

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

POLICY & RESOURCES COMMITTEE
&
COMMITTEE *FOR* ECONOMIC DEVELOPMENT

CREDIT AND FINANCE LEGISLATION

The States are asked to decide:-

Whether, after consideration of the Policy Letter, entitled "Credit and Finance Legislation", dated 2nd December, 2020, of the Policy & Resources Committee and the Committee for Economic Development, they are of the opinion:-

1. To approve the repeal of the Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 and the preparation of a new Credit and Finance Law, as set out in the Policy Letter entitled "Credit and Finance Legislation", dated 2nd December, 2020.
2. To direct the preparation of such legislation as may be necessary to give effect to the above decision.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

POLICY & RESOURCES COMMITTEE
&
COMMITTEE *FOR* ECONOMIC DEVELOPMENT

CREDIT AND FINANCE LEGISLATION

The Presiding Officer
Royal Court
St Peter Port
Guernsey

2nd December, 2020

Dear Sir

1. Executive Summary

- 1.1. The Bailiwick of Guernsey has a well-developed and mature legislative and supervisory framework for financial services, but non-bank credit providers are not yet subject to a licensing process and are not supervised for the conduct of their lending activities. This limits consumer protection in relation to such businesses.
- 1.2. The Registration of Non Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008 (the “NRFSB Law”) requires certain types of business to be registered with the Guernsey Financial Services Commission (the “GFSC”). However, these businesses (“NRFSBs”), most of which undertake credit activities, are only subject to a registration framework for the purpose of meeting international standards on anti-money laundering and combatting of the financing of terrorism (“AML/CFT”) so as to protect and enhance the reputation of the Bailiwick. The GFSC’s powers of supervision outside AML/CFT under the NRFSB Law are limited.
- 1.3. The Policy & Resources Committee and the Committee *for* Economic Development (together referred to as the “Committees”) consider that consumer financial protection, in relation to non-bank provision of credit, should be improved and that the best way of achieving this aim is to remodel the NRFSB Law by repealing and replacing it with new legislation (the “New Legislation”). The Committees are conscious that the New Legislation should be proportionate and not unnecessarily restrict access to credit from either Bailiwick, or non-

Bailiwick, businesses. In addition, in light of the importance of mortgage loans, the Committees consider that the provision of such loans by banks, and non-banks, should also be supervised under the New Legislation.

- 1.4. Improvement of consumer financial protection is considered in two, linked, ways in this policy letter. First, there are general provisions (pillar one), which articulate the licensing and supervisory framework which should apply to the provision of credit, and services ancillary to the provision of credit. Second, it is proposed that a separate pillar (pillar two) will include additional specific criteria on the provision of credit by businesses via digital services (in essence non-traditional “bricks and mortar” lenders) or services in relation to the same. The inclusion of separate provisions on digital services recognises that such areas of business are growing in importance and are deserving of separate focus.
- 1.5. This policy letter also proposes revisions, for AML/CFT purposes, to the coverage of financial services businesses currently falling within the scope of the NFRSB Law (pillar three). These businesses provide credit and/or other types of financial services. In addition, the proposals include coverage of businesses providing certain specified services in relation to virtual assets. Although this is not currently an active area for Guernsey, the extension of the legislation to cover virtual assets is required to meet international standards.
- 1.6. Some businesses might need to be licensed both under the New Legislation and, potentially, also under one, or more, of the Principal Supervisory Laws¹.
- 1.7. It is proposed the GFSC will administer the New Legislation (i.e. undertake the day to day work of licensing and supervision) and the proposals in this policy letter have been agreed by the GFSC as well as by the Committees.

¹ The Principal Supervisory Laws are: the Protection of Investors (Bailiwick of Guernsey) Law, 1987 (POI); the Banking Supervision (Bailiwick of Guernsey) Law, 1994 (BSL); the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) Law, 2000 (ROF); the Insurance Business (Bailiwick of Guernsey) Law, 2002 (IBL) and the Insurance Managers and Insurance Intermediaries (Bailiwick of Guernsey) Law, 2002 (IMIL). On 28 October 2015 the States of Deliberation agreed proposals in a policy letter entitled “Revision of the Financial Supervisory and Regulatory Laws” (Billet d’État XVIII of 2015), which will lead to the amendment of IBL and IMIL by Ordinance and repeal and introduce new legislation in respect of POI, BSL and ROF. In addition, a new enforcement Law will be introduced to incorporate, in one Law, all of the existing enforcement powers in the existing Principal Supervisory Laws. When in force, this new suite of legislation will become the Principal Supervisory Laws. The Principal Supervisory Laws in their present (and future) form comprise a major part of the supervisory framework, including, for example, minimum criteria for licensing.

2. Pillar 1 - Consumer Financial Protection

Financial Harm

- 2.1. The Bailiwick has very limited statutory protection for consumers when entering into lending or other credit transactions. Lenders registered and supervised for AML/CFT purposes under the NRFSB Law are not regulated for solvency or conduct standards in respect of their lending activities. This absence of a wider supervisory framework may expose consumers to the potential risk of poor practice.
- 2.2. The Committees consider that the primary aims of the consumer financial protection elements of the new statutory framework should be (i) the protection of retail customers; and (ii) protection in relation to mortgage loan provision (whether or not provided to retail customers). The main mechanisms to achieve these aims would be (i) the establishment of a licensing framework; (ii) the introduction of the concept of "regulated agreements"; and (iii) the introduction of a definition of retail customer.
- 2.3. It is envisaged that any person who by way of business in, or from within, the Bailiwick, enters into a regulated agreement as a provider of credit, or provides certain specified services in relation to a regulated agreement, would require a licence from the GFSC. The New Legislation should set out criteria by which the concept of retail customer is defined.
- 2.4. It is anticipated a regulated agreement, i.e. contract, would in essence be an agreement between a credit provider and:
 - (a) a retail customer where credit is provided, and interest or other charges are, or can be, charged at any time after the commencement of the agreement;
or
 - (b) any customer where credit is provided and is secured against residential property.

The effect of this is that mortgage loans (whether to purchase property or for any other purpose) provided to any person (including corporate entities) would come within the scope of the New Legislation.
- 2.5. With reference to the paragraph above, it is important to capture mortgage loans against residential property in light of their importance to society, including the importance of the security provided by the homes to which these loans attach. Mortgage loans occupy a different place in society from other types of credit provision and the New Legislation should recognise this. Therefore, it is intended

that any mortgage loan agreement against residential property would be considered to be a regulated agreement.

- 2.6. There might be situations falling within the above categories where it would be disproportionate for the requirements of the New Legislation to be applicable. In light of this, the New Legislation should provide that exemptions could be granted.
- 2.7. For the avoidance of doubt, late payment of invoices (which can include the payment of interest to, or de facto credit being provided by, a business selling goods or services) would not come within the scope of the New Legislation initially. However, the New Legislation should contain an enabling power to allow for such matters to be brought within the scope of the legislation as there might be cases, for example, where interest payments or other charges are levied which provide potential for unfairness and/or abuse and which should be brought within scope.

Services Ancillary to the Provision of Credit

- 2.8. In order to seek to ensure the framework is comprehensive, it is proposed persons carrying out the following services by way of business in, or from within, the Bailiwick should be licensed and subject to consumer financial protection supervision:
 - (a) assisting a retail customer by undertaking preparatory work with a view to that person entering into a regulated agreement with a lender or owner of goods or services;
 - (b) effecting an introduction, of a retail customer, to a lender or owner of goods, or provider of services, with a view to that person entering into a regulated agreement;
 - (c) acting as an intermediary between a provider of credit and a retail customer in relation to a regulated agreement;
 - (d) entering into a regulated agreement on behalf of a provider of credit or a retail customer; and
 - (e) debt administration where this could have an effect on the terms or conditions of the provision of credit (for example, debt administration which leads to restructuring of credit and payment of interest or which leads to other kinds of refinancing).
- 2.9. Simply providing a retail customer with the details of potential lenders would not be considered to be undertaking preparatory work or effecting an introduction,

as detailed in paragraphs 2.8(a) and (b) above. In addition, acts undertaken in the course of providing legal advice would not be activities falling within the scope of the New Legislation.

High Interest

- 2.10. After consultation with the then States Commerce and Employment Department in 2012, the GFSC published a policy which stated that: “The GFSC should ordinarily refuse applications to register financial services businesses under the Registration of Non-Regulated Financial Services Business (Bailiwick of Guernsey) Law, 2008 where the business consists of offering high interest, short term, and unsecured lending facilities to retail customers outside of the Bailiwick. The Policy was adopted on the basis that such business would be likely to affect the reputation of the Bailiwick.” It is anticipated the New Legislation will not only include provisions which will allow the GFSC to continue to apply this policy for businesses under the New Legislation but also to apply this policy more widely to cover secured lending and the provision of credit to retail customers in the Bailiwick.

Status of Agreements entered into in Breach of the New Legislation

- 2.11. Where agreements are entered into in breach of the New Legislation, provision will need to be made to regulate the consequences of such breach, whether by negating any payment of compensation, fees or charges or by some other legally appropriate mechanism, for example, imposition of penalties.

Cooling Off Period and Right of Cancellation

- 2.12. Subject to sub-paragraphs (a) and (b) the legislation should allow a borrower under a regulated agreement to have a cooling off period. In such cases the borrower would be entitled to withdraw from a regulated agreement, without giving any reason, by giving notice to the lender within the cooling off period. The cooling off period should apply only in certain circumstances as, for example, significant legal difficulties could arise where borrowed funds have been transferred to a third party, perhaps in exchange for another asset, and where related, contracts have been agreed within the period. Therefore, the cooling off period will not apply where difficulties may otherwise arise, for example:

- (a) the cooling off period and any rights attached to it may be deemed to have been waived if it is the case that:
- i. any funds or other assets received under a regulated agreement have been used or committed by the borrower;

- ii. there would otherwise be a legal consequence (except as between the parties to, and under, the regulated agreement as outlined above in this paragraph) in taking advantage of the cooling off period; or
- iii. it is impossible, or unrealistic, to restore the position at the time the agreement is entered.

As such, for example, the cooling off period should be deemed to have been waived where real property has been purchased with funds borrowed pursuant to a mortgage loan.

Any other related agreement entered into by the creditor (or by a third party) on the basis of the existence of an agreement between the borrower and the creditor may also be waived;

- (b) there should also be an enabling power to permit exceptions, or modifications to the right of cancellation by way of secondary legislation, for example where sums of money provided as credit are de minimis.

Unfair Contracts and Practices

- 2.13. The New Legislation should provide that an unfair term in a contract is not binding on the borrower. By way of illustration, terms may be considered to be unfair if they were to cause a significant imbalance in the parties' rights and obligations to the detriment of the retail customer. The GFSC would not replace the courts as the ultimate arbiter of the fairness of contract but, for the New Legislation to provide meaningful regulation, and subject to a right of appeal, the GFSC should have powers to review and challenge unfair, or potentially unfair, terms in contracts and promotional material, require the production of information, require a business to stop using a term, impose licence conditions and other sanctions, and have the ability to apply to court for an injunction. The right to appeal against the GFSC's decisions should be broadly similar to that under the Principal Supervisory Laws.

Equivalence

- 2.14. Specific provisions are proposed with regard to non-Bailiwick persons providing services (see paragraphs 2.3 and 2.8 in particular) in, or from within, the Bailiwick but who also fall within the scope of, and are supervised for the provision of, those services under the requirements of another jurisdiction, specified in regulations, as providing consumer financial protection at least equivalent to that in the Bailiwick.
- 2.15. While it is envisaged that such non-Guernsey persons should be subject to a recognition regime administered by the GFSC, in order to avoid duplication with

obligations under an equivalent jurisdiction's supervisory requirements where those obligations and requirements apply to the provision of services in, or from within, the Bailiwick, such persons should be exempted from the requirement to be licensed under the New Legislation.

- 2.16. That said, in order to ensure that the GFSC may retain active supervisory powers to the extent necessary in respect of such persons, enabling power should provide for the making of subordinate legislation to permit, inter alia:
- (a) the imposition of notification requirements;
 - (b) the GFSC to require information and documents to be provided to it;
 - (c) the imposition of penalties for failure to meet these requirements;
 - (d) the GFSC to require a person to meet Guernsey supervisory requirements in part, or in whole; and
 - (e) the prohibition of a person from advertising or carrying out services in, or from within, the Bailiwick, or from facilitating the same;
 - (f) the imposition of restrictions on the way in which a person carries out business or the way in which any person facilitates that business

3. Pillar 2 – Digital Services

Background

- 3.1. Demand for credit, combined with technological change, has led innovators to transform the market with the development of FinTech (i.e. the provision of financial products, services and delivery methods using information technology) being a key feature of this transformation. The pace of change in global, and local, markets will continue to be rapid. While FinTech presents opportunities for the Bailiwick, it also presents new risks. Therefore, this policy letter proposes supervision of specified services in relation to FinTech deployed in lending and finance.

Supervisory Scope

- 3.2. Although services in the New Legislation arising from paragraphs 2.3 to 2.9 will be covered by pillar one irrespective of the delivery mechanism (i.e. irrespective of whether or not an electronic/digital mechanism is used), a range of digital lending and finance services have gained relatively widespread recognition. In light of this, the Committees consider that:

- (a) operating a peer to peer electronic platform;
- (b) operating a crowdfunding platform;
- (c) providing alternative non-bank credit or finance intermediation; and
- (d) operating an AML/CFT platform

should become services which require licensing when undertaken by any person by way of business in, or from within, the Bailiwick of Guernsey, and subject to the supervisory framework provided under the New Legislation.

3.3. What is understood by digital lending and finance can be relatively fluid. Therefore, the sub-paragraphs below provide information to seek to ensure a common understanding of the coverage of the New Legislation:

- (a) Peer to peer electronic platforms: these electronic platforms, sometimes known as P2P platforms, are established as an electronic market place to match persons who wish to borrow money with those who wish to provide credit. Credit providers notify their willingness to provide credit on the platform, their identity and the terms on which they are willing to provide credit. Potential borrowers access the platform and, if they are interested, contact one or more credit providers to agree a transaction. Credit providers comprise not only institutional and business funders but also individuals, potentially with no experience of providing credit.
- (b) Crowdfunding platforms: these platforms are electronic market places where persons wish to raise money or other finance through the issue of investment (equity) or debt instruments rather than by borrowing money. Crowd funding platforms can involve the provision of credit, in which case they will be included within the concept of peer to peer electronic platforms referred to above.
- (c) Alternative non-bank credit or financial intermediation: this covers internet-based intermediation services with regard to the provision of credit, or finance, (or a combination of credit or finance) which fall outside the proposals above.

3.4. With reference to point (d) of paragraph 3.2 above, AML/CFT platforms provide an internet-based depositary for customer due diligence information; these platforms help customers to more easily provide such information when they deal with more than one provider of services subject to AML/CFT obligations. While AML/CFT platforms do not provide a digital lending or finance facility, it is the importance of minimum standards, beyond those of the data protection legislation and a licensing regime for safeguarding the security of significant

information on customers and potential customers which means that additional consumer protection (for the provision of services in relation to them) is warranted. This difference in approach for AML/CFT platforms means that, on risk grounds, it is not proposed to bring them within the AML/CFT framework.

- 3.5. There will be business models or aspects of business models which should be exempt from the framework. This can be achieved by subordinate legislation. For example, there are various types of crowd funding platforms, not all of which involve an expectation of any part of a payment being returned, such as donation crowd funding, where donations are made to support a cause with no expectation of receiving payment in return. In addition, entities providing services only within a group of companies should be exempt.
- 3.6. Business models and products, services and distribution channels will continue to evolve over time with developments in technology and other factors. To seek to ensure that the Bailiwick can react in a timely way to change, it is proposed that the New Legislation will provide that the list and scope of activities that are regulated as digital services can be amended by subordinate legislation.

4. Pillar 3 - AML/CFT

Background

- 4.1. The NRFSB Law was introduced in 2008 as part of the Bailiwick's response to meeting the then AML/CFT standards of the Financial Action Task Force ("the FATF"). It captures businesses that the FATF had designated to be at risk from money laundering and terrorist financing but that were not otherwise supervised for AML/CFT purposes under one of the Principal Supervisory Laws.
- 4.2. Persons undertaking at least one of a list of activities set out in Schedule 1 to the NRFSB Law (such as lending) are required to be registered with the GFSC. The effect of this registration is that such persons are subject to the Bailiwick's AML/CFT regime, including the obligation to identify and verify customers, monitor customer relationships and maintain effective policies, procedures and controls to ensure compliance with the relevant AML/CFT laws and regulations.

Revisions to the AML/CFT registration framework

- 4.3. It is proposed to repeal the NRFSB Law and to substantively re-enact Schedule 1 (which lists activities subject to AML/CFT registration and supervision only) in the New Legislation, with the amendments set out below (which will also mean consequential amendments to Schedule 1 to the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999). This will mean that all activities that currently require registration under the NRFSB Law will, in future, require licensing under the New Legislation.

- 4.4. Lending is currently covered by the NRFSB Law. On the basis that credit providers will be licensed for that activity under the pillar 1 proposals set out above (and therefore subject to AML/CFT supervision), it will not be necessary for lending to be separately included under pillar 3.
- 4.5. However, there is one additional area of business, not currently within the scope of the NRFSB Law, which should be brought within the scope of the AML/CFT framework. In light of the heightened money laundering and terrorist financing risks which virtual assets (also commonly known as crypto assets or digital assets) pose to the global community, in 2019 the FATF adopted new standards relating to such assets. Therefore, for AML/CFT purposes these new standards require a country to license or register persons providing, by way of business, a range of services in relation to virtual assets. These services include (i) exchange between virtual assets and fiat currencies (i.e. normal legal tender such as GBP sterling/US dollars); (ii) exchange between one or more forms of virtual assets; (iii) transfer of virtual assets (iv) safe-keeping and/or administration of virtual assets or instruments enabling control over virtual assets (providers of this service commonly being referred to as custodian wallet providers); and (v) participation in and provision of financial services relating to an issuer's offer and/or sale of a virtual asset (such as an initial coin offering).
- 4.6. The Committees therefore propose that the New Legislation should impose a licensing requirement on persons who, by way of business in or from within the Bailiwick, provide the services specified in the paragraph above in relation to virtual assets. In addition, to ensure the Bailiwick can meet the totality of the FATF's AML/CFT standards in relation to virtual assets, and to ensure the framework is fully enforceable, it is proposed to make consequential amendments to Schedule 1 to the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 and the Principal Supervisory Laws.

Exemptions from AML/CFT supervision

- 4.7. The starting point is that any activity licensed under the New Law should also be covered by the AML/CFT framework. In order to ensure that coverage of the framework would be proportionate, the New Legislation should permit exemptions from AML/CFT supervision to be created by subordinate legislation (as is the case now in the NRFSB Law).
- 4.8. In addition, the New Legislation should provide the GFSC with the power to issue a notice, in particular cases, to a person specifying that activities which would ordinarily require a licence under the Law do not require a licence when it has assessed the money laundering and terrorist financing risks to be low for that case and when the obligations of a licence would be disproportionate; the GFSC should be able to require information and documents from such persons and

apply conditions to a notice. Also, any breach of the notice or its conditions, or failure to provide information or documents could be subject to penalties.

- 4.9. As credit providers will be licensed under the New Legislation, and will be responsible for the regulated agreements which they enter into with consumers, it is not considered to be necessary for the ancillary services to credit providers specified in paragraph 2.8 to themselves be subject to AML/CFT supervision.
- 4.10. It is also proposed that the operation of AML/CFT platforms should not be subject to AML/CFT supervision. This would be impractical and disproportionate as such platforms collect AML/CFT information for businesses which are themselves subject to those obligations. By way of illustration, the Committees are mindful that bringing AML/CFT platforms within the scope of the AML/CFT framework would mean risk rating of customers (those providing information for retention by platforms) by businesses administering the platforms; and platforms having requirements for their customers to provide information to them based on that risk which will, in at least some cases, be different from the requirements of other financial services businesses that are themselves subject to the AML/CFT framework, thus leading to additional burdens on, and potentially confusion for, persons wishing to use Guernsey's finance sector.

5. Overarching Issues

- 5.1. In order to be issued with and maintain a licence, each of the licence owners, controllers, directors and managers should be required to satisfy minimum criteria for licensing. It is proposed that the minimum criteria for licensing in the New Legislation will be consistent with the requirements of the Principal Supervisory Laws. The requirements for obtaining and retaining a licence under the New Legislation will therefore be greater than the registration requirements under the NRFSB Law.
- 5.2. The New Legislation should, in broad terms, provide the GFSC with the enforcement and other powers which will exist under the Principal Supervisory Laws and the Financial Services Business (Enforcement Powers) (Bailiwick of Guernsey) Law, 2020 (once that Law is in force). These powers will, inter alia, include an ability for the GFSC to make rules and issue guidance. In this connection, it is envisaged that rules will, for example, include matters relating to the provision of clear and transparent information on the terms of borrowing, the fair treatment of borrowers and accounting and financial requirements for licensees. Any rules and guidance would be the subject of further consultation.

6. Consultation

- 6.1. The Committees and the GFSC have worked together to develop the proposals in this Policy Letter. On behalf of the Committees, the GFSC consulted with

various focus groups made up of representatives from the private sector, industry and trade associations, the Guernsey International Business Association, and Citizens Advice Guernsey, and liaised with officials from the States of Guernsey Trading Standards Service.

6.2. In addition, the Committees and the GFSC have liaised with representatives of the Policy & Finance Committee of the States of Alderney and the Policy & Finance Committee of the Chief Pleas of Sark. The Committees have consulted with each of the Alderney and Sark committees, which have confirmed they support the proposals in this Policy Letter.

6.3. The Committees have consulted with the Law Officers of the Crown.

7. Compliance with Rule 4

7.1. In accordance with Rule 4(1), the Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications.

7.2. In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committees.

Yours faithfully

Policy & Resources Committee

Committee *for* Economic Development

P T R Ferbrache
President

N R Inder
President

H J Soulsby
Vice-President

S J Falla
Vice-President

M A J Helyar
J P Le Tocq
D J Mahoney

A Kazantseva-Miller
N G Moakes
S P J Vermuelen