COUNTRY
COMPARATIVE
GUIDES 2022

The Legal 500
Country Comparative Guides

Guernsey
MERGERS & ACQUISITIONS

Contributor

Appleby

Stuart Tyler

Partner | styler@applebyglobal.com

This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Guernsey.

For a full list of jurisdictional Q&As visit **legal500.com/guides**

GUERNSEY
MERGERS & ACQUISITIONS

1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

The Companies (Guernsey) Law, 2008, as amended (**Guernsey Companies Law**) provides the legal framework for a Guernsey company's operation in all areas, including any merger and acquisition (**M&A**) of a Guernsey company.

The UK Panel on Takeovers and Mergers (**Takeovers Panel**) regulates takeovers and mergers in Guernsey that fall within the ambit of the UK City Code on Takeovers and Mergers (**Takeover Code**).

The Takeover Code will apply to a Guernsey company when either:

1. the company's securities are admitted to trading on a regulated market or multilateral trading facility (**MTF**) in the UK or on any stock exchange in the Channel Islands or the Isle of Man; or
2. if the company has its place of central management and control in the UK, Channel Islands or Isle of Man and one or more of the following apply:
   a. any of its securities have been admitted to trading on a regulated market or MTF in the UK, Channel Islands or Isle of Man at any time in the last 10 years;
   b. dealings or prices for dealings have been published for a continuous period of at least 6 months in the previous 10 years;
   c. any of the company's securities have been subject to a marketing arrangement as defined under UK Companies legislation at any time in the previous 10 years; and
   d. the company has publicly filed a prospectus with the Registrar of Companies or any other relevant authority in the UK, Channel Islands or Isle of Man at any time in the previous 10 years.

The Takeover Code does not apply to open-ended investment companies and the waiver procedure may be available where the company subject to the Code has very few shareholders and it would be inappropriate or unduly onerous to apply the Code. The procedure is normally only available for companies with ten or fewer shareholders.

If the M&A involves a business which is regulated in Guernsey (this includes banks, insurance companies, investment businesses and trust and fiduciary businesses), the consent of the Guernsey Financial Services Commission (**GFSC**) will also be required. Such change of control notifications may also need to be made where a parent undertaking of a GFSC licensed entity is acquired or subject to a merger.

The Competition (Guernsey) Ordinance, 2012 requires certain mergers and acquisitions in Guernsey to be notified to the Guernsey Competition & Regulatory Authority (**GCRA**) for approval prior to the transaction being completed. The GCRA regulate any merger or acquisition which satisfies a turnover test relating to turnover arising in Guernsey and the Channel Islands.

Where the approval of GCRA is required, there are two application routes available:

1. if the acquiring entity is a credit or financial institution, the shortened merger application route may be used. Upon receipt of the application, GCRA will register the application and post a notice on its website inviting comments from the public for a period of 7 days. If no comments are received and GCRA has no concerns over the proposed merger or acquisition, a short form decision will be published on the next working day after expiry of 14 days from the date of registration of the application. If GCRA does have concerns, it will require the parties to prepare

a standard application form; and
2. in all other circumstances, the standard application route must be used. If the transaction is unlikely to raise substantive competition issues, a draft application form should be submitted to GCRA at least 5 working days in advance of the intended final form being filed. If the application is likely to raise significant issues, GCRA also expects the parties to request a pre-filing meeting to discuss the proposal and potential issues. Upon receipt of the application, GCRA will register the application and publish a notice on their website inviting comments from the public for a period of 2 weeks. Whilst there is no deadline for a response on the application form, GCRA endeavours to reach a decision within 25 working days of registration, subject to requiring any further information. If issues arise, the GCRA may undertake a second detailed review.

If a proposed merger or acquisition involves a company which is itself, or which is a (direct or indirect) parent undertaking of, a GFSC regulated entity, certain notifications or applications will need to be made to the GFSC. These will depend on the type of regulatory licence held by the Guernsey entity and the particular transaction. By way of example, the GFSC may take up to 60 days to consent to a change of controller application whereas some changes need only be notified to the GFSC within 14 days after the event has taken place.

Additional regulatory approvals may be required depending on the specific business sector of the target, e.g. if the target is a gaming company, then the approval of the Alderney Gambling Control Commission may need to be obtained.

The Registrar of Beneficial Ownership of Legal Persons in Guernsey will also have to be notified of any relevant change in the particulars of the beneficial owners (unless such entity is regulated by the GSFC or falls subject to another exception). None of this information is made available to the public.

2. What is the current state of the market?

The market is buoyant, driven by the private equity investment appetite for regulated business, buoyant mineral prices and consolidation of offshore businesses.

3. Which market sectors have been particularly active recently?

Within the Guernsey financial services industry, the fiduciary and insurance sectors have been particularly active in recent years. We have also seen an increase in mergers in the e-gaming and mining industries.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

We believe the some of the most significant factors will be:

1. fluctuations in the prices of commodities, particularly in the mining and oil sectors;
2. the continuing consolidation within the fiduciary, fund administration and insurance sector; and
3. private equity investment appetite for financial services businesses.

5. What are the key means of effecting the acquisition of a publicly traded company?

The Guernsey Companies Law does not differentiate between a public and private company, as such the key means of effecting an acquisition are as follows:

1. a contractual takeover offer under which an offer is proposed to the board and shareholders;
2. a scheme of arrangement as set out in Part VIII of the Guernsey Companies Law. In a scheme of arrangement, the acquisition of the entire share capital of the target may be approved by 75% of the shareholders providing that it is also sanctioned by the Royal Court of Guernsey;
3. an amalgamation whereby two or more companies merge to form one company. The continuing company can either be one of the merging companies or a new company. The shareholders of each of the amalgamating companies are required to approve the amalgamation by special resolution and if any of the companies are regulated or are yet to be incorporated then consent will also be required from the GFSC; and
4. a legal merger in which two or more companies are merged by order of the Royal Court. The process for this is similar to that of a scheme of arrangement with the same shareholder consent required.

It is important to note that if the target is regulated then an application will need to be made to the GFSC for consent to the change in controller. Consent is normally deemed to be automatically granted 60 days after the application is made unless the parties are informed to the contrary. The transfer in ownership is unable to occur before this consent is received.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

The following information in respect of a Guernsey company is available from the Guernsey Companies Registry (**Registry**):

1. information on the company including its registered office and the details of its directors and (if applicable) resident agent;
2. an annual validation which must be filed between 1 June and 31 July confirming information such as the directors of the company and whether the company has waived the requirement to hold AGMs or to be audited. The details contained within the annual validation should reflect the company's position as at 31 December of the previous year;
3. certificate of registration and memorandum and articles of incorporation; and
4. any resolution requiring 75% or above shareholder approval, i.e. special, waiver and unanimous resolutions.

A search can also be undertaken at the Guernsey court to ascertain if any order has been made or proceedings commenced for the winding up of the company.

Shareholder details and annual accounts are not publicly available at the Registry. However, the Guernsey Companies Law sets out a procedure whereby a company's register of shareholders may be inspected and/or a copy of the register may be obtained upon payment of a prescribed fee provided the request is made for a proper purpose.

If the company is listed on an exchange, copies of its annual accounts, interim reports and regulatory news announcements can be obtained; the relevant rules of the exchange will apply.

If the Takeover Code applies there are certain requirements on provision of information.

7. To what level of detail is due diligence customarily undertaken?

This varies between transactions; however, as a minimum a bidder would usually obtain as much information from public sources as possible in combination with approaching the target's board of directors with a comprehensive list of financial, legal, regulatory and operational due diligence questions and requests.

The Takeover Code contains provisions relevant to due diligence requests in a hostile bid.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

The shareholders of the target company (or the relevant requisite majority of shareholders) ultimately decide whether to approve the proposed acquisition/merger. Typically, the board will deal with much of the negotiations and preparations in relation to a transaction, presenting the results to the shareholders for approval and execution where necessary.

The Companies (Guernsey) Law, 2008 provides statutory squeeze out rights that allow for a decision approved by 90% of the shareholders to sell the entire issued share capital of a company to bind any remaining dissenting shareholders. This figure is reduced to 75% shareholder approval for a scheme of arrangement; however, such a scheme requires the sanctioning of the Royal Court of Guernsey who will consider the rights and potential impacts on all of the shareholders and creditors of the company when deciding on whether to approve such a scheme.

9. What are the duties of the directors and controlling shareholders of a target company?

The directors should always have regard to their fiduciary duties as directors of a Guernsey company and as such directors must act in the best interest of the company at all times. Director duties have not been codified in Guernsey; however, the recent case of *Carlyle Capital Corporation Limited v Conway & Others* decided in the Royal Court of Guernsey has provided greater certainty over what these duties are, essentially mirroring the fiduciary duties and duty of care that directors have in the UK.

Additionally, where applicable, the directors must act in accordance with the provisions of the Takeover Code and the rules of any stock exchanges upon which the shares are listed.

The directors and shareholders of a Guernsey target company must also ensure that they do not commit an offence of market abuse or insider dealing or, for example, if the company is a GFSC regulated collective investment scheme, breach any relevant regulatory rules or fund documents.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

There is no requirement to consult with or obtain the specific approval of employees but the Takeover Code (if applicable) does require that certain documents (including the offer document and announcement) are provided to an appointed employee representative (or to the employees if there is no appointed representative).

For an amalgamation under Part VI of the Guernsey Companies Law, creditors of the company must be given written notice of the proposed amalgamation and have a right of inspection of the amalgamation proposal and a right to a free copy of the amalgamation proposal upon request.

For a scheme of arrangement under Part VIII of the Guernsey Companies Law, the Court may make provision for any persons who, within such time and in such manner as the Court directs, dissent from the arrangement. It should also be noted that as part of a scheme of arrangement the target is obliged to provide notice of the proposal to the company’s creditors. The rights of these creditors and any submissions that they may make will be considered by the Court when deciding whether to sanction the scheme.

11. To what degree is conditionality an accepted market feature on acquisitions?

Conditionality is an accepted market feature on acquisitions, e.g. making the transaction conditional upon obtaining all necessary regulatory approvals, such as GRCA or GFSC approval.

Likewise, where the Code applies, UK practice is followed, e.g. an offer must contain a condition that the offer will lapse unless the bidder acquires (or agrees to acquire) more than 50% of the target’s voting rights.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

The use of exclusivity agreements is standard practice in Guernsey for private M&A transactions. However, where the provisions of the Takeover Code apply, the board of the target company are not permitted to agree to not solicit or recommend other offers.

In a transaction that is subject to the Takeover Code, the terms of any agreement between the bidder and the target are heavily restricted by Rule 21.2 of the Takeover Code. Any such agreement is generally prohibited, except to the extent that it deals with irrevocable commitments and letters of intent (for example, the shareholder directors of the target may provide an undertaking to accept the offer in respect of their own shares, if the bid is made on the terms indicated).

Where the Takeover Code does not apply (e.g. in relation to a company listed on the International Stock Exchange (**TISE**) with a majority of directors outside the UK, Channel Islands and Isle of Man) it is common to have an implementation agreement or an arrangement agreement which may include the following:

1. The target board agreeing to take certain steps in relation to the transaction (such as providing information to the bidder, recommending the offer, preparing documentation for a scheme of arrangement and so on) in accordance with a proposed timetable;
2. Undertakings from the target not to solicit a competing offer and to inform the bidder if a competing offer is received;
3. Actions which the target can take if a superior competing offer is received; and
4. A break fee payable to the bidder in certain circumstances.

The target board can generally agree not to solicit other offers, but the directors should carefully consider their fiduciary duties in the context of any commitment not to recommend a superior offer.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

If the target company is not listed and not subject to the Takeover Code, the parties can reach a commercial arrangement as regards any break fees.

If the Takeover Code applies, it prohibits “offer-related arrangements” between a bidder, or any person acting in concert with it, and the target. However, Panel consent for certain arrangements may be obtained in certain circumstances, e.g. where the bidder in question is a “white knight” recommended by the target board in the face of a hostile bid.

14. Which forms of consideration are most commonly used?

The most common forms of consideration are:

1. Cash; and
2. Listed or unlisted securities.

Loan notes may also be offered, but are less common.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

Where the provisions of the Takeover Code apply, there are requirements for the bidder, target and certain persons interested in relevant securities to make a public opening position disclosure following the commencement of the offer period.

Where the target is listed on a stock exchange, the rules of the exchange will apply to the timing of the public disclosure and announcements.

If the transaction requires merger control approval by GCRA the proposed transaction will be made public upon GCRA’s receipt of the application, as set out in paragraph 11 above.

Where no specific regulatory regime applies to the company or transaction, it is for the parties to decide as to when they want to disclose the offer to the public.

16. At what stage of negotiation is public disclosure required or customary?

There is no requirement to make a public disclosure unless the company is subject to the Takeover Code. Where the Takeover Code applies, a potential bid should be kept secret until it is formally announced. Once the bidder has notified the target’s board that they intend to make an offer they are also obliged to make an announcement that they have made a formal takeover offer. The requirement to make an announcement under the Takeover Code may also arise in a number of other situations such as where the acquisition necessitates a mandatory offer, where the target becomes subject to unusual share price movement, rumours or speculation and where negotiations extend beyond the parties involved and their immediate advisors.

17. Is there any maximum time period for negotiations or due diligence?

There is no maximum time period for negotiations or due diligence to be conducted. However, where subject to the Takeover Code, the following timetable applies:

1. **Announcement Day.** Date of announcement of intention to make the offer. This must be no later than 28 days from the announcement in which the bidder is first identified.
2. **Day 0.** The bidder must post the offer document to the target’s shareholders no later than 28 days from the Announcement Day.
3. **Day 14.** This is the latest date the target can post a circular advising its shareholders of its views on a hostile takeover offer (in a recommended offer, this is included in the offer document).
4. **Day 21.** The offer can be accepted from this date (although the offer can be extended by the bidder beyond this date).
5. **Day 42 (assuming first closing date is Day 21).** The shareholders who have accepted the offer can withdraw their acceptances if the offer has not yet become or been declared unconditional as to acceptances.
6. **Day 46.** This is the last date for the bidder to post any revised offer document improving its offer or to publish information which may increase the value of its bid where it is offering securities.
7. **Day 60.** This is the last date for acceptances or purchases to be declared unconditional as to acceptances. If the offer has not been declared unconditional as to acceptances by midnight, the offer is deemed to have lapsed.
8. **Day 74 (assuming offer became unconditional as to acceptances on Day 60).** This is the earliest date on which the offer can close.
9. **Day 81 (assuming offer became unconditional as to acceptances on Day 60).** This is the last date by which all other conditions to the offer must be fulfilled or

satisfied.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

Where the company's shares are listed on a stock exchange, the rules of the exchange may make provision on this.

If the Takeover Code applies, the bid price must not be less than the highest price that the bidder (or any person acting in concert with the bidder) has paid for any interest in the target's shares during the three months prior to the commencement of the offer period, and during the offer period until it closes to acceptances (Rule 6, Takeover Code).

Rule 6 also specifies circumstances in which the offer price must also not be less than the highest price paid by the bidder for shares in the 12 months prior to the offer period.

19. Is it possible for target companies to provide financial assistance?

Where a person is acquiring or is proposing to acquire shares in a Guernsey company, section 329 of the Guernsey Companies Law permits a company and any of its subsidiaries to give financial assistance directly or indirectly for the purpose of or in connection with that acquisition before or at the same time as the acquisition takes place. In addition, where a person has acquired shares in a Guernsey company and any liability has been incurred (by that or any other person) for the purpose of or in connection with that acquisition, the company and any of its subsidiaries may give financial assistance directly or indirectly for the purpose of or in connection with reducing or discharging the liability incurred.

Financial assistance may be given by way of, gift, guarantee, security, indemnity, release or waiver, loan or similar or any other assistance which reduces the net assets of the company to a material extent. Financial assistance is considered to be a distribution for the purposes of the Guernsey Companies Law and the solvency process set out in section 303 of the Guernsey Companies Law in relation to distributions must be followed, treating the assistance in the same manner as a distribution.

20. Which governing law is customarily used on acquisitions?

Acquisitions in Guernsey are most commonly governed by either the laws of the Island of Guernsey or the laws of England and Wales.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

The requirements for public facing documentation will be determined by the rules of the stock exchange on which the target is listed.

Under the Takeover Code, the documents issued during an offer must satisfy the highest standards of accuracy and the information given must be adequately and fairly presented (Rule 19.1, Takeover Code).

Recommended bid

The main documents received by the target's shareholders on a recommended bid are:

1. Circular summarising the terms and conditions of the offer;
2. Offer document;
3. Acceptance form; and
4. Prospectus or equivalent document (if required).

Hostile bid

The main documents received by the target's shareholders on a hostile bid are the:

1. Circular summarising the terms and conditions of the offer;
2. Offer document;
3. Acceptance form;
4. Prospectus or equivalent document (if required);
5. Defence documents; and
6. Revised offer document.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

In order to register the transfer of shares in a Guernsey company there are two basic requirements. These are the execution of a share transfer instrument and the updating of the company's Register of Members. If shares are held in certificated form, an instrument of transfer compliant with the requirements of the company's articles of incorporation will need to be completed, signed and delivered to the company secretary. If the shares are held in uncertificated form and are traded on a computerised settlement system, for example on CREST, a transfer of shares will need to be carried out in accordance with the relevant CREST rules and the Uncertificated Securities (Guernsey) Regulations, 2009.

Once the instrument of transfer has been delivered to the board, and it is in a form which is acceptable to the board, they may either direct that the Register of Members be amended or, on rare occasions and unless prohibited by the articles of incorporation, refuse to register the transfer. The new shareholder will only be recognised as the owner of the shares and adopt the rights and liabilities of those shares once entered into the Register of Members.

With the exception of when the target company owns real property, no stamp duty, registration tax or similar documentary tax or charge is currently payable in Guernsey for the sale of shares in a Guernsey company. Consideration should be given to whether such fees and taxes or their equivalent may be payable in other jurisdictions if the transaction documents are being executed outside of Guernsey.

23. Are hostile acquisitions a common feature?

Hostile bids are allowed but are generally more difficult than recommended bids. This is because the bidder in a hostile bid will only have access to a limited amount of information that is in the public domain.

However, this difficulty could be less of an issue when the target is a regulated investment fund, as is often the case in Guernsey, because the fund's net asset value is assessed and made available on a regular basis, in accordance with the applicable fund regulations.

24. What protections do directors of a target company have against a hostile approach?

There are no specific protections provided by Guernsey law, however there are various methods available to the target to defend itself against a hostile bid. These include the so called 'white knight' defence whereby a preferred third party makes an alternative offer for the target company.

The Takeover Code (where applicable) contains certain restrictions on defensive actions which the target may take. These are contained at rule 21.1 of the Takeover Code and mainly prevent the target from taking frustrating action unless consented to by the shareholders in general meeting. These actions may include:

1. Issuing shares or granting options;
2. Selling treasury shares;
3. Selling or acquiring assets of a material amount;
4. Entering into contracts other than in the ordinary course of business; or
5. Creating defences that make the target unattractive.

In addition to the Takeover Code's provisions, the following must be considered:

1. **Directors' duties.** Directors' fiduciary duties in Guernsey law are based on common law principles and have not been codified or augmented by statute. Directors must act in the best interests of the company at all times and must use their powers for a proper purpose.
2. **Market abuse.** The offence of market abuse may be committed if the board does any of the following (section 41A to 41G, The Protection of Investors (Bailiwick of Guernsey) Law, 1987):
    a. acts on information that is not generally available to the market and which may affect the price of the target's shares;
    b. behaves in a manner likely to create a false impression of the supply or demand for, or the price or value of, the target's shares; or
    c. behaves in a manner generally regarded as distorting, or likely to distort the market in the company's shares.
3. **Insider dealing.** If the directors are in the possession of price-sensitive information and seek to block a bid by acquiring shares or encouraging others to do so, the provisions of the Company Securities (Insider Dealing) (Bailiwick of Guernsey) Law, 1996 will be relevant. A director in breach of these obligations will commit the offence of insider dealing.
4. **Investment fund restrictions.** Since most listed companies in Guernsey are regulated investment funds, the constraints arising from regulatory rules or the fund's own investor documents must also be considered.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

Pursuant to Rule 9 of the Takeover Code (where applicable), a mandatory offer to acquire all of the target's share capital must be made when the bidder (or parties acting in concert) either:

1. acquires an interest that results in the bidder holding a stake of 30% of more of the voting rights of the company. This includes any interest acquired through derivatives; or
2. is interested in shares which in the aggregate carry not less than 30% of the voting rights of a company but does not hold shares carrying more than 50% of such voting rights, and the bidder (or any person acting in concert with it) acquires an interest in any other voting shares of the company.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

Where an acquirer has exercised the squeeze out rights provided under the Guernsey Companies Law (see question 8 above), a shareholder who has not assented to the acquisition may within one month after the date of the acquirer's notice to acquire, apply to the Royal Court of Guernsey to cancel that notice. The Court may cancel the notice or make such order as it thinks fit.

A shareholder may apply to the Guernsey Court for relief on the ground that:

1. the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself); or
2. an actual or proposed act or omission of the company is or would be so prejudicial.

The target's constitutional documents may provide additional rights for its minority shareholders.

27. Is a mechanism available to compulsorily acquire minority stakes?

The Guernsey Companies Law provides if, within 4 months after the date of making an offer in respect of such a scheme or contract, the offer is approved by shareholders comprising 90% in value of the shares affected (excluding any shares held as treasury shares), the transferee may, within 2 months after the expiration of those 4 months, give notice to any dissenting shareholder that it desires to acquire his shares (a "**notice to acquire**").

Subject to the Court's powers in respect of a dissenting shareholder application, where a notice to acquire is given, the transferee is entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee.

On the expiration of one month from the date of the notice to acquire:

1. send a copy of the notice to the transferor, and
2. pay or transfer to the transferor the consideration required under the notice in respect of the shares he is entitled to acquire, and the transferor shall thereupon register the transferee as the holder of those shares.

For the purposes of calculating the 90% threshold, shares held as treasury shares and shares held by the offeror or its affiliates are not taken into account.

Contributors

Stuart Tyler
Partner

styler@applebyglobal.com