's duties in Article 74 (A director, in exercising the director's powers and discharging the director's duties, shall – (a) act honestly and in good faith with a view to the best interests of the company; and (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances).

In addition, the demerger instrument is available to shareholders and creditors (albeit it may be redacted to some degree) which will also assist in terms of the consideration of solvency by third parties.

2. Is there any remedy in the event that the directors' solvency assessment proves incorrect?

The answer to this depends on why the assessment is incorrect. If the directors deliberately make false statements or fail to make proper and full enquiry, the directors themselves could be subject to criminal prosecution and the penalty of imprisonment. Such misconduct also has consequences in the regulatory environment.

If the directors have made an honest mistake and the company is actually insolvent, the usual procedures would be followed with the appointment of a liquidator or the Viscount, both of whom would (if the relevant circumstances apply) have powers to set aside previous transactions or onerous bargains, take action against the directors and make payments to creditors, including in relation to priority claims (which would include employee claims to a proscribed limit).

The usual risks inherent in running a business cannot be eliminated and there will not always be a remedy.

3. **Could the "express provision" referred to in Regulation 14(4)(a)(i) be used by the demerging company to terminate contracts of employment? The concern is that there is no stipulation that "express provision" must be granted by both sides.**

   Yes, but this is no different from the normal situation where an employer can terminate an employee's contract of employment subject to the protections and requirements of the employment legislation.

   The intention of Regulation 14(4) is to automatically preserve the validity of any contracts of employment which are passed on to another company without further action being necessary, and to specifically ensure that continuity of employment is preserved (which is important for various aspects of employment law). Generally speaking, if a company ceases to exist, the contracts it has entered into also cease, and it is this that we want to avoid.

   This automatic preservation can be lifted by either the employee objecting (Regulation 14(5)) or, as you note, by the demerging company.

4. **Does continuation of employment contracts ensure that notice periods are to be respected by employers in the event of an employee choosing to object to the terms of the transfer of contracts? If the demerger takes place before the notice period has been worked, could the word 'may' in Regulation 14(5)(c) enable the employer to avoid paying money to the employee in lieu of unworked notice?**

   No.

   If an employee chooses to object to the transfer of his or her contract, there is no continuation of employment; rather the contract is terminated as of the completion date of the demerger [Regulation 14(5)(c)].

   However, the employer is required either to permit the employee to serve out his or her notice, or to pay him in lieu of notice.

   The provision in relation to the payment in lieu of notice was inserted after discussion with JACS, to cover situations where an employer did not have the benefit of the usual term in an employment contract that a payment in lieu of notice can be made. Strictly speaking and technically, without such a term, the employer cannot pay but must give work to the employee. This would likely not be practical or acceptable to either company or employee in the demerger scenario.

   The contractual requirement to give notice or to make payment in lieu of notice survives the end of the contract (as per normal circumstances) – and if the amount due is not paid, the obligation is said [see Regulation 14(5)(d)] to be a liability of the demerged companies as per the demerger instrument, or jointly and severally. In other words, the ex-employee could sue the demerged company or companies for any outstanding sum in respect of the notice period.

5. **Does the reference to negotiations with "an employee" in Regulation 14(7) automatically also cover collective bargaining by recognised organisations?**

   This is considered likely, as the recognised organisation acts for the individual employee, and the terms and conditions are incorporated into the contract of employment for the individual. However, this is strictly a matter for legal interpretation.

6. **Could Regulation 14(9)(h) be used as a catch-all to justify the sending of personal information that isn't necessary for the continuance of employment? Are there any protections against this happening?**

   The usual provisions as to confidentiality, breach of contract and data protection would apply. Regulation 14(9)(h) specifically states that the information must 'reasonably be necessary'. Although not explicitly stated, this means necessary for the purposes of employment.

7. **Transfer of retirement schemes (Regulation 15) – is there a reason for not including a minimum time limit before the renegotiation of retirement schemes is permitted?**

   If the provision of a retirement scheme is a term and condition of employment, this would be covered by the provisions in Regulation 14.

8. **Could there be greater protection for all stakeholders if minimum timelines between notification/approval/execution of a demerger were included?**

   Minimum time limits are specified in the Regulations for particular actions to be carried out, and completion of the demerger cannot take place until all of these have expired or been waived.

9. **How was the £5,000 minimum limit for notification of creditors arrived at in Regulation 7(1)?**

   This was a question in the consultation but did not give rise to any comment. The £5,000 was derived from and equates to the provision in the Companies (Jersey) Law 1991 relating to mergers – see Article 127FC of the Law.

   The demerger instrument and the solvency statement combination means that a <£5k creditor's position is perfectly preserved. It is solely that they do not have a personal right of notice; they will be notified by way of general advertisement.

10. **Outside of the main consultation, which external organisations have been asked for their opinion of the Regulations and what were their responses?**

    Jersey Finance, acting for the industry generally, was the originator of this project and was keen to see the provisions moved forward. They have provided comment from time to time on drafts of the Regulations.

The Law Society (by way of its Sub-Committee) provided comment on the draft Regulations as they progressed, and on particular questions of policy – such as on the destination of assets, omitted assets and liabilities, the solvency statement. They supported the introduction of the Regulations.

JACS provided comments on the provisions relating to employment, including as to the payment in lieu of notice point, the need for transfer of employee information between demerging and demerged company, retirement schemes, and continuity of employment. Liaison has been had with the Social Security Department to seek adjustment to the Employment legislation in due course to refer to the Demerger Regulations in the context of continuity of employment.

The JFSC and Registry have been consulted to ensure that the Regulations are in line with the regulatory environment, and that the Registry can perform the functions as required in the Regulations.