

Distributions and share purchases and redemptions under the Companies (Jersey) Law 1991

GUIDE

Last reviewed: February 2023

Contents

Distributions	2
What is a distribution?	2
Making distributions	2
Share purchases and redemptions	2
Share purchases	2
Share redemptions	3
Effect on share capital	3
Treasury shares	3
Solvency statement	4
Source of payment	4
Distributions	4
Share purchases and redemptions	4
Methods of Payment	4
Distributions	4
Share purchases and redemptions	4
Potential liabilities for directors	4
Solvency statements	4
Breach of duty	5
Share purchases and redemptions	5
Court ratification of an unlawful distribution	5
Other relief	5
Potential liabilities for members	6
Distributions	6
Share purchases and redemptions	6
Contacts	6

This guide examines the key aspects of distributions and share purchases (sometimes referred to as share buy-backs) and redemptions under the Companies (Jersey) Law 1991 (the **1991 Law**).

Distributions

A company's articles of association will contain provisions dealing with the payment of distributions. In addition, the 1991 Law imposes obligations relating to the payment of distributions.

What is a distribution?

A distribution is defined in the 1991 Law as a distribution (whether in cash or otherwise) of a company's assets to its members in their capacity as members other than an issue of bonus shares, the redemption or purchase of shares, any reduction of capital made in accordance with the 1991 Law or a distribution of assets on a winding up. A dividend is a form of distribution.

In addition, the 1991 Law only regulates a distribution if the distribution (a) reduces the net assets of the company or (b) is in respect of shares which (in accordance with generally accepted accounting principles adopted by the company) are required to be recognised as a liability in the accounts of the company.

In this context, 'the net assets of the company' means the aggregate of the company's assets less the aggregate of its liabilities and any question as to whether a distribution reduces the amount of the net assets of the company is to be determined in accordance with the generally accepted accounting principles adopted by the company.

The focus on the reduction of net assets is designed to ensure that certain transactions are not classified as distributions. For example, if a subsidiary guarantees the indebtedness of its parent company, the giving of the guarantee would not normally need to be the subject of a provision in the subsidiary's accounts, thereby reducing the net assets of the company provided that it is unlikely that the guarantee will be called and, as such, would not normally need to be approved as a distribution. The accounts of the subsidiary company may, however, need to disclose the guarantee as a contingent liability. By contrast, if a guarantee was given and it was more likely than not that the guarantee would be called, then accounting practice would normally require the guarantee to be the subject of an immediate provision, reducing the net assets of the subsidiary and thereby requiring approval as a distribution.

Making distributions

A company (other than an open ended investment company) may only make a distribution if the directors who authorise the distribution make a prior solvency statement in the statutory form set out below.

An open ended investment company may only make a distribution if the directors who authorise the distribution reasonably believe that, immediately after the distribution is made, the company will be able to discharge its liabilities as they fall due.

For the purposes of the 1991 Law, an **open ended investment company** is a company, the sole business of which, is to invest in securities or any other property and which provides in its articles of association that its shares (or substantially all of its shares) are to be redeemed or purchased at the request of the holders of those shares at a price not exceeding the net asset value of those shares.

Share purchases and redemptions

Share purchases

A company may purchase any of its limited shares, including any redeemable shares.

Under the 1991 Law, a limited share is a share in respect of which the liability of the holder to contribute to the debts of the company is limited to the amount (if any) unpaid on it.

A company (other than an open ended investment company) may only purchase its limited shares if the shares are fully paid and the directors who authorise the purchase make a prior solvency statement in the statutory form set out below.

An open ended investment company may only purchase its limited shares if the shares are fully paid, the shares are purchased at a price not exceeding their net asset value and the directors who authorise

the purchase have reasonable grounds for believing that, immediately following the date on which the payment is proposed to be made, the company will be able to discharge its liabilities as they fall due.

A company may not purchase its limited shares if, as a result, there would no longer be a member holding shares other than redeemable shares or treasury shares.

Unless the company is a wholly owned subsidiary, a purchase of shares must be sanctioned by a special resolution. Under the 1991 Law, a special resolution is a resolution that is required to be passed as such by a majority of two thirds (or such higher majority as may be specified in the company's articles of association) of members who (being entitled to do so) vote at a meeting of the company of which not less than 14 days' notice has been duly given.

Where the purchase will not take place on a stock exchange, the shares may only be purchased pursuant to a contract approved in advance by an ordinary resolution. The holder of the shares to be purchased is not entitled to exercise the voting rights in respect of those shares in relation to the special resolution to sanction the purchase or the ordinary resolution to approve the purchase contract.

Where the purchase will take place on a stock exchange (an on market buy-back), the special resolution sanctioning the purchase must specify the maximum number of shares to be purchased, the maximum and minimum prices which may be paid (which may be specified sums or a basis or formula pursuant to which those sums may be calculated) and a date on which the purchase authority will expire, which must not be more than five years after the date on which the special resolution is passed.

An open ended investment company does not require any sanction from its members to purchase any of its limited shares.

In addition to the purchase of shares, a company may also purchase depositary certificates in respect of its shares. Under the 1991 Law, a depositary certificate is an instrument which confers on a person a right or rights (other than an option or a security interest) in respect of a share or shares held by another person. A purchase of depositary certificates must also be sanctioned by a special resolution which must specify the equivalent information in respect of the depositary certificates as a special resolution approving an on market buy-back.

Share redemptions

A company may issue (or convert non-redeemable limited shares into) limited shares that are liable to be redeemed in accordance with their terms or at the option of either the company or the holder if the company is authorised to do so by its articles of association. A company may not issue (or convert any existing limited shares into) redeemable shares if, as a result, the company would only have redeemable shares in issue.

A company (other than an open ended investment company) may only redeem its redeemable limited shares if the shares are fully paid and the directors who authorise the redemption make a prior solvency statement in the statutory form set out below.

An open ended investment company may only redeem its redeemable limited shares if the shares are fully paid, the shares are redeemed at a price not exceeding their net asset value and the directors who authorise the redemption have reasonable grounds for believing that, immediately following the date on which the payment is proposed to be made, the company will be able to discharge its liabilities as they fall due.

Effect on share capital

In the case of a par value company, a purchase or redemption of limited shares will reduce the company's issued share capital by the number of shares that have been purchased or redeemed (unless the company resolves to hold them as treasury shares) but it does not reduce the company's authorised share capital.

Treasury shares

A company may hold as treasury shares any shares that it has purchased or redeemed if the company is not prohibited by its memorandum or articles of association from doing so and the members have passed an ordinary resolution authorising the company to hold the shares as treasury shares.

A company that holds treasury shares may cancel them, sell them, transfer them for the purposes of an employees' share scheme or hold them.

While the company holds shares as treasury shares, the rights attaching to the shares are generally suspended. Consequently, the company may not exercise any voting rights attached to the shares, receive any dividends or other distributions in respect of the shares (other than fully paid bonus shares) and the rights and obligations in respect of the shares cannot be exercised by, or enforced by or against, the company.

Solvency statement

In the solvency statement required by the 1991 Law, the directors who authorise the distribution, purchase or redemption must confirm that they have formed the opinion that:

- immediately following the date on which the distribution or payment 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 expiry of the period of 12 months immediately following the date on which the distribution or payment is proposed to be made or until the company is dissolved pursuant to a solvent winding up, whichever first occurs.

The solvency statement may be included in the minutes of the board meeting at which the distribution, purchase or redemption is approved. It is not necessary that the solvency statement be signed by the relevant directors or filed with the Jersey Financial Services Commission.

Source of payment

Distributions

A distribution may be debited to any account of the company other than the nominal capital account (in the case of a par value company) or a capital redemption reserve.

Share purchases and redemptions

A share purchase or redemption may be funded from any source, including the nominal capital account and the share premium account (in the case of a par value company) and the stated capital account (in the case of a no par value company).

Methods of Payment

Distributions

A distribution may be made in cash or otherwise.

Share purchases and redemptions

A payment may be made in cash or otherwise (or partly in cash and partly otherwise than in cash).

Potential liabilities for directors

Solvency statements

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, purchase or redemption and the company subsequently becomes insolvent, the director may be found to have breached the director's duties to the company, under Jersey customary law and the 1991 Law, to act honestly and in good faith with a view to the best interests of the company and to exercise the necessary degree of care, diligence and skill.

Share purchases and redemptions

If:

- a company (other than an open ended investment company) has its assets declared en désastre (ie the company is placed in liquidation) or commences an insolvent winding up;
- the company has made a payment in respect of a purchase or redemption of shares in the 12 month period before the declaration was made or the winding up commenced;
- the payment was not lawfully made; and
- the aggregate realisable value of the company's assets and the amount paid by way of contribution to the company's assets by the members in accordance with the Bankruptcy (Désastre) (Jersey) Law 1990 or the 1991 Law (as applicable) is insufficient to pay in full the company's liabilities and the expenses of the désastre proceedings or winding up,

the court may, on the application of the Viscount (the executive officer of the court) or liquidator, order a director to contribute to the assets of the company to enable the insufficiency to be met.

A director who has made a solvency statement in connection with the purchase or redemption may be ordered, jointly and severally with any other person liable to contribute in connection with the unlawful payment, to contribute to the assets of the company an amount not exceeding the amount of the unlawful payment, unless the court is satisfied that the director had grounds for holding the solvency opinion.

Court ratification of an unlawful distribution

Where a distribution has been made by a company in contravention of the 1991 Law and the company makes an application to the court, the court may make an order that the distribution is to be treated for all purposes as if it had been made in accordance with the 1991 Law if the court (a) considers that specified conditions are met and (b) does not consider that it would be contrary to the interests of justice to do so.

The specified conditions are that:

- immediately after the distribution was made the company was able to discharge its liabilities as they fell due;
- at the time when the application is determined by the court the company is able to discharge its liabilities as they fall due; and
- where the distribution was made less than 12 months before the date on which the application is determined, 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.

If an order is made, this would absolve a director from any liability in respect of the unlawful distribution. The order would also have the effect of absolving a member from any potential liability to repay the distribution.

Other relief

If proceedings were instituted against a director alleging that the director breached the director's duties to the company, the director would be entitled to apply to the court to be relieved of liability. The court is empowered by the 1991 Law to relieve the director, in whole or part, from liability for negligence, default or breach of duty or trust on such terms as the court thinks fit if it appears to the court that:

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

Potential liabilities for members

Distributions

If:

- a distribution is made by a company to a member; and
- at the time the distribution is made, the member knows, or has reasonable grounds for believing that, the distribution (or part of it) is made in contravention of the 1991 Law,

the member is liable to repay the distribution (or part of it) to the company (unless the court has ratified the distribution).

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

Share purchases and redemptions

In the circumstances mentioned under the paragraph headed *Potential liabilities for directors – Share purchases and redemptions* above, a person from whom shares were purchased or redeemed is liable to contribute to the assets of the company an amount not exceeding the amount of the unlawful payment received by the person.

The court will not order the person to contribute to the assets of the company unless the court is satisfied that, when the person received the unlawful payment, the person knew, or ought to have concluded from facts known to the person, that immediately after the unlawful payment was made:

- the company would be unable to discharge its liabilities as they fall due; and
- the realisable value of the company's assets would be less than its aggregate liabilities.

Contacts

A full list of contacts specialising in corporate law can be found [here](#).

This guide is only intended to give a summary and general overview of the subject matter. It is not intended to be comprehensive and does not constitute, and should not be taken to be, legal advice. If you would like legal advice or further information on any issue raised by this guide, please get in touch with one of your usual contacts. You can find out more about us, and access our legal and regulatory notices at [mourant.com](#). © 2023 MOURANT OZANNES ALL RIGHTS RESERVED