Guernsey blockchain and cryptocurrency regulation 2020, second edition

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Government attitude and definition

The Bailiwick of Guernsey ("Guernsey"), as one of the world's leading financial centres, has always been an early adopter of financial innovation and has a reputation for expertise and stability. The first-ever commercial deployment of blockchain technology for the private equity market in early 2017, which was pioneered in Guernsey by Northern Trust and IBM, demonstrates that Guernsey is very much open to new innovation and development.

The Guernsey Financial Services Commission (the "Commission") is the body responsible for the regulation of the finance sector. One of the founding objectives of the Commission is to protect the public, and to protect and enhance the reputation of Guernsey as a financial services centre, and one of the ways that the Commission seeks to fulfil this objective is to adhere to the highest international standards of compliance and transparency and to adopt a policy of encouraging promoters of only the highest calibre. Accordingly, the Commission has issued advice calling for caution in the field of digital, virtual or cryptocurrencies ("Virtual Currencies") and initial coin offerings ("ICOs"). The Commission has indicated that whilst it has a broad policy of encouraging innovation, and is keen to liaise with firms or individuals to discuss potential applications, it believes that there are potential risks in the use of Virtual Currencies, especially for retail customers. The Commission has indicated that it would be cautious about approving applications for ICOs which could then be traded on a secondary market, or the establishment of a digital currency exchange within Guernsey, due to the significant risk of fraud and/or money laundering, and has generally issued advice to investors that when investing in Virtual Currencies they should act with extreme caution – and be prepared to lose the entire value of their investment.

At present, there are no cryptocurrencies backed by Guernsey's government, the States of Guernsey, and Guernsey does not have a central bank. There have been no pronouncements from the States of Guernsey or the Commission which would indicate that Virtual Currencies are given any form of equal status as domestic currency, although it should be noted that there have similarly been no pronouncements that would indicate that Virtual Currencies will *not* be treated as a currency or foreign currency.

In general, funds seeking to invest in Virtual Currencies should be aware that whilst the Commission is generally cautious about the regulatory approach which should be taken in relation to Virtual Currencies and ICOs, Guernsey as a jurisdiction is keen to encourage financial innovation, and provided that an applicant can satisfy the Commission that key controls are in place for the protection of investors, there should be no reason why a responsible fund should not be regulated in Guernsey by the Commission.

Cryptocurrency regulation

Guernsey does not at present have any specific regulatory laws or guidance relating to any form of Virtual Currencies or ICOs, but the nature of Guernsey's existing regulatory laws is such that Virtual Currencies and ICOs could be capable of regulation in a number of ways. The Commission has indicated that it will assess any application for regulation by the same criteria that it uses for any other asset types or structure, and look to ensure that key controls around custody, liquidity, valuation of assets and investor information are in place.

A fund based on Virtual Currencies or the making of an ICO, if required to be regulated, is likely to fall under one of two regulatory regimes; that of the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (as amended) (the "POI Law") or the Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 (the "NRFSB Law").

Regulatory position under the POI Law

Every "collective investment scheme" (a "fund") domiciled in Guernsey is subject to the provisions of Guernsey's principal funds legislation – the Protection of Investors (Bailiwick of Guernsey) Law, 1987, as amended (the "POI Law") – and regulated by the Commission.

Broadly speaking:

- Every fund domiciled in Guernsey (a "Guernsey fund") must be administered by a Guernsey company which holds an appropriate licence under the POI Law (a "POI Licence").[1] The administrator is responsible for ensuring that the fund is managed and administered in accordance with the fund documentation.
- Every open-ended Guernsey fund must also appoint a Guernsey company which holds a POI Licence to act as custodian (or trustee, where the Guernsey fund is structured as a unit trust). The trustee/custodian is (with limited exceptions) responsible for safeguarding the assets of the fund and, in some of the rules, to oversee the management and administration of the fund by the administrator.

The POI Law makes it a criminal offence, subject to certain exceptions, for any person to carry on or hold himself out as carrying on any controlled investment business in or from within the Bailiwick of Guernsey without a POI Licence. Additionally, it is an offence for a Bailiwick body to carry on or hold itself out as carrying on any controlled investment business in or from within a territory outside the Bailiwick of Guernsey unless that body is licensed to carry on that business in the Bailiwick and the business would be lawfully carried on if it were carried on in the Bailiwick.

Guernsey funds regulation only applies to "collective investment schemes" – arrangements relating to property of any description which involve:

- the pooling of contributions by investors;
- third party management of the assets; and
- a spread of risk.

Thus arrangements with a single investor or a single asset would not usually be classified as a fund.

The POI Law divides Guernsey funds into two categories:

- "**registered funds**", which are *registered with* the Commission; and
- "**authorised funds**", which are *authorised by* the Commission.

The difference between authorised funds and registered funds is essentially that authorised funds receive their authorisation following a substantive review of their suitability by the Commission, whereas registered funds receive their registration following a representation of suitability from a Guernsey body holding a POI Licence (the administrator, who scrutinises the fund and its promoter in lieu of the Commission and takes on the ongoing responsibility for monitoring the fund).

The POI Law grants the Commission the power to develop different classes of authorised and registered funds and determine the rules applicable to such classes.

Funds seeking authorisation or registration must therefore satisfy the requirements of the POI Law and (where applicable) the applicable rules specified by the Commission.

The rules governing the different classes of Guernsey funds state whether funds in each class may be open-ended or closed-ended (or whether they may choose from either).

A Guernsey fund is open-ended if the investors are entitled to have their units redeemed or repurchased by the fund at a price related to the value of the property to which they relate (i.e. the net asset value).

There is no prescribed period within which the redemption must occur or the moneys be paid.

Fund types in Guernsey include, but are not limited to:

- Registered Collective Investment Schemes (a registered open- or closed-ended fund governed by the Registered Collective Investment Scheme Rules 2018 and the Prospectus Rules 2018).
- Private Investment Funds (a registered open- or closed-ended fund governed by the Private Investment Fund Rules 2016).
- Class A Funds (an authorised open-ended fund governed by the Authorised Collective Investment Schemes (Class A) Rules 2008). Class A Funds are primarily designed for offering to retail investors.
- Class B Funds (an authorised open-ended fund governed by the Authorised Collective Investment Schemes (Class B) Rules 2013). Class B Funds are the most popular form of fund and are suitable for retail and institutional investors alike.
- Class Q Funds (an authorised open-ended fund governed by the Authorised Collective Investment Schemes (Qualifying Professional Investor Funds) (Class Q) Rules 1998). Class Q Funds benefit from a lighter regulatory regime and are therefore limited to Qualifying (sophisticated) Investors.
- Authorised closed-ended funds (an authorised closed-ended fund governed by the Authorised Closed-Ended Investment Schemes Rules 2008).

Regulatory position under the NRFSB Law

The NRFSB Law provides that if an entity carries out certain "financial services businesses" *in or from within the Bailiwick by way of business* then it must, subject to certain exceptions (see below), register with the Commission. A financial services business which is not registered is guilty of an offence.

The NRFSB Law provides that a business holds itself out as carrying on business in or from within the Bailiwick if:

- by way of business, it occupies premises in the Bailiwick or makes it known by an advertisement or by an insertion in a directory or by means of letterheads that it may be contacted at a particular address in the Bailiwick;
- it invites a person in the Bailiwick, by issuing an advertisement or otherwise, to enter into or to offer to enter into a contract or otherwise to undertake business; or
- it is otherwise seen to be carrying on business in or from within the Bailiwick.

Financial services business

The NRFSB Law only applies to businesses specified in Schedule 1 of the NRFSB Law, the relevant parts of which are summarised as follows:

- Facilitating or transmitting money or value through an informal money or value-transfer system or network.
- Issuing, redeeming, managing or administering means of payment, including, without limitation, credit, charge and debit cards, cheques, travellers' cheques, money orders and bankers' drafts and electronic money.

For the purposes of the NRFSB Law, the activities listed will only constitute "financial services businesses" when carried on: (i) by way of business; and (ii) for or on behalf of a customer". "By way of business" is interpreted to mean charging some form of fee for the service provided.

A business will not constitute a "financial services business" for the purposes of the NRFSB Law if it is a "regulated business", meaning business carried on in accordance with a licence granted under: the Banking Supervision (Bailiwick of Guernsey) Law, 1994, as amended; the POI Law; the Insurance Business (Bailiwick of Guernsey) Law, 2002, as amended; or the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002, as amended.

Exceptions
Businesses undertaking "financial services business" on an incidental or occasional basis may not be required to register with the Commission. To be excluded, the business must meet *all of the criteria* below:

- the total turnover of that business, plus that of any other financial services business carried on by the same person, does not exceed £50,000 per annum;
- no occasional transactions are carried out in the course of such business, that is to say, any transaction involving more than £10,000, where no business relationship has been proposed or established, including such transactions carried out in a single operation or two or more operations that appear to be linked;
- the turnover of such business does not exceed 5% of the total turnover of the person carrying on such business;
- the business is ancillary, and directly related, to the main activity of the person carrying on the business;
- in the course of such business, money or value is not transmitted or such transmission is not facilitated by any means;
- the main activity of the person carrying on the business is not that of a financial services business;
- the business is provided only to customers of the main activity of the person carrying on the business and is not offered to the public; and
- the business is not carried on by a person who also carries on a business falling within Paragraphs 20 to 23A of Part I of Schedule 1 to the NRFSB Law.

In addition, activities that are merely "incidental and other activities", as listed in Part III of Schedule I of the NRFSB Law, do not constitute "financial services businesses". In short, these relate to activities carried out in the course of carrying on the professions of a lawyer, accountant or actuary.

Requirement to register
This is still an evolving regulatory area in Guernsey, and there is some uncertainty as to whether cryptocurrency falls within the terms set out in b) above (and Schedule 1 of the NRFSB Law), but as these are not exhaustive, the cautious approach would be to assume that this section is wide enough to capture cryptocurrency. Further, a) also refers to transfer of money or value, which is wide enough to capture cryptocurrency.

Application to virtual currencies

A person is treated as carrying on controlled investment business if he engages by way of business in any of the "restricted activities" specified in Schedule 2 of the POI Law in connection with any "controlled investment" identified and described in Schedule 1 of the POI Law. The scope of this chapter does not permit a detailed look at either of these concepts, but generally "restricted activities" include the promotion of funds, dealings with investments (including buying, selling, subscribing for, borrowing, lending or underwriting an investment) or making arrangements for another person to do the same, or operating an investment exchange, each in connection with a controlled investment, which can include either open- or closed-ended collective investment schemes, or general securities and derivatives.

Whether a POI Licence is necessary in relation to an ICO or a fund engaged in any way with a Virtual Currency will largely turn on whether such a Virtual Currency can legitimately be defined as a security. This is likely to be tested on a case-by-case basis in practice, but consideration may be given to whether a Virtual Currency is asset-based or whether it is a more "pure" cryptocurrency.

Given the uncertainty surrounding the nature of Virtual Currencies in Guernsey, it would be prudent to assume that where an endeavour in Guernsey is not subject to regulation under the POI Law, it will be registrable under the NRFSB Law.

Sales regulation

At present, there are no securities laws or commodities laws in Guernsey regulating the sale of Bitcoin or tokens. The POI Law makes it a general offence to operate an investment exchange in relation to a controlled investment without an appropriate POI Licence, but it is generally unclear if any specific Virtual Currency would constitute a "security" for the purpose of the POI Law, and whilst the Commission have not yet adopted an official position on the matter, it would likely find guidance issued by the prominent financial regulators (the U.S. Securities Exchange Commission, the UK Financial Conduct Authority, etc.) persuasive. Given the general uncertainty in this area, it would be prudent for any individual or firm contemplating engaging in the business of running an investment exchange in relation to any Virtual Currency to consult with the Commission at the early stages.

Taxation

There are no specific laws in Guernsey regulating the taxation of Virtual Currencies, and it is therefore likely that they will be taxed in accordance with general Guernsey taxation principles and provisions.

Guernsey does not have a concept of value added, goods and services or consumption tax, capital gains tax, net wealth/net worth tax or inheritance tax (although there are registration fees and *ad valorem* duty for a Guernsey Grant of Representation where required). Similarly, apart from transfers of Guernsey real property or transfers of interest in certain unlisted entities (other than collective investment schemes) that have a direct or indirect interest in Guernsey real property, which may (subject to exemption) attract a document duty, no stamp or transfer taxes are applicable. Withholding taxes are payable at a rate of 20% solely in relation to the payment of dividends by a Guernsey company to a Guernsey resident individual (unless the company has exempt status), but are not payable in relation to the payment of dividends to non-residents, or on interest, royalties or service fees. Guernsey does not have specific anti-avoidance rules but does have a broad general anti-avoidance provision which targets transactions where the effect of the transaction or series of transactions is the avoidance, reduction or deferral of a tax liability.

Guernsey has introduced economic substance legislation for accounting periods commencing on or after 1 January 2019. The details of this legislation are beyond the scope of this chapter but economic substance requirements should be considered in the context of structures containing Guernsey tax-resident companies.

It would therefore be prudent to assume that any income arising from a Virtual Currency (whether in the form of a Virtual Currency or otherwise), or any income arising in the form of a Virtual Currency, will be taxable in line with Guernsey income tax provisions and valued at the appropriate spot rate on the date that the income arises, although the Guernsey Income Tax Office has not made a formal statement on the matter and may determine that another valuation method should be used.

Corporate Income Tax

A company is treated as tax-resident in Guernsey if:

- it is incorporated in Guernsey;
- it is incorporated outside of Guernsey but is "centrally managed and controlled" in Guernsey (control for these purposes refers to strategic control, and is generally exerted by directors, making the location of board meetings and other decision-making key); or
- it is incorporated outside of Guernsey but is directly or indirectly controlled by one or more Guernsey resident individuals (control in this case referring to shareholder control instead of director control, and generally applies where one or more natural persons are able to secure by the means of holding shares that the affairs of the company are conducted in accordance with their wishes).

Companies resident in Guernsey are subject to income tax on their worldwide income (although certain reliefs are available to prevent double taxation). Most companies that are tax-resident in Guernsey are taxed at a standard rate of 0%, but income arising from certain activities is taxed at 10% or 20%. This includes (but is not limited to) income arising from fund administration, investment management (except in relation to funds) and fiduciary business (each of which are taxed at the 10% rate), and income arising from large retail businesses (taxable profits in any year exceeding £500,000), the ownership of land and buildings in Guernsey, regulated trading activities such as telecommunications or the importation and/or supply of gas and hydrocarbon oil in Guernsey (which are taxed at the 20% rate).

Unit trusts are treated as companies for Guernsey income tax purposes and limited partnerships and limited liability partnerships are considered tax-transparent, and so are not taxable entities in Guernsey.

There is an exemption regime available for collective investment schemes, entities beneficially owned by collective investment schemes, and entities established for the purpose of certain specified activities relating to a specific collective investment scheme. Applications for this exemption must be made annually and attract a payment of an annual fee currently fixed at £1,200. Where an exemption is granted, the entity is treated as not being resident in Guernsey for tax purposes and is not liable for Guernsey tax on non-Guernsey source income (including Guernsey bank deposit interest).

Personal income tax

Individuals in Guernsey pay income tax at a flat rate of 20%. The personal income tax year is based on the calendar year, and income tax returns must be filed by 30 November of the year following the relevant tax year (which filing can be made electronically or on paper).

There are different classes of residence which may affect an individual's tax treatment. Individuals may be:

- "**principally resident**" – they are in Guernsey for 182 days or more in a tax year, or are in Guernsey for 91 days or more in a tax year and have spent 730 days or more in Guernsey over the four prior tax years;

- "**solely resident**" – they are in Guernsey for 91 days or more in a tax year, or are in Guernsey for 35 days or more in a tax year and have spent 365 days or more in Guernsey over the four prior tax years, and in either case have not spent 91 days or more in any other jurisdiction in the tax year; or
- "**resident only**" – they would be treated as solely resident in a tax year, but they have spent 91 days or more in another jurisdiction for that tax year.

Individuals who fall within the scope of any of the above will pay Guernsey tax on their worldwide income, although foreign tax relief is available. Individuals who are "resident only" can elect to pay a standard charge of £30,000, which has the effect of exempting them from Guernsey income tax on their worldwide income (they will still have to pay tax on any Guernsey-source income).

A personal allowance is available for individuals of £11,000 (although earners of more than £100,000 have their allowance reduced by £1 for every £5 exceeding this limit. Certain reliefs are available for pension contributions and mortgage interest which are beyond the scope of this chapter. A Guernsey resident individual can elect for a cap on their income tax liability in relation to their worldwide income (but not in relation to income arising on Guernsey real property).

FATCA and CRS

Guernsey is party to an intergovernmental agreement with the United States regarding the Foreign Account Tax Compliance Act of 2009 ("FATCA") and implemented FATCA due diligence and reporting obligations in June 2014. Under FATCA legislation in Guernsey, Guernsey "financial institutions" are obliged to carry out due diligence on account holders and report on accounts held by persons who are, or are entities that are controlled by, one or more natural persons who are, residents or citizens of the United States, unless a relevant exemption applies.

Guernsey is also a party to an intergovernmental agreement with the United Kingdom in relation the United Kingdom's own version of FATCA, which it also implemented in June 2014. However, the United Kingdom's version of FATCA has now been superseded by the adoption by Guernsey (alongside numerous jurisdictions) of the much broader global Common Reporting Standard ("CRS").

Guernsey is a party to the OECD's Multilateral Competent Authority Agreement regarding the CRS and implemented the CRS into its domestic legislation with effect from 1 January 2016. Under CRS legislation in Guernsey, Guernsey "financial institutions" are obliged to carry out due diligence on account holders and report on accounts held by persons who are, or are entities that are controlled by, one or more natural persons who are residents of jurisdictions that have adopted the CRS, unless a relevant exemption applies.

It is unclear at this stage what, if any, reporting should take place in relation to Virtual Currencies under FATCA or CRS, and much will turn on whether individual Virtual Currencies are "securities" for FATCA and CRS purposes. Until this point has been settled, it would be prudent to adopt a conservative approach.

Money transmission laws and anti-money laundering requirements

All Guernsey individuals and firms are subject to the Drug Trafficking (Bailiwick of Guernsey) Law, 2000 (as amended), the Terrorism and Crime (Bailiwick of Guernsey) Law, 2002 (as amended) and the Disclosure (Bailiwick of Guernsey) Law, 2007. These laws contain various offences which arise should a financial service business, a non-financial service business or a nominated officer in a financial service business fail to make a disclosure to Guernsey's Financial Intelligence Unit, the Financial Intelligence Service where they have knowledge or suspicion (or reasonable grounds for knowledge or suspicion) of money laundering or terrorist financing. It is also an offence to disclose information or any other matter which is likely to prejudice an investigation by law enforcement.

In addition, regulated entities in Guernsey are bound by various rules and regulations – in particular, Guernsey's anti-money laundering and counter-terrorist financing legislation, including the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations, 2008 and the Handbook for Financial Services Businesses on Countering Financial Crime and Terrorist Financing (current edition June 2019) published by the Commission (the "Handbook").

The full scope of Guernsey's anti-money laundering regime, counter-terrorist financing legislation and of all of the applicable laws, rules and regulations applicable to an entity regulated under the POI Law or the NRFSB Law is beyond the scope of this chapter but the key points to consider are as follows:

- a regulated entity should appoint a money laundering reporting officer ("MLRO") and Money Laundering Compliance Officer ("MLCO") resident in Guernsey;
- the board or equivalent of the entity will have effective responsibility for compliance with Guernsey's anti-money laundering regime and counter-terrorist financing legislation and must take responsibility for the policy on reviewing compliance, consider the appropriateness and effectiveness of compliance and the review of compliance at appropriate intervals, and take appropriate measures to keep abreast of and guard against the use of technological developments and new methodologies in money laundering and terrorist financing schemes. The board may delegate some or all of its duties but must retain responsibility for the review of overall compliance with Guernsey's anti-money laundering and counter-terrorist financing legislation requirements;

- the entity will require appropriate customer take-on policies; procedures and controls will need to be adopted to sufficiently identify and verify identity (to a depth appropriate to the assessed risk of the business relationship and occasional transaction) of all of its existing and new customers, with enhanced measures in relation to certain customers;
- all transactions and activity will need to be monitored on an ongoing basis to include all business relationships (on a risk-based approach), with high-risk relationships being subjected to an appropriate frequency of scrutiny, which must be greater than may be appropriate for low-risk relationships;
- appropriate and effective policies, procedures and controls must be established in order to facilitate compliance with the reporting requirements of the regulations; and
- appropriate employee screening and training policies will need to be in place.

The Handbook permits the use of technology for customer due diligence, and indeed as referenced above, Guernsey was one of the earliest adopters of blockchain technology in the private equity market for administration purposes. Other administrators have since adopted technologically backed systems for undertaking customer due diligence, and in particular, private equity fund administrator Ipes has set up the ID Register, an online platform for connected due diligence, FATCA and investor reporting.

Promotion and testing

The Commission has introduced the free "Innovation SoundBox" to serve as a hub for enquiries regarding innovative financial products and services, and encourages firms or individuals to use this facility to discuss potential applications in the field of Virtual Currencies at an early stage. No fees are charged for engaging with the Innovation SoundBox.No fees are charged for engaging with the Innovation SoundBox.

Ownership and licensing requirements

There are no specific restrictions in Guernsey on investment managers holding cryptocurrencies for investment purposes, and as the regulatory position is unclear, individuals should approach the Commission on a case-by-case basis to determine whether they are required to obtain a POI Licence in order to hold cryptocurrency as an investment advisor or fund manager. The above section, headed "Cryptocurrency regulation", provides more detail on when an individual or entity is required to be licensed under the POI Law, and the section headed "Money transmission laws and anti-money laundering requirements" provides further detail about applicable anti-money laundering and counter-terrorist financing requirements.

Mining

There are no specific restrictions on the mining of Virtual Currencies in Guernsey.

Border restrictions and declaration

There are no specific border restrictions or declarations which must be made on the ownership of Virtual Currencies in Guernsey. However, the Cash Controls (Bailiwick of Guernsey) Law, 2007 (as amended) (the "Cash Controls Law") does set out requirements for any person who is entering or leaving Guernsey who is carrying cash in any currency to the equivalent value of €10,000 or more to make a declaration to a Guernsey Border Agency Officer. The definition of "cash" under the Cash Controls Law is broad, including banknotes, bullion, ingots and coins (whether or not in circulation as a medium of exchange) and it is not clear whether Virtual Currencies would be caught under such a provision. Despite this, it is likely that the Cash Controls Law will not apply to the movement of Virtual Currencies, as to be caught under the Cash Controls Law the cash must be carried in baggage or on one's person and, given the purely digital nature of many Virtual Currencies, it is unclear whether it would be conceptually possible for it to be "carried".

Reporting requirements

There are no specific Guernsey reporting requirements for cryptocurrency payments made in excess of a certain value. However, any transactions should be monitored to ensure that they are compliant with anti-money laundering and countering the financing of terrorism procedures.

Estate planning and testamentary succession

At present, Virtual Currencies in Guernsey are not treated differently than any other asset on the death of the holder. In principle, therefore, if an estate is subject to Guernsey succession laws, Virtual Currencies would be treated in the same way as any other asset and distributed in accordance with the will or intestacy of the holder under Guernsey law. There may, however, be practical difficulties with both locating and distributing any Virtual Currencies which may be stored in virtual wallets or protected by other forms of security, and the means for transferring Virtual Currencies to a successor in title may largely depend on the relevant issuer or exchange.

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David trained at Clifford Chance in London, qualifying as an English solicitor in the Private Funds Group in 2004. While there, he specialised in the establishment of institutional closed-ended investment funds, particularly private equity, real estate and infrastructure funds. In 2006, he spent nine months on secondment at ABN AMRO advising on the structuring and launch of institutional fund-linked investment products, before joining Carey Olsen in May 2007. David became a partner in 2013.

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Endnotes

1. Under the POI Law, such an administrator is referred to as a "designated manager", but in the rules governing the various classes of funds in Guernsey, such an administrator is sometimes described as a "designated administrator". For the sake of convenience, we will refer to them as an "administrator" throughout this chapter.

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PLEASE NOTE

Please note that this guide is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

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