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HOME DEPARTMENT

AMENDMENTS TO THE CASH CONTROLS (DEFINITION OF CASH) (BAILIWICK OF GUERNSEY) LAW, 2007

The Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

29th May 2009

Dear Sir

1. EXECUTIVE SUMMARY

1.1 The purpose of this report is to seek the States of Deliberation's approval for the current Cash Controls legislation, namely the Cash Controls (Definition of Cash) (Bailiwick of Guernsey) Law, 2007 ('the Law'), be amended by extending control of the cross border movements of cash to include bullion.

2. BACKGROUND

2.1 The Law came into force on 12th February 2008 and was enacted pursuant to a report from the Home Department and contained in Billet D'État XX 2007 (pp. 1573-1577).

2.2 Under the Law, it is an offence for an individual not to declare cash carried by him in excess of a sum equivalent to €10,000. The definition of cash is contained in Section 10 (1) of the Law:

Interpretation.
10. *(1) In this Law, unless the context otherwise requires –*

*"**cash**" means –*

(a) Bearer negotiable instruments including monetary instruments in bearer form, such as travellers' cheques, negotiable instruments (including cheques, promissory notes and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee, or otherwise in such form that title thereto passes upon delivery, incomplete instruments (including cheques,

promissory notes and money orders) signed, but with the payee's name omitted, and

(b) *Banknotes and coins that are in circulation as a medium of exchange.*

2.3 Bullion is defined as pieces of gold, silver, platinum and metals of the platinum group – including palladium – whether or not produced as, or in the form of, coin of current of former legal tender of the Bailiwick or of any other jurisdiction. It does not include pieces in which metals of the foregoing types or descriptions are partly comprised, including jewellery or other objects of personal ornament.

2.4 As a consequence of risk assessment exercises undertaken by the Customs and Immigration Service (Detection Branch and joint Finance Intelligence Service), it has been established that there are a considerable number of imports and exports of bullion.

2.5 Once bullion has been imported, it is stored at approved dealers in the Bailiwick until again required, whereupon it will be exported into the UK and/or elsewhere. There is no reporting restriction on such carrying, apart from making a declaration of commercial goods in the 'Red Channel' on arrival in the UK. Even then, there is no duty or VAT to be paid and the individual would be allowed to proceed. Bullion can be converted into cash.

3. PROPOSALS

3.1 The Customs and Immigration Service has assessed the risk of money laundering presented by the import and export of bullion to be high, and believes that the current financial climate has exacerbated this issue as investors are nervous of maintaining funds in the banking system.

3.2 It is proposed that the definition of cash is amended to include bullion by Ordinance of the States as provided by section 10 (2) of the Law:

10. *(2) The definition of cash may be amended by Ordinance of the States.*

4. CONSULTATION

4.1 The Department has consulted with St James' Chambers regarding the proposals set out in this report and the proposals have their full support.

4.2 This amendment is also encouraged by the Bailiwick of Guernsey Anti Money Laundering/Countering of Financial Terrorism Advisory Committee at a meeting held on 27th March 2009.

5. RECOMMENDATIONS

5.1 The Departments recommends the States to:

(a) Approve the proposal to amend the Cash Controls (Definition of Cash) (Bailiwick of Guernsey) Law, 2007 as set out in this report;

(b) Direct the preparation of the legislative changes necessary to give effect to that proposal.

Yours faithfully

G H Mahy
Minister

(NB The Policy Council has no comment on the proposals.)

(NB The Treasury and Resources Department has no comment on the proposals.)

The States are asked to decide:-

VIII.- Whether, after consideration of the Report dated 29th May, 2009, of the Home Department, they are of the opinion:-

1. To approve the proposal to amend the Cash Controls (Definition of Cash) (Bailiwick of Guernsey) Law, 2007 as set out in that Report

2. To direct the preparation of such legislation as may be necessary to give effect to their above decision.

COMMERCE AND EMPLOYMENT DEPARTMENT

PROMOTING COMPETITION AND PREVENTING MARKET ABUSE – MERGERS AND ACQUISITIONS

The Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

29th May 2009

Dear Sir

1. EXECUTIVE SUMMARY

1.1 In 2006, after consideration of a Report from the Commerce and Employment Department, the States made a number of Resolutions in respect of the introduction of competition legislation into Guernsey. This Report represents a further stage in the implementation of the legislation, and in particular considers the appropriate criteria and thresholds for the introduction of mergers and acquisitions regulation. These details had not been included in the Report considered in 2006, as it had not been the intention of the Commerce and Employment Department to introduce this particular aspect of competition legislation at that time. **With the States' Resolution resulting from an amendment, there is a need to provide details of the proposals for mergers and acquisitions regulation so that an Ordinance can be laid before the States in due course.** The proposals as put forward take into account two fundamental principles:

a. That the legislative provisions should meet the special needs of Guernsey as a small market economy;

b. That given the restricted resources that an economy the size of Guernsey is likely to be able to make available, the legislation should be administered in as cost effective manner as possible.

1.2 In addition, this Report considers the administration arrangements that it will be necessary to put in place relative to the appointment of the Director General of Competition and to provide him or her with the necessary executive support. The proposal is that competition legislation should be administered by a restructured Office of Utility Regulation, with, in view of the differing nature and procedures of both types of legislation, different departments dealing with each issue under the auspices of a single statutory official. The Department is of

the view that the arrangements as proposed will succeed in achieving the appropriate balance between maintaining the separate identity of each field of legislation, while still enabling a significant sharing of resources.

1.3 In terms of costs, in 2006 the States resolved that the costs and expenses related to the administration of competition legislation should be met by a separate vote of the States, initially of a maximum of £300,000 per year and allocated on a ringfenced basis to the budget of the Commerce and Employment Department. It is noted that the sum of £300,000 did not however make any allowance for the administration of mergers and acquisitions regulation, which was not part of the initial proposals and it was based on a different model of competition law which has subsequently been rejected as inadequate by the Commerce and Employment Board. This Report recommends a revised estimate of c£410,000 per year, with a further amendment being that the funds should, with the permission of the Treasury, be able to be rolled over on an annual basis. The Department is continuing to explore opportunities for Pan Channel Island co-operation in competition enforcement and this will be pursued if it can deliver the benefits in a more cost effective manner.

1.4 The economic justification for the additional expenditure is set out in this States Report.

1.5 Finally, the Report reviews the results of the high-level study of the energy sector undertaken by Consultancy Solutions for the Oil Industry and published in May 2007. It is the intention of the Commerce and Employment Department to continue monitoring prices in this important sector of the Island's economy with a view to proposing further action if required.

2. CONTENTS

2.1 This Report considers the following issues:

Section 3: Introduction – Update on existing States' Resolutions
Section 4: Competition Legislation – Policy Background
Section 5: Mergers and Acquisitions Regulation – Principal Provisions
Section 6: Mergers and Acquisitions Regulation – Other Considerations
Section 7: The Director General of Competition
Section 8: Cost Forecasts
Section 9: Economic Case for Intervention
Section 10: Energy Market – Feedback on Energy Report
Section 11: Conclusion
Section 12: Recommendations

3. INTRODUCTION

3.1. In July 2006, the States made the following Resolutions, following consideration of a Report from the Commerce and Employment Department (Billet d'Etat

XIII, 2006):

1. *To enact enabling legislation to give the States powers to enact Ordinances which would incorporate measures to promote competition in the Island's economy in respect of abuse of a dominant market position, anti-competitive behaviour, mergers and acquisitions, and Fair Trading on the lines set out in this Report.*

2. *That when new enabling legislation has been enacted Ordinances shall be laid before the States as soon as possible incorporating specific measures to control:*

   a. *Anti-competitive arrangements by undertakings;*

   b. *Abuse of a dominant position by undertakings;*

   c. *Mergers and acquisitions by undertakings*[1]*.*

3. *That the legislation should include the following provisions:*

   a. *A requirement for a Resolution of the States for an investigation to be carried out into a specified market sector;*

   b. *Powers to investigate the circumstances of the operation of any such market sector;*

   c. *Powers to publish the results of such investigations and to make recommendations and give directions;*

   d. *Appropriate penalties and powers of enforcement and appeals in respect thereof;*

   e. *Such other provisions as are necessary for the purpose of giving effect to this Report.*

4. *That a Statutory Official known as the Director General of Competition should be established in order to undertake such statutory reviews of specific market sectors as directed by the States.*

5. *That the administration costs and all expenses, including staff and associated costs, of the Director General of Competition should be met by a separate vote of the States, initially of a maximum of £300,000 per annum, such sum to be negotiated annually and*

[1] Mergers and Acquisitions regulation was not recommended by the Department in the 2006 States Report, but was added by an Amendment

allocated on a ringfenced basis to the budget of the Commerce and Employment Department.

6. *To note that informal investigations will be undertaken into areas of the Island's economy, in particular the energy market, and specifically gas and the importation of bulk fuels, with a view to deciding on the appropriateness of either bringing them within the remit of the Regulation of Utilities Law, 2001, or of making them subject to a formal investigation under the legislation proposed in this Report.*

7. *To direct the preparation of such legislation as may be necessary to give effect to the above decisions.*

3.2 In respect of these Resolutions, in pursuit of Resolution 1, in January 2007, the States approved the Projet de Loi entitled "The Competition and Trading Standards (Enabling Provisions) (Guernsey) Law, 2007". However, the inclusion of a reference in the legislation to Acts of Parliament was considered not to be appropriate and a revised Projet de Loi was approved by the States in March 2008. However, further concerns related to this Projet and to other Guernsey legislation were subsequently raised by the Ministry of Justice and these concerns were the subject of a Report to the States by the Policy Council in February 2009 proposing further amendments to the Projet. These amendments also included the removal of the proposals for Trading Standards, which will form the substance of a further Projet in due course. At the time of writing, the revised Competition Law Projet is awaiting the sanction of Her Majesty in Council and it is understood that a revised Projet de Loi relating to Trading Standards will be brought to the States in the near future.

3.3 With regard to Resolution 2, the Report considered by the States in July 2006 contained specific directions for the preparation of Ordinances related to the control of anti-competitive arrangements, and of abuse of a dominant position, and those Ordinances are currently in the process of preparation. However, no such directions were included with regard to mergers and acquisitions as it was not the Department's intention to introduce such provisions at that time. In the event, however, the States resolved by amendment that the Ordinances to be laid before the States should also include measures to control mergers and acquisitions.

3.4 A major purpose of this Report is therefore to provide the opportunity for the States to consider the principles and policies that should underpin legislative measures to control mergers and acquisitions in Guernsey, so that, as with anti-competitive arrangements and abuse of a dominant position, specific directions can now be given to the Law Officers in the drafting of the necessary Ordinance. Once drafted it is the intention that the three Ordinances will be brought back to the States for approval at the same meeting.

3.5 This Report also considers further the role of the Director-General of Competition and the specific powers, procedural arrangements and policy support related to the administration of the legislation that will be essential for him to carry out this role. More specifically, consideration is given to the structure of his supporting administration in order to ensure that the legislation is seen to be administered in an efficient and objective manner and that the budget and administrative costs are tightly controlled.

3.6 With regard to Resolution 6, in the autumn of 2006 the Commerce and Employment Department commissioned Consultancy Solutions for the Oil Industry to produce a Report on the operation of the petroleum products market in the Island. The results of the investigation were published in May 2007. While the conclusions of the Report were generally to the effect that the market is competitive it did also make recommendations as to how the competitiveness of the market may be improved. At present however, there was not a definitive case for bringing the energy market sector within the remit of the Regulation of Utilities Law. The Report's recommendations are considered later in this Report and the Department is continuing to monitor fuel prices and will report back to the States as necessary.

4. COMPETITION LEGISLATION

Policy Background

4.1 Competition is an important means by which the potential benefits of the market economy are both realised and spread through the community. In particular, and as was stated clearly in the 2006 States Report competition is fundamental for the market mechanism to deliver benefits to the consumer and the broader economy. It encourages companies to increase efficiency and reduce costs, control prices (after allowance of reasonable profit to provide funds for return on capital and continued investment) and innovate to provide new products and services. Without competition, or the threat of competition, the incentive on firms to undertake these three activities, i.e. reduce costs, control prices, and innovate is absent **to the detriment of consumers.**

4.2 While the 'theory of the firm' of micro-economics is founded on a notion of 'perfect' competition[2], the conditions of 'perfect' competition never exist and theories and empirical evidence both demonstrate that, without the availability of some form of legislative restraint, firms will act in an anti-competitive manner and seek to protect a dominant market position and increase profits. **It has been clearly demonstrated that, without such restraint prices are higher than they would otherwise be.**

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[2] The assumption of perfect competition are as follows: there are 'many' buyers, many sellers (ie no-one firm has any influence on the price goods are sold for), zero transport costs and a homogenous product (ie every firm sells an identical product thus there is no role for marketing or branding).

4.3 This increase in prices results in inflation and it is widely recognised that inflation in Guernsey has historically tracked that of the UK but at a slightly higher level. During the period between 2001 and mid 2008 the average differential between the RPI (Retail Price Index) rate of inflation in Guernsey and the UK was around one percent. The net result of this was that, over this time period, whilst the price level in Guernsey grew by a third the price level of the UK grew by only a quarter. **In the long run such price differentials are detrimental to the competitiveness of the Guernsey economy.**

4.4 **Indeed there is some evidence of this already occurring,** in that over the past 10 years Guernsey has started to experience some difficulties in growing business due to costs, particularly labour costs. In recent years a number of financial services businesses have outsourced functions to other jurisdictions, such as the Isle of Man, due to the fact that they have significantly lower labour costs than Guernsey. There is also a push to move fund administration to Dublin again as a result of cost pressures.

4.5 Analysis conducted by the Policy and Research Unit[3] indicates it is not likely that the entire inflation differential can be accounted for by traditional 'anecdotal' explanations (ie higher transport costs for imported goods for the island etc) and that there is evidence to suggest that there may be a lack of competition in certain markets. **Separate analysis[4] also suggests that there are grounds to believe that Jersey's anti-inflation strategy, incorporating competition regulation, had encountered a degree of success**[5]. Since the introduction of this strategy Jersey's rate of RPIX had dropped to around its target level and there was a reversal in the relative positions of the Jersey and Guernsey RPI inflation rates (ie prior to the introduction Jersey had traditionally had the higher rate, since 2005 it had been Guernsey with the higher rate). The Isle of Man shows a similar pattern in comparison with Guernsey.

The Isle of Man has had fair trading legislation since 1996 and their inflation rate has also been lower than Guernsey despite having similar transport costs to Guernsey.

4.6 Inflation may not in the current context be seen as a concern given the recessionary global environment and commentators' concerns about possible UK deflation. However, the current monetary policy of The Bank of England (ie unprecedentedly low interest rates and quantitative easing) is in all likelihood likely to lead to higher rates of future inflation than those currently experienced. As a policy issue the control of future inflation has not disappeared.

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[3] 'Differences in UK, Guernsey and Jersey Inflation Rates: An Analysis', September 2008 (draft internal Policy & Research Unit report)

[4] 'Jersey Inflation Strategy, A Short 'Critique'', Policy & Research Unit, presented to the Fiscal and Economic Policy Steering Group, November, 2008. (See also States of Jersey, Anti-Inflation Strategy, February 2008).

[5] The use is made of the past perfect, not present perfect, tense as the study related to the time period 2001 to mid 2008.

4.7 Mitigating the differential of inflation between Guernsey and the UK was a subject of discussion by the Fiscal and Economic Policy Group during the final quarter of 2008 and it had been agreed to progress (at the appropriate juncture) *'a 'light touch' strategy (anti-inflation) incorporating a credible target with a focus on measures to enhance product market competition.'* The reference to 'measures to enhance product market competition' is a reference to the present proposals from Commerce and Employment.

International Dimension

4.8 Recent events have thrown into sharp relief a significant gap in Guernsey's regulatory architecture. As many States Members appreciate, Guernsey faces increased international scrutiny, and this ranging from its fiscal policies to its regulation of financial services. Presently Guernsey has a high standard of regulation of financial services. However, in any international assessment, Guernsey's lack of any regulation of competition is a serious weakness, and potentially a significant barrier to Guernsey's future economic opportunity, which is likely to constrain Guernsey's ability to access international markets, as well as to reduce Guernsey's international competitiveness over the long term.

4.9 The Department considers that, besides the local benefits to accrue to the economy and the consumer, of introducing competition regulation, it is also essential to Guernsey's competitiveness and international standing.

International and European trends in Competition Law

4.10 For at least the last ten years, competition law has become a key feature of the global economic order, in advanced and developing market-based economies. The origin of this phenomenon is the fact that market-economy models have been adopted around the world, in place of the commercial economies of dirigiste governments An integral part of such economic models has been the need to outlaw cartels and other anti-competitive agreements and concerted practices, as well as prohibiting abuses of exceptional market power.

4.11 The European Union and the United States of America have provided regulatory "models" for most competition legislation in place around the world. In important respects, EU and US competition law pursue identical goals, to ensure that the markets can function effectively to provide the lowest price to consumers, encourage companies to innovate and compete, and ensure that economic growth can continue.

4.12 In the EU since 1 May 2004, all 27 Member States (and the three EEA States) have national legislation identical or equivalent with Articles 81 and 82 of the EC Treaty. Those Articles require Member States to have in place competition law to ensure that the common market is not distorted through anti-competitive practices. Guernsey is part of the common market for goods by virtue of Protocol 3 to the Treaty of Accession.

4.13 In addition, more than 100 jurisdictions around the world which have special relationships with the EU (for example under the European Neighbourhood Policy) must also implement competition law based on the EU model, in accordance with their partnership or cooperation agreements with the EU.

4.14 The size or economic importance of particular jurisdictions is not relevant to the need to adopt and enforce competition law. Malta, Cyprus, Latvia, Lithuania, Estonia, Slovenia, Luxembourg, Liechtenstein and Iceland all have functioning competition laws based on Articles 81and 82. One reason why the adoption of competition law, even by small jurisdictions, is so important is because of the trans-national effects of anti competition practices. Thus, it is important not only that small jurisdictions apply competition rules to transactions or situations within their jurisdictions, but also that they be able to cooperate – on a regulatory 'level-playing field' for enforcement – with other, larger, jurisdictions. In the future this is likely to become more important for Guernsey.

4.15 Globalisation, and the increasing 'irrelevance' of national economic frontiers, (especially in invisible transactions such as financial services, e-commerce and, in future, the production and distribution of electricity) has increased the need for international cooperation in competition policy. The International Competition Network (ICN) was established in 2001 and now has more than 100 participating jurisdictions, including the UK, China, the US, Jersey, Malta, Singapore, Kenya, Barbados, Jamaica and India. The list varies from small Islands to the largest G7/G20 economies.

4.16 Against this background, the existence of a functioning competition law system is seen as a necessary feature of a modern, liberal, market-economy, in addition to providing a basis for international cooperation.

Guernsey's future international competitiveness

4.17 As a small and accessible economy, one of the key drivers for economic growth in Guernsey is the ability to access international markets for goods and services. It is increasingly evident that Guernsey will need to demonstrate effective competition law and regulation in order to continue to access those international markets.

4.18 For Guernsey to continue to prosper particularly as a finance centre, it is now evident that there must be in place an effective and appropriate competition regime. European financial services are becoming more integrated with the development of the single market for services. In order for Guernsey to be able to access that single market an increasing number of European initiatives have, as a pre-requisite, a functioning competition law.

4.19 A recent example is the Single Euro Payments Area (SEPA), which will create a single integrated payments system in the 'Eurozone'. Guernsey, along with the other Crown Dependencies, is presently in discussions with the European

Payment Council concerning possible entry into the SEPA initiative. If Guernsey remains outside SEPA then it is likely that businesses and individuals seeking euro denominated payments will have to route those payments through other jurisdictions, and Guernsey will be placed at a competitive disadvantage. One of the criteria for entry into SEPA is that applicant jurisdictions must demonstrate that they have in place a competition regime that is broadly consistent with EC principles. This requirement is being imposed to ensure that providers cannot engage in anti-competitive behaviour and distort the single market for payment services. While introducing competition law does not guarantee that Guernsey will be able to participate in SEPA, or in future European financial services markets, the lack of an effective and functioning competition regime is likely to be a major barrier in the future.

4.20 Another example of where Guernsey will need a functioning competition regime is in the area of tidal power generation. Guernsey has the potential to become a major exporter of electricity, should tidal power generation become commercially viable. Under EU law, electricity is a "good" and therefore Guernsey is entitled to export electricity to Europe under Protocol 3.

4.21 At present there is a question about the extent to which Guernsey's participation in the single market for goods obliges Guernsey to introduce competition law, to ensure that it does not distort competition in the single market. Until recent times this has not been a major issue, due to the fact that Guernsey is a very small goods exporter. However the potential development of tidal power may well change that. If Guernsey wishes to export electricity, then it will have to do so in a way that does not distort the market.

4.22 Regardless of the legal niceties, the political reality is that Guernsey must be prepared to demonstrate to the European Union and its Member States that it is committed to do so in fair competition.

Regulatory Convergence

4.23 Recent events have demonstrated that jurisdictions such as Guernsey will become under much greater international scrutiny on regulation and transparency. That scrutiny will inevitably go beyond tax transparency and financial regulation to regulation more generally. In that context the lack of any effective and functioning competition regime in Guernsey is an obvious gap.

Summary

4.24 In summary, an effective competition law provides the following principal advantages:

a. It helps to ensure that consumers (as opposed to employees and shareholders) receive a fair share of the benefits of the market economy;

b. It promotes efficiency within the business sector, thereby improving the ability of businesses to compete within the broader market;

c. Through the freeing of underused resources it improves the efficiency of the economy as a whole, thereby promoting economic development and social welfare; and

d. It contributes towards Guernsey's international competitiveness.

4.25 As such it has a major influence on the promotion of economic development along with other factors, for example the availability of resources, investment, innovation, enterprise, and skilled and motivated staff. This influence is achieved principally through the ability of competition legislation to encourage efficiency.

4.26 At the same time the legislation can control abuse by firms operating in the market which acts to the detriment of the consumer and the broader needs of the economy.

Methods of Operation

4.27 By international standards legislation designed to promote competition within the economy contains three fundamental provisions:

1. The prohibition of anti-competitive arrangements.

2. The prohibition of abuse of a dominant market position.

3. A system of control, subject to criteria, of proposed mergers and acquisitions.

4.28 These three provisions influence the market in different ways:

a. By influencing the structure of the economy thereby providing the environment within which competition can operate effectively. This can be referred to as "market structure";

b. By deterring and controlling abuses of competition by operators in the market who are in a position to commit such abuse, either through collusion or because an operator already enjoys a dominant market position. This can be referred to as "market abuse".

4.29 While the above two aspects are in many ways interdependent, for example controlling cartels also affects market structure, in general terms:

a. The structure of the market is influenced primarily by mergers and acquisitions legislation, which attempts to ensure that there is an

appropriate number of operators within the market to enable competition to be effective;

b. The deterrence and control of abuse of the market is effected by legislation on anti-competitive arrangements and abuse of a dominant market position.

4.30 Both "market abuse" and an inefficient market structure might be described by the general term "market inefficiency".

4.31 **On the other hand, the objectives of competition legislation can be summarised, as indicated above, as being to assist in the promotion of "market efficiency".**

Mergers and Acquisitions

4.32 As referred to above, the July 2006 Report dealt in detail with the issues related to the control of anti-competitive behaviour and abuse of a dominant position, but made little reference to mergers and acquisitions as it had not been the intention of the Commerce and Employment Department to proceed with proposals to control mergers and acquisitions at that stage.

4.33 Reasons generally put forward for legislation to control mergers and acquisitions include:

- To ensure that there are sufficient players in the market so that the competitiveness of the market can operate effectively. In essence, the general criterion according to which a proposed merger that would reduce the number of market players would be refused is that it would "substantially lessen competition within the economy."

- To prevent a business acceding to a dominant position, and thereby being able to abuse that position, with mergers and acquisitions legislation being effectively an additional tool to prevent potential market abuse.

4.34 As mergers and acquisitions legislation deals directly with structure rather than specific types of behaviour ("offences"), a greater degree of variation is possible in the conditions and criteria specified in the legislation.

Mergers and Acquisitions in Small Market Economies

4.35 Given such possible variation and the potentially substantial costs of administration there is therefore the opportunity for Guernsey to tailor the provisions of mergers and acquisitions legislation to meet the Island's specific needs through the efficient use of the resources that can be made available. Therefore, in considering its proposals for mergers and acquisitions regulation within Guernsey, the Commerce and Employment Department has established

the following principles which it believes are essential to underpin its establishment and administration:

a. That the needs of the Island and its status as a small market economy should be fully reflected in the contents of the legislation;

b. That, given the comparatively limited resources that any small economy can realistically be expected to dedicate to competition legislation, the legislation should be administered in as cost-effective manner as possible, compatible with meeting the Island's needs.

4.36 The Commerce and Employment Department has from the outset been aware of the requirement to ensure that competition legislation should be tailored to meet the Island's specific needs, and the 2006 Report made reference to the work of Dr Michal Gal, as described in her publication entitled "Competition Policy for Small Market Economies" (Harvard University Press, 2003). In this work the author argues strongly that the administration of competition legislation needs to be adapted to meet the needs of small market economies.

4.37 In particular, in any small market economy an important factor that has to be taken into account is that of scale, as in such an economy only a limited number of suppliers can be expected in any market sector. In addition, there is a minimum size at which all businesses can be efficient and this size depends on a number of factors, including the size of the market and the level of infrastructure investment that is necessary for the business to operate. It is generally assumed that in a larger economy efficiencies due to economies of scale have been achieved, but the same is not true in a small economy.

4.38 **Achieving the appropriate trade-off between the objective of encouraging businesses to operate at an efficient size and encouraging competition within the economy, which is essential if market efficiency is to be optimised, is particularly important in a small market economy and will have particular implications in terms of mergers and acquisitions policy.**

4.39 Given the Island's specific requirements, the Department enlisted the services of Dr Gal and recognises the contribution that she has made in the formulation of its policies. The Report that she has produced discussing the implications of mergers and acquisitions regulation for Guernsey is attached as Appendix 1. This Report was circulated widely for consultation purposes, including a presentation by Dr Gal that took place at the Frossard Theatre on the 10th March, 2008.

5. MERGERS AND ACQUISITIONS REGULATION

General Principles

5.1 Dr Gal's principal recommendation is that mergers and acquisitions regulation should be implemented in Guernsey, but that it should be specifically adapted to

the conditions in the local economy. The two fundamental points that underline her recommendation are:

a. The administration of mergers and acquisitions regulation is costly, particularly on a per-head basis in a small jurisdiction. The effective use of limited resources needs to be taken into account in the legislative provisions without, however, compromising the effectiveness of the legislation;

b. The objective of the legislation should not be to ensure a sufficient number of competitors per se, as there is also a need in an economy of Guernsey's size for some businesses to merge in order to achieve economies of scope and scale. **The appropriate objective for merger and acquisitions regulation in Guernsey should therefore be the promotion of overall efficiency within the local economy**. In order to so do it has to be accepted that some mergers and acquisitions would be approved in the local context that would not be approved in a larger economy.

5.2 Recommendation

The Commerce and Employment Department recommends that the principal objective for mergers and acquisitions regulation in Guernsey should be the promotion of the efficiency of the local economy.

5.3 The basic structure of mergers and acquisitions regulation consists of three distinct phases:

1. The **definition** of what constitutes a merger or acquisition. If this definition is not met, then whatever financial arrangements that are being considered by the businesses concerned do not come within the terms of the legislation and can go ahead without encumbrance.

2. A system of **thresholds** which exempt certain mergers and acquisitions from consideration under the legislation. This prevents time being wasted on mergers between small businesses that would have no, or only a very limited, effect on the Island's economy. It would be a significant waste of resources to require such mergers to be subject to a formal evaluation process. These **thresholds** are commonly based on one or two principles: the **turnover** of the merging parties; and/or the estimated **market share** of the merging parties.

3. For those mergers that meet the agreed thresholds, a requirement in the legislation to notify the proposed merger or acquisition to the Regulatory Authority, following which an **evaluation** of the proposed merger against the **evaluation criteria** that are specified in the legislation, is carried out in order to assess whether the proposals are detrimental to the Island's

economy. This is commonly termed a **legality** test. Common criteria that are included in the legislation include the **lessening of competition** resulting from the merger and its effect on **consumer welfare**. Usually the Regulatory Authority has the power either to approve or reject the proposed merger, or to approve the merger subject to conditions.

5.4 It should be noted that even in larger economies it is comparatively rare for a proposed merger or acquisition to be officially refused. Likewise, since the enactment of the legislation in Jersey the Jersey Competition Regulatory Authority has not refused a single merger proposal, although it has imposed conditions on two mergers that were allowed to proceed. The role of the legislation is to protect and promote the interests of the consumer and broadly the efficiency of the Island's economy rather than to involve itself in business arrangements per se. Some proposed mergers may not proceed because of advice received prior to the official application process.

Definition

5.5 As defined by Dr Gal in her Report the definition of what should constitute a merger or acquisition should include "a merger between two or more previously independent undertakings, in which such entities amalgamate into a single undertaking and cease to be separate legal entities. It should also include the acquisition of complete control of one undertaking, or part thereof, by another undertaking". Further, the latter definition should also include any acquisition that gives the acquiring firm significant influence over the acquired company. In addition to majority shareholdings this can include "acquisitions of shareholdings falling short of an outright majority stake, where such holdings would nonetheless enable the acquirer to block the adoption of strategic decisions". The Jersey legislation provides a complex and detailed definition but specifically states that control in relation to an undertaking is to be taken to exist if decisive influence is capable of being exercised with regard to the activities of the undertaking. In defining this all relevant circumstances are to be taken into account. The definition also includes the acquisition of a company's assets.

5.6 Recommendation:

The "Competition (Enabling Provisions) (Guernsey) Law, 2009" contains a definition of transactions that would come within the description of a merger or acquisition. The wording incorporates the concept of "control" and it is specified that "Control of a business or undertaking may be direct or indirect and exists if decisive influence is capable of being exercised in respect of it". The Commerce and Employment Department is of the view that the definition in the Enabling Law reflects the Department's intentions and is therefore appropriate. More detailed provisions can if necessary be included in the Ordinance.

Thresholds

5.7 The difficulties of setting the thresholds that determine whether a proposed merger or acquisition is required to be referred to the Regulatory Authority for an assessment are that:

a. If the thresholds are set too low, then the Authority can spend significant resources in assessing proposed mergers and acquisitions that, even if they go ahead, will have no real effect on competition in the Island or its economy;

b. If the thresholds are set too high, then mergers and acquisitions that may affect competition in the Island or its economy may be allowed to pass without assessment.

5.8 In her Report Dr Gal recommends that the thresholds specified in Guernsey legislation should include requirements in respect of both turnover and market share.

5.9 The purpose of the **turnover** threshold is to exempt smaller companies entirely from the legislation. In whatever market they operate, the influence of such companies on the Island's economy will be very small and the costs of assessing merger or acquisition proposals would be difficult to justify. In addition, many such companies already operate in fully competitive market sectors or in sectors where there are few barriers to new entrants.

5.10 Nevertheless, within the context of a small market economy, comparatively small businesses can still attain a significant market share in certain market sectors, and therefore it is recommended that the legislation should also make provision for **market share** thresholds.

1. **Turnover:** In order to exempt smaller firms from the provisions of the mergers and acquisitions regulation, **it is recommended that any merger or acquisition that results in the combined entity having a turnover of less than £4m per annum should be exempted from the legislation.** (If it were wished to take this principle further, it would also be possible to exempt mergers based on the minimum turnover levels of one of the merging parties, for example where the turnover of one of the parties is, say, below £500,000 per annum, then that merger would be exempt. The Department's view is that such a provision should not be introduced at the present time, but should be reconsidered based on the experience of operating the legislation).

2. **Market Share:** In terms of market share the thresholds that are recommended as appropriate for Guernsey as a small market economy depend on the type of merger proposed:

a. For "horizontal" mergers: (i.e. between competitors within the same market), **it is recommended that the merger should be exempted in circumstances where the merged entity's market share is below 40%, and there exist at least two other competitors in the market with a market share of at least 20%.**

b. For "vertical" mergers (i.e. between businesses which have a "vertical" relationship, for example in that one firm supplies the other), **it is also recommended that the merger should be exempted in circumstances where the merged entity's market share is below 40%, and there exist at least two other competitors in the market with a market share of at least 20%.**

c. For "conglomerate" mergers (i.e. large businesses that do not necessarily operate generally within the same markets), **it is recommended that the merger should be subject to the legislation only in circumstances where the merged entity's market share is above 60% in more than five markets.** Such mergers are likely to be rare in local circumstances.

5.11 Recommendation:

The Commerce and Employment Department recommends that the legislation related to Mergers and Acquisitions should make provision for both turnover and supply share thresholds as described.

5.12 The Commerce and Employment Department had hoped that it would be able to use available statistics to identify the appropriate turnover threshold, but unfortunately the statistics that would have been necessary are not collected in the Island. However, whatever the initial thresholds that are set, it is probable that they will need to be amended from time, based on the experience of administering mergers and acquisitions regulation.

5.13 In addition it is possible that due to changing economic circumstances it may be advisable from time to time to set different thresholds for specific sectors, for example lower thresholds for certain strategic sectors of the economy.

5.14 **It is also recommended therefore that the legislation should be framed in such a way as to make provision for establishing different thresholds for specific sectors of the economy, in order to allow for sufficient flexibility in the administration of the legislation.**

Evaluation Criteria

5.15 Provided that a proposed merger or acquisition does not come beneath the thresholds that would allow it to be exempted from the legislation, it will be subject to a full in-depth evaluation based on a set of assessment criteria. The

following are the basic principles according to which such an assessment would be carried out:

The Basic Standard

5.16 In many larger economies, the basic standard for assessment is **"consumer welfare"**, referring to the immediate benefits/disbenefits that would be derived by the consumer, and in some circumstances these benefits can be assessed according to a formula. Within a small market economy such as Guernsey, however, such a method would not take into account the potential benefits to the efficiency of the economy as a whole of allowing certain mergers to proceed, even where the consumer does not benefit immediately from the transaction. Large jurisdictions often only take into account the immediate benefits to the consumer, it being assumed that because of the size of the market the other benefits will be derived through the market mechanism. This cannot however be assumed in a small market economy.

5.17 A possible alternative is "**total welfare",** according to which the interests of shareholders are also taken into account but this would not be appropriate for Guernsey given that many local businesses are owned outside the Island. In addition there are technical difficulties in applying such a standard.

5.18 Based on Dr Gal's recommendations, **the basic standard used for evaluation should be "wide consumer welfare" which takes into account not only those benefits/disbenefits that are immediately relevant to the transaction, but also the total benefits/disbenefits likely to be derived by consumers.** This would include longer term or deferred benefits, for example through productivity growth and innovation in the economy. It would also enable the interests of business development to be taken into account.

The Legality/Illegality Test

5.19 This sets the benchmark against which the proposed merger or acquisition will be evaluated. The common standard which is used in most jurisdictions is whether the merger will result in a **"substantial lessening of competition", and it is recommended that the same benchmark is used for Guernsey.** If the merger does not meet this test (i.e. it will not result in any lessening of competition), then it will not be prohibited. Included in the assessment is a view as to what would happen in the market if the merger were not to go ahead, for example if one of the businesses is likely to cease trading. As a matter of principle competition legislation cannot be used artificially to create more competition than either exists or would otherwise have existed in the market.

The Balancing Test

5.20 As stated earlier, the policy that would be appropriate for Guernsey as a small market economy is not simply to take into account the anti-competitive effects

of any merger, but to balance these against any advantages that would be derived for the Island in terms of promoting the overall efficiency of its economy if the merger or acquisition were to go ahead. With "wide consumer benefit" as the yardstick, the merger could be approved if the benefits to consumers**,** including those derived in the longer term were judged to outweigh the costs. Benefits that could come under the banner of "improved efficiency include scale and scope economies, better use of existing capacity, cost reductions due to reduced labour costs, greater specialisation in production, lower working capital and reduced transaction costs" (Dr Gal). **The balancing test would allow mergers that would substantially lessen competition to go ahead in circumstances where "wide consumer welfare" is served by the efficiencies that the merger would create. It is recommended that the legislation should include provision for a "balancing test" along the lines described.**

Burdens and Standards of Proof

5.21 Clearly, if the standard of proof is set too high in order to establish the efficiencies that would be achieved through a proposed merger or acquisition proceeding then it will be almost impossible for such efficiencies to be taken into account. The higher the efficiencies must be to justify the merger, the less likely it is to be approved. **It is recommended that the standard of proof should be that the merging parties would need to establish "a tendency or real probability" that the claimed efficiencies will be derived,** which is the position in New Zealand**.** It would also need to be established that the efficiencies were directly related to the merger proposals and were "real" efficiencies rather than simply pecuniary transfers.

5.22 Recommendation:

The Commerce and Employment Department recommends that mergers and acquisitions legislation should make provision for evaluation criteria as described.

6. OTHER CONSIDERATIONS

Notification Requirements

6.1 The legislation will need to include requirements for merging parties to notify the Competition Authority of their intentions. It would be appropriate that a two stage approach is adopted, with a simplified "primary" opportunity for notification in order for the Director General of Competition to establish whether or not a proposed merger comes within the specified thresholds. In order to reduce workload, this first stage would be voluntary and the full mandatory requirement would only apply at the secondary stage, when it has been established that the proposed merger or acquisition comes within the thresholds specified in the legislation and therefore requires a full evaluation. In legal terms it would be possible for merging parties to determine themselves that

the secondary stage has been reached and make an official notification at that stage. Neither of these requirements should prevent the parties seeking the advice of the Director General prior to a formal notification, and indeed it would be expected that "pre-merger consultations" would take place prior to any official notification. In addition, the Director-General will need to have sufficient powers to investigate and determine whether a merger or acquisition that has gone ahead should have been referred officially to the Competition Authority for its consideration.

6.2 Recommendation:

The Commerce and Employment Department recommends that the mergers and acquisitions legislation makes provision for a two-stage process for the notification of potential mergers, as outlined.

Large non-local businesses

6.3 Clearly the Island could not resist the merger or acquisition of a large company that operates principally outside the Island, but has a local presence. Any attempt to do so may simply result in the company withdrawing from the local market. One method of exempting such companies from the legislation would be to establish an upper threshold to make it clear that businesses with a turnover above a certain level were also exempt. However, while it may not be possible to prevent such a merger or acquisition going ahead, there may be the possibility of imposing conditions on such a merger with a view to taking local consumer interests into account. In terms of notification requirements for such mergers, there should be no statutory requirement for notification, but the Director-General of Competition should have powers to "call-in" such mergers during the six-month period following the merger taking place, in circumstances where he feels that the merger raises competition issues within the Island. Such a procedure would over-ride the general exemption granted to mergers of this scale under the legislation.

6.4 Recommendation:

The Commerce and Employment Department recommends that in addition to the lower threshold described above, the legislation should also make provision for an upper threshold in order to exempt large non-Island companies from most aspects of the legislation. It is also recommended that while such mergers should not be subject to the usual notification requirements the Director General of Competition should have powers to "call in" such mergers during a six-month period following the merger taking place, when it is felt that a merger raises competition issues within the Island, and there is a possibility of imposing conditions for the benefit of local consumers.

Fees

6.5 The charging of "filing" fees is a common feature of legislation and procedures elsewhere, but may constitute a disincentive for businesses to involve the Director General of Competition in their proposals, or even to consider seriously a merger that may potentially be in the Island's interest. For these reasons the Commerce and Employment Department did not initially consider the charging of fees to be appropriate. It has however now given further consideration to the matter and is of the view that given the overall costs of the administration of competition legislation it would be appropriate for a system of fees to be charged, with the fees bearing some relationship to the quantity of work that a particular application will involve. With a view to providing flexibility in their determination the Department is of the view that fees should be set by Order and will give consideration as to the appropriate scale of fees in due course. As a matter of principle however it believes that the fees charged should be comparable to those charged for similar purposes by the Jersey Competition Regulatory Authority. It should be noted that fees would only be charged for formal applications and would not be incurred for responding to enquiries or giving advice as to whether proposals would be likely to come within the specified thresholds and therefore require a formal application. The charging of fees will of course to some extent offset the costs of administering the legislation.

6.6 The Commerce and Employment Department recommends that Mergers and Acquisitions legislation should make provision for the determination and charging of fees for the consideration of formal mergers and acquisitions applications, to be implemented by Order.

Exemption for specific sectors

6.7 The 2006 States Report referred to the concept that, in order to control costs competition legislation as a whole should only apply to selected, strategic sectors, and that these sectors would be decided by the States. This recommendation reflected the policy of the Commerce and Employment Department at the time. Indeed, the States Resolution (3 (a)) went further and directed the inclusion of a provision in the legislation of a requirement for a Resolution of the States for an investigation to be carried out into a specified market sector. Further consideration has been given to this proposal and legal advice sought. These investigations have shown that such a procedure is for a number of reasons impractical and a more detailed consideration of the relevant issues is given in Section 7. In general terms however such a procedure:

- would invite political interference into what should be an independent and objective legal process;
- would give an opportunity for those who have infringed the requirements of the law to destroy the evidence; and,

- would run the risk that as the Island's economy evolves important developing sectors would not be covered by the legislation.

6.8 In addition, and specifically in terms of mergers and acquisitions regulation, many of the Island's business sectors may in any event be exempt from the legislation through the thresholds described above.

6.9 Nevertheless, and although the Commerce and Employment Department has no plans to propose exemptions at the present time, as experience of the operation of the legislation develops **it may be advisable to exempt certain sectors from mergers and acquisitions regulation, for example to reduce costs.** It should be noted that this exemption would only apply to the Mergers and Acquisitions Ordinance and not to the other aspects of competition legislation such as anti-competitive arrangements.

6.10 Recommendation:

The Commerce and Employment Department recommends therefore that the Mergers and Acquisitions Ordinance should include provisions for specified economic or business sectors to be exempted from the legislation.

Public Policy Exemptions

6.11 It is common within competition legislation for exemptions to be granted for public policy purposes, where there are exceptional and compelling reasons of public policy that makes it desirable to do so. There need to be clear and objective reasons for such exemptions and a close definition of what constitutes the public interest in defining which sectors should be granted public policy exemption status. Often this status is granted to business activities which as a matter of public policy have been made subject to other legislation. **It is recommended that public policy exemptions can only be granted by a Resolution of the States of Guernsey.** Such exemptions would apply to all aspects of competition legislation, and not just mergers and acquisitions. Local examples of activities which are subject to alternative legislation include taxis and buses, air routes to the UK and within the Channel Islands, and the packaging and distribution of milk, and these therefore need to be exempted while the relevant legislation remains in place. **It is recommended that these specific activities are exempted from the legislation while this alternative legislation remains in place.** It is not recommended that the various sectors that are subject to Utilities Regulation (i.e. Electricity, Postal Services, and Telecommunications) should be granted a public policy exemption. The Regulation of Utilities (Bailiwick of Guernsey) Law, 2001, itself makes reference to objectives to introduce, maintain and promote effective and sustainable competition, and this legislation should therefore be seen to be complementary to, rather than in contradiction of, Competition Law.

6.12 Recommendation:

The Commerce and Employment Department recommends that:

1. **Ordinances related to all aspects of competition legislation should make provision for public policy exemptions**

2. **The following activities should be exempted from the provisions of the Anti-Competitive Arrangements, Abuse of a Dominant Market Position, and Mergers and Acquisitions Ordinances:**

   a. **The Island's Public Transport Services, including buses and taxis, currently regulated under the Public Transport (Guernsey) Law, 1984;**

   b. **The arrangements related to the packaging and distribution of milk under the Milk and Milk Products (Guernsey) Law, 1955;**

   c. **The provision of air routes within the Channel Islands and to and from the United Kingdom, currently regulated under the Air Transport Licensing (Guernsey) Law, 1995.**

Enforcement Powers

6.13 It is essential that the Director General of Competition has sufficient powers to enable him to carry out his mandate in the event, for example, of a merger or acquisition being effected without the matter being referred to the Authority for consideration. These powers will need to make provision for:

a. significant fines (up to 10% of the yearly turnover of the merging parties);

b. requirements to take mitigating action to annul or reduce the effects of a merger going ahead;

c. in extreme circumstances an order for the break-up of the merger.

6.14 In addition, even in circumstances where a proposed merger or acquisition can generally be approved, such approval should be able to be made subject to conditions, generally known as "remedies" in order to prevent any negative effects resulting from the merger from taking place, or to mitigate those effects. Such "remedies" can be either of a structural nature (for example a requirement for the merged entity to divest itself of certain assets) or behavioural (for example the merged entity being required not to raise prices above a defined level for a certain period). Any such conditions imposed will need to be enforceable under the provisions of the legislation.

6.15 Recommendation:

The Commerce and Employment Department recommends that the legislation for mergers and acquisitions contains appropriate penalties for circumstances where the provisions of the law have been disregarded, as well as the ability to attach enforceable conditions to approvals.

7. THE DIRECTOR GENERAL OF COMPETITION

7.1 The States resolved, following consideration of the 2006 States' Report (Resolution 4):

> "*That a Statutory Official known as the Director General of Competition should be established in order to undertake such statutory reviews of specific market sectors as directed by the States.*"

7.2 The wording of this Resolution was related to another Resolution resulting from the same States Report, to the effect that a "Resolution of the States would be necessary for an investigation to be carried out into a specified market sector". This provision had been included in the 2006 Recommendations principally with a view to providing a mechanism to control costs. While the Resolution refers specifically to the carrying out of statutory reviews into specific market sectors, the wording of the Report itself makes it clear that the intention was that a States' Resolution would be necessary before the Director General of Competition could take any action under the provisions of the law. In effect he would be powerless without such a Resolution.

7.3 Recommendations to the States as to the market sectors to be investigated would come from the Commerce and Employment Department itself or by way of a Requête and under such a procedure it is clear that the Department itself would play a significant role in the administration of the legislation. The Director General would need to work very closely with the Department in the actions that he took and in deciding on the investigations to be undertaken.

7.4 Since the 2006 Report the Department has been giving closer consideration as to how the legislation would in practice be administered and has come to the conclusion that the procedures as originally envisaged are highly problematic and would raise a number of issues that would prejudice the effective administration of the legislation:

a. Firstly, it is a recognised principle in the administration of competition legislation worldwide that the legislation itself should be administered independently of the political process. The close involvement of the Commerce and Employment Department, and more broadly the States, in the administration of the legislation would be likely to lead to inconsistency and the danger that cases would be influenced by political

pressure – in one direction or another – rather than being based on objective criteria and priorities. This is a particular danger in a small market economy such as Guernsey, given the close links between business and political circles.

b. Unless there are good reasons to the contrary, there are specific advantages to be gained in administering local competition law according to internationally agreed principles and guidelines. Firstly, doing so provides access to significant case law from other jurisdictions that can be used as a precedent and thereby reduce overall legal costs. In addition, having internationally compatible legislation demonstrates that the Island has legal provisions in place on a par with elsewhere, thereby encouraging enhanced access to markets outside the Island. The proposals for administration as put forward in 2006 were not in line with the administration of competition legislation elsewhere.

c. The requirement to refer issues to the States prior to action being taken is not only cumbersome in itself, but in cases where an offence may have been committed would give ample notice to those who have committed such an offence that their activities were about to be investigated. This would give them ample opportunity to arrange their affairs accordingly, and even to destroy possibly incriminating evidence, thereby seriously prejudicing the results of the investigation and the effectiveness of any action taken.

d. Under the proposals as originally envisaged a States' Resolution would have been necessary in order to evoke the Director General's full investigative powers, yet such powers would have been essential to uncover and assess the evidence on which any Recommendation to the States would need to be based. Without the evidence it would be impossible to make recommendations to the States based on substantial, objective, detailed and verifiable information, thereby casting doubt on the integrity of the investigative process and ultimately the legislation itself.

7.5 The Commerce and Employment Department has given the matter further consideration and believes that the original concept on which the proposed administration was based should be significantly modified, and in particular the requirement for a States' Resolution for an investigation to be carried out into a specific sector should be discarded. **This will involve rescinding States' Resolution 3 (a) referred to above and amending Resolution 4 by omitting the words "in order to undertake such statutory reviews of specific market sectors as directed by the States".**

7.6 Recommendation:

The Commerce and Employment Department recommends that Resolution

3 (a), Item 18, Billet d'Etat XII, 2006 be rescinded, and that Resolution 4 is amended as described.

7.7 In modifying its earlier approach the Commerce and Employment Department has given consideration as to alternative administration arrangements and procedures that could be identified and which would meet its overall objectives of ensuring that the needs of the Island and its status as a small market economy are reflected in the contents and administration of the legislation; and that the legislation should be administered in as cost-effective manner as possible, compatible with meeting the Island's needs.

7.8 In deciding what approach to take the Department has considered a number of options:

a. That a separate Guernsey Competition Authority Office should be established. While this was felt to be an ideal solution, it was noted that it would be an expensive choice that could not be justified given the Island's resources as a small economy;

b. That the legislation should be administered jointly with the Jersey Competition Regulatory Authority. It was felt that this may be a possibility for the future, but would be difficult to put in place and complex in legal terms. Even if successful, investigating such a possibility would be likely to delay significantly the implementation of the legislation;

c. That arrangements should be put into place according to which the administration of competition law in Guernsey would be integrated with that of Utility Regulation.

7.9 In considering this matter the Department noted that although it is general practice worldwide that Utilities Regulation and Competition Legislation are administered by separate authorities, there are usually some common features between the two responsibilities and that in Australia, New Zealand and Jersey the functions are carried out by substantially by the same body. Benefits from such an arrangement include:

a. There is some commonality of objectives in that both competition law and sector-specific regulation attempt to influence market conditions in order to increase social welfare in circumstances where the ability of the market mechanism to operate successfully is compromised;

b. Significant areas of similar expertise are required to administer both competition law and regulation, and in particular both require similar techniques of analysis. Providing opportunities to share such expertise should result in a significant reduction in costs;

c. In addition, the accommodation of both functions within a single office could be expected to result in a further reduction of costs through the sharing of office and general administrative facilities;

d. Finally, further opportunities to reduce costs may be made available through economies of scale making it viable to provide certain areas of expertise in house rather than employing specialist consultants. A case in point is specialised legal advice in competition and regulation matters.

7.10 However, there are also a number of potential differences between the two types of legislation, in particular in that:

a. Direct sector-specific regulation is needed to control certain activities where, because of the nature of the activity itself, for example utilities, the operation of the market cannot provide the optimum solution. On the other hand, the purpose of Competition Law is to help ensure that the market itself operates successfully and that its success is not compromised or prevented by the actions of individual businesses. In normal circumstances the market is left to its own devices;

b. As a consequence the operation of Regulation is much more interventionist than that of Competition Law (except to an extent, and depending on the thresholds used, Mergers and Acquisitions regulation), and therefore necessarily results in significant administrative costs. In contrast, in an ideal world a successful competition law would never have to be applied in practice;

c. Competition Law in general (apart from Mergers and Acquisitions) deals with issues after the event and involves the possible imposition of sanctions, whereas the function of Regulation is primarily administrative in order to set the rules according to which the regulated businesses are required to operate.

7.11 With reference to the specific nature of Guernsey as a small market economy, the Department has paid particular attention to facts that:

a. As a very small economy there is clearly a limit to the administrative resources that can be put to both Regulation and Competition Law;

b. In such a small market there is, because of the structure of the market, likely to be greater similarity between the roles of Regulation and Competition Law than in larger economies;

c. The Director General of Utility Regulation is already acting under a direction of the States to encourage competition in the appropriate sectors, in particular telecommunications;

d. During the first phase of the implementation of Competition Law there will be a need for a significant education programme for local industry and businesses, which to be effective will require an in-depth knowledge of how the local economy functions. It will be much quicker and easier to put into place such a programme using resources that are already available.

7.12 **Taking these factors into account the Commerce and Employment Department is of the view that the integration of the administration of Competition Law and Utility Regulation would be the best method of ensuring that the legislation is administered in the most cost effective manner, but is also most effective in achieving its objectives.**

7.13 In coming to this recommendation the Department considered whether simply to add responsibility for competition law to the current responsibilities of the OUR.

However it has noted that:

a. Competition Law is likely to concern a broader cross-section of the Island's businesses than Utility Regulation, and that:

b. In reality, the implementation of Competition Legislation represents an important new departure in the legislative functions of the States of Guernsey and for its administration to be effective, and for the benefits to be derived in practice, it would be useful for the new legislation to be perceived as such and not as a simple extension of the OUR's current activities.

7.14 In taking this into account, the Department has come to the view that **there should be some re-structuring of the OUR in order to accommodate the new responsibilities, and that both Competition Law and Utility Regulation should become the responsibility of a new body to be known as the Guernsey Competition and Consumer Authority, which would be composed of separately identifiable departments concerned with competition law and regulation issues.** Such an arrangement should be optimal in ensuring an efficient use of resources and expertise, while at the same time maintaining the differing roles of Utility Regulation and Competition Law in the local economy.

7.15 **In terms of structure, the new organisation would be headed by a Director General of Competition and Utility Regulation, who would fulfil the roles of both Director General of Utility Regulation and Director General of Competition as the statutory official specified in both sets of legislation.** He would be supported by a Head of Competition and a Head of Utility Regulation who would be responsible for each function. It is also envisaged that there would be a need to employ a Case Officer to deal specifically with competition issues. These positions in themselves would increase the complement of staff at the new Office by two, but, as referred to above, the combination of both

functions into one Office will also provide an opportunity to employ a legal expert with specialised knowledge of Utility Regulation and Competition Law issues. Although expensive in itself, the employment of such a person should reduce overall costs by avoiding the need to employ specialist outside consultants.

7.16 At present it is envisaged that of the three positions outlined, two may need to be recruited from outside the Island and would therefore require a housing licence. However, the aim would be to recruit a locally qualified person for the Case Officer role, but if this is not possible a further licence may also be required.

7.17 In terms of the duties, powers and procedures of the Director General in respect of the Competition Law, the "The Competition (Enabling Provisions) (Guernsey) Law, 2009" makes provision for the definition of these duties, powers and procedures by Ordinance. These provisions cover a number of different areas for incorporation into legislation, for example including:

1. The appointment of the Director General of Competition and the setting up of the Office;

2. Powers of investigation including the provision of documents;

3. The imposition of penalties and ability to issue directions, as well as to grant exemptions and derogations;

4. The production and publication of reports, including accounts;

5. The ability of the States and the Commerce and Employment Department to give directions and recommendations to the Director General;

6. Privilege and duties of confidentiality;

7. Relationships with competition regulatory bodies in other jurisdictions;

8. Procedures related to the enforcement of the requirements of other Ordinances enacted under the legislation.

7.18 The Department is mindful that there may be opportunities for Pan Channel Island co-operation in the area of competition law and will continue to explore how this can be achieved within this framework.

7.19 Recommendation:

The Commerce and Employment Department recommends that competition legislation in Guernsey is administered by a new body entitled the Guernsey Competition and Consumer Authority with a Director General of Competition and Utility Regulation fulfilling the function of

statutory official as specified in both sets of legislation. Arrangements will proceed for recruitment in due course, and if the legislation is not in place at that time it may be necessary for the new Director General to operate initially on a "shadow" basis. The Department is of the view that it is essential that prior to the full implementation of the legislation a full education programme is implemented to make businesses and the broader community aware of its requirements. Given that in order to ensure a smooth introduction of the legislation the principal focus of the Office at the outset will be educational rather than legislative the possible absence of the legislation at that stage should not prevent the implementation process from commencing.

8. COST FORECASTS

8.1 Following consideration of the 2006 Report the States resolved:

> "*That the administration costs and all expenses, including staff and associated costs, of the Director General of Competition should be met by a separate vote of the States, initially of a maximum of £300,000 per annum, such sum to be negotiated annually and allocated on a ringfenced basis to the budget of the Commerce and Employment Department*".

8.2 In June 2006 the States[6] approved an approach to competition law which envisaged an annual budget of £300,000[7]. This figure was based on a particular approach to competition law which inter alia excluded oversight of merger and acquisitions. For the reasons outlined in the previous Section, it has since become apparent that this model of competition law is not compliant with international best practice.

8.3 Since June 2006 the Commerce and Employment Department has reviewed the whole operation of competition law so that an approach which is more closely aligned to international best practice can be put in place.

8.4 The Department has prepared a detailed estimate of the cost of implementing an effective and efficient competition regime (a full breakdown based on the best available information at the current time is provided in Appendix 2):

- All staff costs would be set in accordance with the OUR's salary structure already agreed by the OUR's Audit, Risk and Remuneration Committee and the PSRC. It is envisaged that staffing would comprise some additional new staff and sharing of existing regulatory staff with a total cost of **£272,400 pa** (3.4 FTE).

- The increased staffing required in meeting the needs of the restructured

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[6] Billet d'Etat XIII, 2006

[7] Equivalent to £335,000 in current prices

regulation and competition body will also result in additional overheads being incurred. Key amongst these will be the need for larger office premises than currently occupied by the OUR. On the basis that rent will increase and allowing for additional overheads (electricity, telecoms, stationery, publication of guides, training seminars, workshops with industry etc) it is estimated annual costs attributable to competition law will be **£55,000**.

- It is estimated that allowing for two major reviews per year an initial budget of **£80,000** (£40,000 per project) should be allowed given the likely need for specialised advice and/or market research in setting out a given case. This is particularly necessary given the lack of information currently collected by the States that would be required when undertaking market assessments or findings of dominance. These costs would of course not be incurred should investigations prove unnecessary. They are therefore categorised as variable costs.

Total costs of Competition Function

Staff	£272,400
Overheads	£55,000
Consultants Case 1	£40,000
Consultants Case 2	£40,000
Total	**£407,400**

8.5 **For the avoidance of doubt, the increase in costs from £300,000 to £407,400 pa is not purely down to the inclusion of mergers and acquisitions within the remit of the competition authority. The revised cost forecast is derived from a zero based budget for an appropriately resourced and independent competition authority.**

8.6 The Department will continue to explore with Jersey the scope for benefitting from economies of scale and from working with the Jersey Competition and Regulatory Authority ("JCRA") to see whether these costs can be reduced.

8.7 The JCRA is the most direct comparator available for the approach being proposed by the Commerce and Employment Department. It currently receives a grant from the Economic Development Department to fund competition work and requires companies filing mergers & acquisitions to also pay a fee. In 2008 the EDC grant amounted to £413,000. Additional income from M&A activity fees brought in £63,000 (the JCRA charges a £5,000 fee for the filing of a merger notification with an additional fee of £15,000 should a second stage investigation be required – so far in 2009, the JCRA has received 4 notifications). This results in a total funding in 2008 for competition law in Jersey of £476,000.

8.8 There will be a need for one-off set-up costs in the first year for the new

combined office, related to the need to move to a larger office suite than currently occupied by the OUR, recruitment costs (principally advertising) for the additional staff, the production and publication of guides to the new legislation, and the redesign of stationery and the website. It is estimated that the maximum sum that would be necessary for such set-up costs is £80,000, and this sum will be met from the ringfenced allocation the Department has already received in respect of competition legislation.

8.9 A difficulty with the administration of competition legislation in budgeting terms is that costs can vary significantly from year to year, depending on the issues that might have been identified and the action that it has been necessary to take. The most immediate practical method of dealing with such variations would be for any surplus that may exist at the end of the year to be able to be carried over, with the permission of the Treasury, to the following year.

8.10 Recommendation:

It is recommended that the separate vote by the States, currently of a maximum of £300,000 per annum to meet the administration costs and all expenses, including staff and associated costs, of the Director General of Competition should be increased to a maximum of £410,000 per annum, to be allocated on a ringfenced basis to the budget of the Commerce and Employment Department, and

that this revised sum is reviewed in line with States' budgets generally by the Treasury and Resources Department and that sums remaining in the budget at the end of the year may with the agreement of that Department be rolled over to the following year.

9. ECONOMIC CASE FOR INTERVENTION

9.1 The Department is aware that notwithstanding that the Department is carrying out previous States direction in bringing forward these proposals some may be of the view that there is not a strong enough business case to justify the creation and expensive resourcing of another regulator. The Department is of course fully aware of the need for restraint in bringing forward new proposals with revenue expenditure requirements and all new initiatives, be they capital or revenue expenditure, should be subject to a robust investment appraisal. The Department fully supports the Treasury and Resources Department in its view that demands for additional funds to meet the cost of new services cannot continue unabated and funding for new services should now only be achieved through the Government Business Plan prioritisation process.

9.2 Whilst it is easy to focus on the annual implementation costs it is important not to overlook the potential benefits to the Guernsey consumer of competitive markets. **The costs of the present proposal need to be considered against the possible and probable benefits.**

9.3 The following calculations are provided as illustrative examples. First the caveat needs to be provided that these are illustrations only and do not imply that there exists a lack of competition in these particular markets or with the sales of these specific goods. The figures in the following examples are based on the Household Expenditure Survey of 2005.

> Example 1: If there existed a lack of competition in the sale of bread leading to it being priced 10 pence above what it would otherwise be, this would lead to Guernsey consumers collectively losing out to the tune of £385,000 per year.
>
> Example 2: If, through the lack of competition, the average bottle of wine in off license sales was five percent overpriced than what it would otherwise be, this would lead to Guernsey consumers collectively losing out to the tune of £495,000 per year.
>
> Example 3: If, through the lack of competition, the average price of fuel per litre was just one pence higher than it would otherwise have been, Guernsey consumers would be collectively losing out to the tune of £242,000 per year.

9.4 These are illustrative examples only, but Jersey's experience with its competition regime is able to shed potential light on the benefits that might accrue to Guernsey.

9.5 In September 2008 the Jersey Commission and Regulatory Authority ("JCRA") published a report[8] entitled "Impacts of Competition Policy in the Bailiwick of Jersey" which included monetary quantification of the benefits of Jersey's competition regime. In that study the JCRA did not attempt to calculate the total impact of competition policy on Jersey's economy but in each of its areas of authority it estimated the preliminary effects, or likely effects, arising from specific regulatory actions it has undertaken.

9.6 In the field of competition law the JCRA has estimated the benefits arising from the removal of the formerly fixed fee for conveyancing. On 8 December 2005, the JCRA announced that the members of the Law Society of Jersey had decided to eliminate the scale fee that had applied since 1954 to conveyancing services for the purchase or sale of property in Jersey. The scale fee required all Law Society members to charge a fee of no less than 1% of the value for the provision of conveyancing services for the purchase or sale of property in Jersey, or charge no fee at all. The scale fee had the effect of producing a common price (1% of the value) among lawyers in Jersey for the provision of conveyancing services for residential property transactions. According to public reports, the Law Society had previously enforced this rule by denying requests

[8] See http://www.jcra.je/pdf/080922%20Impacts%20of%20Competition%20Policy%20Study.pdf

from individual lawyers to charge less than the 1% fee.

9.7 The JCRA notified the Law Society that the scale fee likely would infringe the Competition Law's prohibition on price fixing agreements among competitors and urged the Law Society to voluntarily eliminate the fee to avoid potential enforcement action. The JCRA thus welcomed the Law Society's decision to eliminate the 1% scale fee. At the time, the JCRA stated that "[t]his will enable conveyancing lawyers to compete with each other on price, bringing potentially lower prices to consumers."

9.8 The JCRA's report stated that:

> *"In the subsequent two and a half years, this prediction largely has come true. Through information gained by the JCRA during an informal survey of conveyancing lawyers from thirteen law firms in Jersey undertaken from March to May 2008, the JCRA found that conveyancing fees now vary substantially among suppliers and that consumers shop around for the best price for conveyancing services. This is precisely the type of behaviour one would expect to see in a competitive market. In this market, consumers have benefitted overall in terms of reduced prices. Whereas under the old rule fees were set at 1% of the value, today we understand that fees generally range from 0.5% to 0.75%, with fees even lower (0.2% or 0.3%) in some instances.*
>
> *Taking a conservative estimate of fee reductions (to equate to a fee of 0.75%), the JCRA estimates that, overall, consumers in Jersey have saved approximately £2 million per year, or approximately £5.5 million in total, as a result of the abolition of the scale fee."*

9.9 If the threat of non-compliance with a Guernsey competition law had the same effect on behaviour in Guernsey and assuming 75% of Jersey's annual savings (i.e. £1.5m pa) and discounting the net savings of £1.1m for 10 years then this one benefit produces a Net Present Value of £8.5m. Any other benefits arising to consumers over that 10 year period would further add to the economic justification for intervention. The Department is of the view that based on these assumptions and experience in Jersey, there is likely to be a strong economic case for the implementation of the Department's recommendations.

9.10 The Department further notes that the States of Guernsey is a significant buyer of goods and services in the island and that as a consumer it would benefit substantially from more competitive prices in the marketplace. Not only would the competition law assist with the States' anti-inflationary strategy it may also contribute towards the States own efficiency savings.

10. THE ENERGY MARKET

10.1 One of the States' Resolutions following consideration of the 2006 Report was:

"*To note that informal investigations will be undertaken into areas of the Island's economy, in particular the energy market, and specifically gas and the importation of bulk fuels, with a view to deciding on the appropriateness of either bringing them within the remit of the Regulation of Utilities Law, 2001, or of making them subject to a formal investigation under the legislation proposed in this Report.*".

10.2 In accordance with this Resolution, in October 2006 the Commerce and Employment Department commissioned Consultancy Solutions for the Oil Industry to undertake a high level review of the size, structure and operation of the energy market in Guernsey as it related to fuel used for both heating and transport services, including gas. The purpose of the study was to determine whether there was a case for referring the energy sector for a more formal, in-depth study under the forthcoming competition legislation, or even for controlling the sector under the Regulation of Utilities legislation.

10.3 Following investigations and consultations with the industry, the results of the study were published in May 2007, and these are summarised for the information of States' members in the following paragraphs.

Bulk Liquid Fuels Imports

10.4 The investigation noted that the difficulties of transporting fuel by sea to the Island resulted in significantly higher costs than in the UK and in comparison with Jersey these costs were further increased by Guernsey operating two separate import terminals. Given this, any introduction of a further bulk fuels supplier would be counterproductive and be likely to increase consumer prices given the infrastructure costs involved. On the other hand, any merger or acquisition of a current importer should be referred for full investigation under the competition legislation.

Retail Transport Fuels

10.5 In terms of transport fuels the investigation noted some special characteristics of the retail market in the Island, in particular:

a. The large number of outlets compared to a community with the same population in the United Kingdom;

b. The lack of competition in the Island from large supermarkets retailing transport fuel, as occurs in the UK and elsewhere. These have the effect of generally forcing down the prices charged in the market as a whole;

c. A lack of transparency in pricing due to a widespread use of discounts for account customers, or on some other loyalty scheme basis;

d. A general lack of competition in the market, which could be encouraged by a greater use of roadside price signs in order to encourage motorists to make their own informed choice;

e. With regard to marine fuels, there is a general lack of competition in the market due to a restricted number of outlets.

Oil for Heating

10.6 It was noted that while there had been some "drifting out" of prices in the recent past, generally the prices charged in Guernsey for heating oil were not unreasonable given the additional infrastructure costs.

Bulk and Retail Supply of Gas

10.7 The supply of gas to the Island is based on Liquified Petroleum Gas (LPG), and not on natural gas, and therefore prices follow closely those in the broader liquid fuels market. Because of the structure of Guernsey Gas' accounts the consultants had some difficulty in identifying the relationship between the company's different profit centres. This resulted in a small supplementary study which came to the conclusion that there was "no historical evidence to recommend to Commerce and Employment the need for Regulation nor formal investigation under the nascent Competition Law". It was recommended however that an informal dialogue be continued with Guernsey Gas. The Department has met representatives of the Company to discuss the findings of the Report and intends to continue this dialogue in the future.

10.8 The Commerce and Employment Department has considered the results and recommendations of the study into the Energy Market. It has noted that fuel prices, and in particular those used for motor transport are likely to remain an area of public concern, given the broader effect that they have throughout the economy. Given the recent, and likely future volatility of such prices, these concerns are likely to continue.

10.9 Since the results of the study it has continued to monitor petrol and diesel prices in the Island, and has noted that:

a. While in value terms margins have been maintained, there would appear to have been a small reduction in overall percentage terms;

b. There is no evidence that the motor fuels distribution sector has attempted to profit in pricing terms from the recent rise in the excise duties on motor fuels;

c. There is a significant range of prices in the retail market, which provides significant opportunities for motorists to shop around if they so wish.

10.10 Overall the Department endorses the findings of the study to the effect that there is no case at present for a full scale statutory investigation of the energy market, nor for the sector to be brought within the remit of the Regulation of Utilities Law. It is of the view that the best way to promote value for money in the sector is to continue to work to raise awareness among the sector of the need to set "fair" and transparent prices that can be made known to motorists and that they can use to make their own purchase choices, thereby encouraging a competitive market.

10.11 With this in mind the Department has noted that a significant number of the garages in the Island now display roadside price signs. With a view to encouraging the display of further signs and ensuring that the signs meet with the requirements of both Trading Standards and the Environment Department, the Commerce and Employment Department intends to introduce a Code of Practice for such signs at all transport fuel outlets in the Island.

11. CONCLUSION

11.1 The pressure for the introduction of competition legislation built up after the sale of the Morrisons' Channel Island's stores to the then CI Traders Group in 2005 and against the background of the legislation introduced in Jersey that came into force the day after that sale. The previous Board of the Department was not convinced that legislation along the lines of that introduced in Jersey would provide a net benefit to the community. Consequently it developed an approach to competition legislation whereby statutory powers would only be invoked if the States agreed that there was prima facie evidence of a specific abuse of market dominance. In parallel with this approach the previous Board recommended that consideration of the introduction of provisions to require prior approval of mergers and acquisitions should await a review of the costs and benefits derived in Jersey from such provisions. This approach was recommended to the States along with a budget cap of £300,000.

11.2 An amendment to those proposals was passed which required the immediate implementation of provisions for the approval of mergers and acquisitions and which is the subject of this States Report. Subsequent research and advice from the Department's specialist competition adviser, Dr Michal Gal, and others have: a) cast considerable doubt on whether it would be feasible to involve the States in considering the invocation of statutory powers on a specific case by case basis; b) highlighted that the original proposals did not comply with international best practice and c) questioned the initial costing of the function.

11.3 To some extent the current Board of the Department is intuitively against interference in the market and it shared the concerns of the previous Board that an inappropriate competition regime may not provide a net benefit to the community. The Board is acutely aware of the need to restrain and prioritise public expenditure at the current time.

11.4 In addition during the development of the proposals the Board was made aware of the international reputational and other implications of the island not having competition legislation that reflects EU principles. At the same time during the preparation of the States Second Fiscal and Economic Plan the Policy Council considered such legislation to be an important plank in its anti-inflation policies.

11.5 The Board has therefore been mindful of the need to ensure that the implementation of competition law takes fully into account both the nature of the Island as a small market economy, and the resources that a community of the size of Guernsey can realistically be expected to devote to the function in order to optimise the benefits derived. The justification for introducing any competition regime must be that it will stimulate a more competitive market for goods and services and provide indirect benefits for the community that offset the direct costs. **The analysis presented in this States Report, which is based on benchmarking Jersey's experience to date, has demonstrated that the likely benefits will outweigh the costs.**

11.6 It is all of these considerations that have tipped the balance of the Board towards bringing forward these proposals with a recommendation that they be approved by the States.

11.7 The characteristics of Guernsey's economy are such that in comparison with larger jurisdictions the trade-off between effective competition and economies of scale is different and this in particular has been taken into account in putting forward the proposals for mergers and acquisitions regulation.

11.8 With regard to the arrangements for the administration of competition legislation as a whole the Department has been keen to ensure that these are compatible with arrangements elsewhere, and in particular that the arrangements put in place ensure an **objective and independent administration of the legislation, within the overall policies that are agreed by the States, that can be seen to be effective in guaranteeing certain standards of business behaviour.**

11.9 In summary the proposals put forward in this Report are in fulfilment of States' Resolutions of July 2006 (Billet d'Etat XIII, 2006) and the Commerce and Employment Department is aware that given the changes to the Island's financial position in the intervening period some persons may question the current need for and value of the proposals put forward. The Department has given this aspect particular attention and believes that the specific advantages of the proposals can be summarised as follows:

1. The promotion of competition within the economy to the benefit of local consumers, as outlined in Section 9.

2. The promotion of efficiency and competitiveness within the economy with particular reference to the potential reduction in inflation which has been identified as a strategic objective by the Fiscal and Economic Policy Group, as outlined in Section 4.1 to 4.7.

3. The provision of a legislative infrastructure that lays the basis for a modern market economy and which is essential for the Island to be able to develop its economy in international markets as outlined in Section 4.8 to 4.23.

11.10 Given these advantages the Department is of the view that the estimated costs of administering competition legislation including mergers and acquisitions at a maximum of £410,000 per year (less any fees that are received) are fully justified given the overall advantages to the Island's economy that will result from the proposals. The Board will continue to explore opportunities to work with Jersey's Economic Development Department to reduce this cost further by sharing resources between the two jurisdictions.

11.11 Finally, the Department is of the view that the study into the Island's energy market may provide a model for further similar studies into areas of the Island's economy. It will continue to monitor prices and encourage competition in this sector which plays an essential role as part of the Island's infrastructure.

12. RECOMMENDATIONS:

12.1 The Commerce and Employment Department recommends therefore:

1. That the definition, thresholds, criteria, and other matters related to the administration of mergers and acquisitions legislation in Guernsey should be along the lines set out in Sections 4 and 5 of this Report.

2. That competition legislation should be administered by a Guernsey Competition and Consumer Authority, to be based on a restructuring of the current Office of Utility Regulation, as outlined in Section 6 of this Report.

3. To rescind Resolution 3 (a), Billet d'Etat XIII, 2006, Item 18, and to amend Resolution 4 of the same item by the omission of the words "in order to undertake such statutory reviews of specific market sectors as directed by the States".

4. (1) To amend Resolution 5, Billet d'Etat XIII, 2006, Item 18, to increase the separate vote by the States, currently of a maximum of £300,000 per year to meet the administration costs and all expenses, including staff and associated costs, of the Director General of Competition to a maximum of £410,000 per annum, to be allocated on a ringfenced basis to the budget of the Commerce and Employment Department,

   (2) To direct the Treasury and Resources Department to review this revised sum in line with States' budgets generally and to agree that sums remaining in the budget at the end of the year may, with

the agreement of that Department, be rolled over to the following year.

5. To note that following the publication of the Report by Consultancy Solutions for the Oil Industry into the Island's energy market, the Commerce and Employment Department will continue to monitor energy prices in the Island and report further to the States as necessary.

6. To direct the preparation of such legislation as may be necessary to give effect to the foregoing.

Yours faithfully

C S McNulty Bauer
Minister

Appendix One:

Guernsey Merger Regulation Report – Dr Michal S Gal

Dr. Michal S. Gal

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Co-Director of the Center for Law and Markets
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Merger Regulation Report, February 2008

I have been asked to analyze the issue of whether the States of Guernsey (hereafter: "Guernsey") should adopt a Merger and Acquisition Regulation (hereafter: "Merger Regulation") as part of their competition law, and if so, then how should such a regulation be structured to meet Guernsey's special needs.

Accordingly, this report analyzes such issues and provides drafting instructions for a Merger Regulation. The first part focuses on the justifications for a Merger Regulation in a small, open economy such as Guernsey. It is argued that strong rationales justify the adoption of such a regulation, so long as the law is designed in a way which takes into account the unique characteristics of Guernsey's markets. The second part suggests several policy tools that can serve to create a cost-effective and efficient regulation. The third part provides guidance with regard to the institutions and procedures to be included in the regulation. All the recommendations form part of a whole, and should be read this way, since an internal balance is created amongst them.

Part I: The Rationales for Merger Regulation in Guernsey

The basic question to be asked is whether Guernsey needs merger policy at all. In the past decade the number of jurisdictions which have adopted such a policy has grown exponentially so that most jurisdictions which have a competition law also adopted a merger regulation. Yet the adoption of such a regulation in Guernsey is not trivial. Rather, given the costs involved in such regulation-- both for the merging parties as well as for the government-- the decision should be based on the appropriateness of such a regulation in Guernsey's special setting. As elaborated below, strong rationales argue in favor of the adoption of a Merger Regulation in Guernsey.

First, merger control is one of the most powerful tools available in competition law to regulate market power.[9] It acts as a safeguard against the strengthening or the creation of market structures that may lead to the exercise of such power and that are not justified by social gains. It does so by preventing certain changes in market structure from their incipiency. Such regulation is especially important for small, micro economies such as Guernsey because in such economies market power, once created, is difficult to erode due to the limited self-correcting powers of the market's invisible hand.[10] Rather, market structure is often entrenched for long periods of time. Accordingly, the small size of the market strengthens the rationale for the adoption of Merger Regulation.

Second, the need to adopt a Merger Regulation is strengthened by the fact that other competition law tools may be difficult to apply in order to limit the market power that might be created or strengthened by a merger. In particular, abuse of dominance provisions pose some of the most complicated issues for competition law enforcement and thus post facto regulation of market power created by a merger is often

[9] See definition in the attached glossary.

[10] The term is defined in the attached glossary.

problematic.[11] In addition, oligopolistic coordination,[12] which is most prominent in small markets and often carries high social costs, is not caught under the competition law and thus is left unregulated.[13] The only way to limit the results of such conduct through the competition laws is to prevent from their incipiency those external changes in market structure that create better conditions for oligopolistic coordination.[14]

In addition, merger policy is important since mergers are one of the main driving forces behind changes in concentrated market structures. Often firms prefer to merge rather than grow internally, or potential entrants prefer to enter a market by merging with a local firm rather than by creating their own subsidiary. Such conduct may have many benefits for the market, but it can also impose costs, and thus should be regulated.

Finally, and of no less importance, if firms are prevented from engaging in cartelistic conduct, they may often prefer to merge rather than incur the risks and costs of cartel regulation. Such mergers are often not cost-justified as they are motivated by the wish to avoid cartel regulation rather than to achieve efficiencies, and are thus welfare-reducing. This negative externality[15] can be avoided by implementing merger regulation.

Accordingly, the special characteristics of Guernsey's markets strengthen the justification for the adoption of a Merger Regulation. Indeed, these reasons have led many small economies, including Jersey,[16] Malta[17] and Singapore,[18] to adopt such a regulation.

At the same time, merger regulation carries high costs, some of which are increased because of Guernsey's small size. As elaborated below, given that merger control often involves a resource-intensive analysis of market conditions, it might not always be cost-effective to engage in such regulation if the effect of the merger on market conditions is minimal. In addition, mergers, and the resulting high concentration levels[19] of an economy, are often a necessary evil for realizing productive and dynamic efficiencies. Limiting such mergers might, thus, be harmful to Guernsey's economy.

These costs do not imply, however, that Guernsey should not adopt a Merger Regulation. Rather, they imply that the regulation should be carefully structured so as to take into account the special characteristics of the economy in order to ensure that

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[11] See European Commission, *DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary abuses* (2005).

[12] See definition in attached glossary.

[13] See Richard Whish, EU Competition Policy….

[14] See Michal S. Gal, *Competition Policy for Small Market Economies* (Harvard University Press,. 2003).

[15] See definition in attached glossary.

[16] Competition (Mergers and Acquisitions) (Jersey) Order 2005.

[17] Malta Competition law

[18] Singapore Competition Law.

[19] Industrial concentration is defined in the attached glossary.

regulatory interference in the market is, indeed, cost-effective and efficient. Accordingly, the following parts of the report focus on the effects of Guernsey's characteristics on optimal merger regulation.

Part II: Structuring a Cost-Effective Merger Regulation for Guernsey

This part is structured as follows. The first section elaborates on the special characteristics of Guernsey that affect its merger regime. The second section suggests general principles for a cost-effective and efficient merger regime for Guernsey. The following sections build upon such principles to suggest the details of a Merger Regulation that might suit Guernsey's special needs.

1. The Effects of the Special Characteristics of Guernsey

Undoubtedly, the most important characteristic of Guernsey's markets is their small size. Guernsey is a micro-economy with extremely limited domestic demand. This implies that most of its markets are highly concentrated, with a limited number of players operating in them. In addition, Guernsey is an island, with quite high transportation costs from its major trading partners (such costs are referred to in the wide sense, to include not only direct transportation costs but also indirect costs such as storage costs etc.) This, in turn, implies that entry barriers into its markets may be high and that potential competition from foreign entrants is also often limited, despite Guernsey's general liberal trade policy. Additional entry barriers include a limited availability of land and skilled labour, resulting from regulatory controls on such factors of production.

These facts have significant implications for merger regulation. First, they imply that **many mergers in such an environment may be necessary in order to achieve efficient scales of production**.[20] In other words, the very limited size of domestic demand often prevents firms from reaching minimum efficient scales. Mergers are an important way of firms to grow to such efficient sizes which, in turn, serve to reduce productive inefficiency and sometimes also dynamic inefficiency.[21] Most importantly, mergers are an important tool for the realization of potential efficiencies in oligopolistic markets. In such markets firms might prefer to operate at sub-optimal levels rather than grow internally, in order to not change the status quo significantly (thereby engaging in oligopolistic coordination). A merger between sub-optimal firms can solve the sub-optimal productive levels as it creates a larger firm while not increasing supply. The merged entity can also become a more competitive player, thereby introducing some degree of competition in to the market. Mergers may also be the best-- and sometimes the only-- response of domestic firms to the lowering of trade barriers and the entry of more efficient foreign competitors. Finally, domestic firms may need to merge in order to increase their international competitiveness in foreign and international markets.[22]

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[20] Scale and scope economies are defined in the attached glossary.

[21] Economic efficiency, an its three basic types, are defined in the attached glossary.

[22] See Gal, *infra*, chapter 6.

Second, such characteristics often imply that **mergers significantly increase the market power of the merging parties**. This is because in a small market protected by high entry barriers there might be no actual or potential competitors that could constrain the market power of the merged entity. Yet the consequences of prohibiting all mergers that strengthen market power in a micro-economy such as Guernsey might be that some of the parties to the proposed merger will need to exit the market, thereby creating a situation that can be substantially the same or even worse compared to what would have occurred had the merger taken place.

Third, the micro-size of Guernsey's economy implies that **the effects of many mergers --in *absolute financial terms*-- would be minimal, even if such effects might be high in *relative terms*.** To give an example, assume that two distributors compete in the market for radios in Guernsey. Further assume that each sells 500 radios a year, for a profit of 2,000 Euros. If these two firms merge, their joint profit will rise to 4,500 due to their joint market power. This implies a significant increase in their joint profit (500, an increase of more than 10%). Still, in absolute terms, the increase in costs of radios as a result of the merger will have quite a minimal effect on consumers. Even over a period of five years-- longer than that considered in most merger analyses around the world-- the cost effect of the merger in absolute terms is quite small (500X5=2,500). On the other hand, merger regulation may be costly both to regulatory authority as well as the parties (costs of supplying documentation, arguing for legality, delaying the merger until it is cleared, etc.). Moreover, the size of an economy does not affect the "fixed" costs of conducting a merger review. Such costs are incurred regardless of the size of the economy, because the analytical steps of a merger analysis are similar in markets of all sizes. It may thus not be economically justified to regulate some mergers, or at least to spend large resources to analyze them.

Another implication of the small scales of operation of many firms in Guernsey is that a **high regulatory burden might limit incentives to enter into some welfare-enhancing mergers**. If the merger involves domestic firms, then such firms would most likely have limited resources to invest in complying with burdensome legislative requirements. But even if the merger involved a large corporation, that corporation would generally have limited incentives to invest in the merger review process. This is because a rational firm will always compare the harm that dropping the merger may cause it to the costs of obtaining a favorable merger decision. Since the profits to be had in most of Guernsey's markets are quite small, the costs the firm will be willing to invest in the merger process will also generally be quite small. Accordingly, it will be the rare case in which the parties to the proposed merger will have a strong financial incentive and ability to spend significant resources to clear a merger.

Lastly, given the fact that Guernsey is separated by sea from all its trade partners, **some market will have a more significant impact on its economy than others**. Particularly, markets for transportation services have a strong impact on the competitiveness of Guernsey's markets. Mergers in such markets might justify a closer scrutiny. Similarly,

markets for non-tradable goods and services merit closer scrutiny.[23] This is because in such markets suppliers will not be concerned with off-island competition.

Another important characteristic of Guernsey is the fact that, like all small economies, its business and political elites are often intertwined. This implies that **institutional arrangements have to be made so that the institution making the merger decision should be as independent as possible** from political forces, in order to ensure that the decision is not tainted by narrow political considerations which fail to give sufficient weight to public policy considerations.

In addition, small economies are often characterized by several large conglomerate firms with many cross holdings in many markets. This is likely to characterize Guernsey from time to time. This implies that **mergers should be analyzed in a wider context**, which takes account not only of the effects of the merger in the specific market, but also on its effects on other markets in which the parent or holding companies of the parties to the merger operate.[24]

A final characteristic that should be taken into account is the fact that **Guernsey's economy is largely driven by its highly internationally competitive financial sector**. The financial sector does not only serve Guernsey's inhabitants. Rather, most of its customers are foreign firms and individuals. While Guernsey's financial firms compete among themselves, they mainly compete with foreign firms. It is thus highly important to ensure that the Merger Regulation does not harm the comparative advantages of Guernsey's financial sector.[25] This may imply, for example, that mergers in the financial sector, which are necessary to ensure its competitiveness, do not meet a high regulatory burden. This is especially true given the fact that many financial institutions that operate in Guernsey are parts of large, international firms and can thus relatively easily change their location should regulatory burdens be too high. Interestingly, this last fact, coupled with the need to protect the financial sector's competitive advantage, create a further justification for applying merger regulation in other sectors of the economy. This is because prices and trade conditions in other sectors of Guernsey's economy may reflect upon the costs of doing business in Guernsey and may thus indirectly affect its comparative advantage. To give but one example, if costs of flying to and from Guernsey are prohibitively high due to the market power of air carriers, this may affect (even if only marginally) the decisions of investors of whether to invest in Guernsey or elsewhere.

It is worth pointing out that these characteristics create a **basic tension between setting rules and standards in merger analysis**. Rules are less costly to apply because determining whether they have been violated is a relatively mechanical process rather than one requiring the exercise of discretion or the determination of numerous facts. Also, rules facilitate monitoring of the decision makers as the correlation between the

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23 Non-tradable goods are defined in the attached glossary.

24 Gal, *ibid.*

25 Comparative advantage is defined in the attached glossary.

rule and the decision is easily observable. On the other hand, the small size of the economy makes it harder to rely on generalizations and often requires a case-by-case analysis governed by a standard. This tension plays out in all merger review regulatory tools.

2. General Principles of the Merger Regime

Given the above characteristics of Guernsey's economy, this section spells out the different general principles on which the Merger Regulation should be based.

The first general principle dictates that **Guernsey's special characteristics (economic, institutional, political, cultural or otherwise) should be taken into account when shaping its merger regime**. Guernsey thus cannot simply 'cut and paste' the merger regimes of other jurisdictions without first verifying whether such regimes will effectively and efficiently regulate its mergers.

The second general principle states that **mergers should not be assumed to be harmful to Guernsey's economy.** Rather, since many mergers are justified given Guernsey's domestic market's small scale, the regulation should be based on the assumption that a merger should be allowed to go through-- and not be subject to regulatory burden-- unless there are strong indications that it might have a significant negative effect on social welfare.

The third general principle suggests that **merger review should be designed to allow the regulatory authority to balance between competing considerations**. This implies that the merger review would not always be easy to perform, as the authority would have to weigh the probable anti- and pro-competitive effects of a merger. Yet a small economy such as Guernsey cannot afford to adopt a Merger Regulation which adopts an absolute-protection-of-competition regime under which every merger that is likely to reduce competition is prohibited, regardless of the efficiencies it might create. Accordingly, **merger policy might need to avoid rigid structural presumptions that high concentration levels are necessarily welfare-reducing.** Rather, non-structural dynamic factors that have bearing on the competitive restraints placed upon firms operating in the market should be given significant weight.

The fourth principle suggests that the Merger Regulation and especially its criteria for merger evaluation **should be clear and comprehensible by market participants**. This will reduce compliance costs and prevent unnecessary litigation. Undoubtedly, this principle will sometimes clash with the third principle. However, to the extent possible, both principles should be furthered. Clarity can be advanced, for example, by spelling out in the legislation or in briefing papers that are published by the regulator the criteria for evaluation and the relative weight given to each consideration.

The fifth principle states that **merger review provisions and institutions should be designed so as to be cost effective.** This principle is especially important in a micro-economy such as Guernsey, in which regulatory resources are limited and firms have

limited resources to spend in regulatory procedures. Such a principle is also important because, for reasons explained more fully below, domestic firms are likely to bear most of the brunt of merger review. As many domestic firms may already be suffering from high costs due to the limited scales of operation, imposing upon such firms high merger review burdens may be harmful to Guernsey's economy.

The last principle dictates that, **to the extent possible, Guernsey's merger regulation should follow that of the large economies and the best practices suggested by international bodies** such as the International Competition Network (ICN) and the OECD. Following such suggestions has some inherent advantages. Guernsey can build on a body of ready-made law which is constantly evolving instead of waiting for its laws to be interpreted by its own courts. In addition, such harmonization may make it easier and less costly for foreign firms to enter and operate in Guernsey without having to study a set of different rules that regulate their activities on the island.[26] Yet foreign laws should only be adopted if the benefits they create are larger than the costs they produce if they do not fit Guernsey's needs.

These principles form the basis for the merger regime proposed below.

3. The Goals of Merger Regulation

Merger Regulation is shaped, first and foremost, by its goals. In the case of an open, micro-economy economy such as Guernsey there are significant trade-offs to be considered when determining the goals of merger review.

An important issue is whether merger control should mainly focus on achieving efficiency or on preventing concentrations of economic power.[27] In my view, there is no doubt that Guernsey should promote the former. The reason is that given Guernsey's natural conditions, concentration and economic power are often a necessary evil in order to allow firms to operate efficiently. The goal of ensuring that a sufficient number of competitors operate in each market should be subordinated to the more compelling necessity of servicing a small population efficiently.

A most important and difficult question centers on whether the regulation should promote total welfare or consumer welfare, or some intermediate measure. The difference between the two can be simply explained, as follows. The consumer welfare approach strives to maximize consumer surplus. This standard will only be met if the post-merger price will not increase beyond the pre-merger price. This might happen because the merging firms do not strengthen their market power as a result of the merger or because the efficiencies created by the merger are sufficiently significant to cause the profit-maximizing price not to rise. A wide consumer welfare approach would

[26] See Michal S. Gal, "The 'Cut and Paste' of Article 82 of the EU Treaty in Israel: Conditions for a Successful Transplant" (2007) 9 *European Journal of Law Reform* 467; Kevin Davies, *Law making in Small Jurisdictions*, 56 Univ. Of Toronto L. J. 151 (2006).

[27] Gal, Competition Policy, *infra*.

also allow a merger to go through if the merger benefits consumers otherwise (for example, by producing better products or by providing better service), so long as the benefits to the consumer outweigh the costs the merger imposes on consumers. It is worth emphasizing that although the consumer welfare standard protects "consumers", it indirectly protects firms as well. This is because firms are often consumers themselves- of inputs and of distributional and marketing services. Thus, applying such a standard will often protect firms from price rises.

Under the total welfare approach, a merger is permitted if it increases total surplus, which includes both consumer and producer surplus. Under this standard, if the merger allows the merging parties to operate more efficiently, it will be allowed, so long as the parties' savings are larger than the harm to consumers. The total welfare standard is thus neutral with regard to the issue of who benefits from the merger.

Small economies have strong justifications to adopt a total welfare standard.[28] This is because the consumer approach might sometimes prevent increases in productive and dynamic efficiency. Also, the consumer welfare approach may sometimes conflict with the goal of enhancing the international competitiveness of domestic firm, as domestic firms might need to achieve a critical mass in order to compete effectively with foreign firms. This is an important concern for Guernsey, in which many mergers might be justified by the need to reach scale and scope economies of operation.

On the other hand, there are some strong reasons in Guernsey's case that vie in favor of a wide consumer welfare approach. This is especially true if efficiency-enhancing mergers could still be allowed to go through while mitigating the effects on consumers, as elaborated in section III7 below. First, the total welfare approach involves a number of difficult analytical and qualitative issues that place a heavy burden on the regulator. This is because it requires the regulator to weigh both the effects on the firms' cost levels as well as on market prices and conditions. Such a burden is especially troublesome in a micro-economy such as Guernsey.

Second, consumer welfare is the standard adopted by almost all economies around the world, and is the preferred standard for the US, the EU and the UK. It is also encouraged by the ICN and other international organizations as the standard of choice.[29]

Lastly, but most importantly, the total welfare standard is based on several assumptions that do not hold true in Guernsey. The premise of the total welfare approach is that firms pay taxes on their revenues-- the higher their profits the higher the tax revenues-- and such revenues then serve for wealth distribution.[30] It is also assumed that wealth redistribution is best left for government instruments such as taxation and social insurance or welfare systems that are designed for that purpose, and through which

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[28] Gal, *infra*.

[29] ICN Report

[30] Roger Ware, "Efficiencies and the Propane Case" 3 *International Antitrust Bulletin* 14 (2000); Frank Mathewson and Ralph A. Winter, "*Superior Propane*: Correct Criterion Incorrectly Applied," 20(2) *Canadian Competition Policy Record* 88 (2001).

redistribution is more directly observed. In Guernsey there is limited taxation and thus limited redistribution through it.

Another premise on which the total welfare standard is based is that the higher profits that result from the merger are re-invested in the country where they accrued, thus generating a dynamic cycle of industry. However, if the merging entities are controlled mostly or solely by foreign shareholders or the production facilities are located outside the jurisdiction, as might often occur in the case of Guernsey, then an approach that maximizes total welfare and ignores the nationality of shareholders may well increase total world welfare, but not domestic welfare, because the cost savings and profits from the merger may accrue elsewhere.[31] Only when it can be assumed with a high degree of certainty that most of the profits made by shareholders in the domestic market will be spent in it, will this approach necessarily maximize total domestic welfare.

This last problem was recognised by New Zealand. It attempted to solve it by applying a qualified total welfare approach under which all welfare benefits which are recognised must accrue to domestic firms or consumers. As the experience of New Zealand signifies, however, this qualified total welfare approach is sometimes difficult to apply in practice, involving detailed assessments of the functions of cost savings and profits made, including whether they promote efficiency gains, for example by stimulating new competition and innovation. Determining whether profits might indeed stimulate more competition and innovation is an extremely difficult decision to make. It is this difficulty which has essentially led the New Zealand Courts to largely abandon the qualified total welfare approach.[32]

Applying a qualified total welfare test in Guernsey might, therefore, raise considerable problems. Most importantly, it might involve a costly and highly discretionary analysis of some mergers. This is because estimating where the benefits of the merger might accrue involves a highly data and cost-intensive case-specific analysis. It might involve providing answers to questions like the following: If 50% of the shares of the merging parties are owned by Guernsey's citizens- does that necessarily imply that 50% of the profits will then be reinvested in Guernsey? How do market conditions in the Guernsey market affect the assumption with regard to the locality of the profits? Does the "nationality" of the firm, rather than the nationality of its shareholders, determine such effects? Should the fact that a firm generally pays dividends to its shareholders --some of which are located in Guernsey-- change the analysis? How should we classify a shareholder who is a Guernsey resident but who spends most of his time abroad or who owns firms elsewhere? Making general assumptions based on the nationality of the firm or on shareholder percentage and location might be very difficult. It is this difficulty which has essentially led the New Zealand courts to largely abandon the qualified total welfare approach.

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[31] Stephen F. Ross, "Did the Canadian Parliament Really Permit Mergers that Exploit Canadian Consumers so that the World Can Be More Efficient?" 65 *Antitrust L. J.* 641 (1997).

[32] *Telecom Corp of NZ Ltd v Commerce Commission* (1991) 3 NZBLC 102,340, at p. 531, p. 102,386.

Still, Guernsey might apply such a qualified total welfare approach, or even an unconditional total welfare approach, while acknowledging that it does not solve the problems elaborated above.

Should Guernsey apply a consumer welfare standard, I would suggest the following qualifications. First, it should apply a wide consumer welfare standard which recognizes "deferred" or "long-term" consumer interests. This test, which is applied in New Zealand in most areas of competition law, is quite different from the one employed, for example, in the U.S., which focuses only on the direct benefits to consumers.[33] The rationale behind this wide interpretation is that some monopoly power and retention of monopoly profits is justified in order to maintain producers' incentives to improve production and innovate. Competition law will subordinate the immediate welfare of consumers, by way of lower prices or higher quality, to the long-run productivity of the entire economy which will ultimately benefit consumers.[34] This approach also recognizes that productivity growth is the most important determinant of long-term consumer welfare and a nation's standard of living. This approach is a sound one. A preoccupation with short-term consumer welfare and price-cost margins overlooks the fundamental benefit of competition which is to drive productivity growth through innovation.[35]

Second, it is suggested that the term "consumer" be interpreted widely. This implies that a merger should be approved even if it harms some consumers, so long as the aggregate benefits to all consumers is larger than the overall harm to them. In a similar vein, since 1991 the courts in New Zealand have established that the distribution of gains and losses is irrelevant to their inclusion in the process of weighting benefits and detriments.[36]

It is important to emphasize that following a wide consumer welfare approach does not imply that a merger that increases efficiency but also has the potential to increase market power would necessarily be prohibited. Rather, as elaborated in section III7 below, Guernsey's merger authority can use its power to accept, in exceptional cases in which large efficiencies or other public benefits will result from the merger, concessions from the merging parties in order to ensure that consumers are not harmed by it. Such a solution would ensure that firms can merge in order to increase their efficiencies and also that domestic consumers are not significantly harmed by such mergers. In fact, this method is used by other small economies in order to balance the competing considerations.[37]

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[33] See Michal S. Gal, "The Effects of Smallness and Remoteness on Competition Law- The Case of New Zealand" (2006-2007) 14 (3) *Competition and Consumer Law Journal*, 292

[34] See, e.g., *Verizon Communications Inc., Petitioner v. Law offices of Curtis v. Trinko, LLP.*, 540 U.S. 398, 124 S. Ct. 872 (2004).

[35] Michael Porter, "Competition and Antitrust: Toward a Productivity-based Approach to Evaluating Mergers and Joint Ventures" (2001) 46 *Antitrust Bull.* 919, at 934-935.

[36] *Air New Zealand*, para. 238.

[37] See Section III7 below.

4. Definition of a "Merger"

Merger regulation generally involves three stages, each serving to limit those mergers that must undergo scrutiny. The definition of a merger acts as the first gate for merger regulation. Any conduct or agreement which does not fit the definition will not be regulated. The second gate is an application threshold which strives to separate those mergers that might potentially significantly affect competition from those without such effects. Both gates are based on general assumptions regarding merger activity. The last gate is the legality test, which involves a more in-depth analysis of the specific merger. The following sections suggest the optimal design of such tests for Guernsey.

The overriding aim of the definition of a "merger" is to capture those transactions that merit review under applicable substantive merger legislation, while at the same time providing clear and easily understandable standards that enable the merging parties to readily ascertain their obligations. [38]

The definition should be carefully constructed. If the category of transactions that potentially qualify for "mergers" is defined too broadly, the result may be to capture many types of ownership changes that are unlikely to have a material impact on competition, thus placing a greater burden on business and law enforcement resources than would seem justified. Conversely, a definition of "merger" that is too narrow implies that transactions raising potential competition concerns may not be challenged.

There are no reasons that require Guernsey to take its own path rather than follow the definitions adopted by other jurisdictions, as long as such definitions are efficiently structured. Let me suggest what such a definition should include. In particular, the definition should include a merger between two or more previously independent undertakings, in which such entities amalgamate into a single undertaking and cease to be separate legal entities. It should also include the acquisition of complete control of one undertaking, or a part thereof, by another undertaking.

In addition, the definition should cover acquisitions of shares or assets falling short of the 100% threshold, where the transaction nevertheless results in an acquisition of "control" of a business enterprise. A qualifying transaction arises whenever the buyer obtains a controlling equity interest in the target such that it can exercise "decisive influence" over the target's business operations. An acquisition of "control" presumptively arises whenever the purchaser acquires a majority of the target company's shares, such that the purchaser obtains voting rights that permit it to control the target company's board, management and/or business direction. Qualifying transactions may include both acquisitions of "sole control" by one firm over another, and acquisitions of "joint control" of a firm by two or more firms.

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[38] http://www.internationalcompetitionnetwork.org/media/library/conference_6th_moscow_2007/23ReportonDefiningMergerTransactionsforPurposesofMergerReview.pdf The following paragraphs build upon this document.

The definition should also cover acquisitions of shares that, while falling short of a of an outright majority of the target company's shares, nevertheless give rise to the potential ability of the acquiring firm to exert significant influence over the acquired company, and especially over its strategic decisions (indirect control). The EU merger definition, for example, captures acquisitions of shareholdings falling short of an outright majority stake, where such holdings would nonetheless enable the acquirer to block the adoption of strategic decisions, for example, through the exercise of veto rights, or other arrangements which permit the acquirer to exercise *de facto* decisive influence over the target.[39] The importance of such a definition arises from the fact that it would otherwise fail to capture minority acquisitions that, while falling short of control, nevertheless give the acquiring firm the ability to influence the management and operations of the target and thereby affect its competitive conduct.

In addition, it is also important that the definition of a "merger" capture some types of asset transactions that might significantly affect competition. Transactions in which the purchaser acquires all or most of the seller's business assets should be viewed as qualifying transactions for merger review purposes. It is also advised to capture under the definition additional asset purchases where such a purchase will have sufficient economic significance so as to give rise to an appreciable economic concentration in the marketplace.

In all events, the definition of qualifying "merger" transactions should provide clear and easily understandable standards that will enable merging parties to readily ascertain their obligations. With respect to share acquisitions, objective tests predicated upon specified shareholding percentages have the advantage of providing clear and unambiguous guidance to merging parties. True, absolute percentages may understate the extent to which the shareholder may influence the target's business as, for example, through special voting rights, shareholder agreements or veto rights which may give the acquiring person effective control of the target notwithstanding the fact that it may hold less than 50% of the target's shares. Nonetheless, given the importance of setting clear guidelines, market shares and the percentage of assets that are acquired should be used as safe harbors.

Finally, the definition should clearly capture incremental but cumulative changes in market structure that eventually meet the benchmarks set in the legislation.[40]

5. The Threshold for Application of the Regulation

Even in a small economy there is no need for a systematic review of all mergers. Many mergers have benign or even positive effects on welfare. Furthermore, regulation of all mergers would unduly burden the authorities and impose unreasonable costs and delays

[39] Cite to European merger regulation.

[40] For the importance of such a rule see the New Zealand case of bus.. in which the authority did not block such a merger, and its outcome. For an analysis of the case see Gal, The case of New Zealand, *supra*.

on the merging parties. Indeed, the experiences of several small economies indicates that if thresholds are set too low, then the regulatory agency might be over-burdened with merger applications.[41] Mergers should thus not be required to go through a regulatory process unless they create a presumption of significant anti-competitive effects, in which case they might require further market analysis.[42] Accordingly, the regulation should set thresholds or "safe harbours" that will automatically clear some mergers based on general assumptions of their potential effects.

In order to ensure that thresholds are set efficiently, I suggest that Guernsey employ a combination of the following four methods. First, the thresholds should be based on a combination of financial turnovers and market shares. Second, the threshold requirements should change in accordance with the type of the merger (horizontal, vertical or conglomerate), in order to reflect the different presumption of anti-competitive effects that different mergers creates. Third, thresholds for some special industries should be set at lower levels. Fourth, not all mergers need to be notified to the authority and their approval be subject to clearance. Rather, notification should be required only from mergers that fall within a "corridor", between a minimum and a maximum threshold. The first three methods are elaborated in this section, while the third is elaborated in Section III1 below.

Two main methods are used around the world in order to determine safe harbors for merger review, once a transaction has met the definition for "merger". The first is based on the turnover of the merging parties. If the joint turnover exceeds a certain threshold, the merger should advance to the next stage of merger analysis. This method is used in most large economies, including the EU and the US.[43] The second method is based on market shares and is the most widely used proxy for the possible existence of market power.[44] If the market shares of the merged entity or those of other firms operating in the market exceed a certain threshold, then the merger must be subject to further scrutiny.[45]

The market share method is largely discarded by the ICN.[46] This is because it may be difficult to apply, given that in order to calculate market shares one should first define the relevant product and geographic market. Indeed, defining the relevant market might

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[41] In Malta, for example, the evaluation criteria was narrowed after it was found that the previous criteria was much too wide and created a huge amount of paperwork. Similarly, Latvia adopted low market share thresholds for notification and its Authority is overloaded with merger filings. This has negative effects as many welfare-enhancing mergers cannot be consummated before clearance is granted, and there are limited funds left for in-depth second phase investigations. As a result, those mergers with efficiency justifications do not receive the attention they merit.

[42] See also world Bank/OECD, A Framework for the Design and Implementation of Competition Law and Policy, (Washington D.C.-Paris, 1999).

[43] Cite to ICN

[44] ICN Workbook.

[45] ICN, B11.

[46] See recommendation IIB of the ICN Best Practices Report.

be a difficult and resource-intensive task. Also, market shares often do not serve as a good indication of the effect of a merger on a certain market.[47] In such cases, the costs of merger review might easily outweigh the effect of the merger on the economy.

In contrast, the parties' turnover is an objectively and easily quantifiable criteria. Yet a safe harbor based solely on turnovers is also highly problematic, especially in small economies. This is because the relevant turnover that might indicate a significant control of a relevant market may change significantly from one market to another. For example, a relatively small turnover will capture mergers that might create anti-competitive effects in most industries. Yet such a threshold would require almost all mergers to be notified, given the high turnover rates of the parties. This might, in turn, flood the authority with merger applications of transactions that in reality have very limited effect on the market's competitiveness.

Accordingly, in a small jurisdiction such as Guernsey it makes sense to adopt the following type of threshold, which attempts to benefit from both criteria:

A merger should be *exempted* from the merger regulation if-

(a) it creates a concentration which is below a predefined market share; or

(b) the joint turnover of the merging parties or the threshold of one of the parties is below a certain threshold.

This mixture is beneficial since it captures significant changes in market structure through the market share criteria. At the same time, it does not capture those mergers that although they create a more concentrated structure have no significant pecuniary effect on Guernsey's economy. This is, in fact, a *de minimis* rule, which attempts to shun out those mergers with minimal effects on the Guernsey economy, such as the merger of the two radio distributors elaborated in section II1above.

An important issue involves the determination of the height of thresholds to be included in the legislation. With regard to turnover rates, I suggest that the threshold be set at a level which is based on the assumption that even if profits are increased by 20% or so, then the absolute effect of the merger will still be negligible and would not merit review.[48] It is worth noting that a profit increase of 20% is quite high, especially since in the pre-merger market situation markets are generally oligopolistic and thus prices are already affected by the interdependence among firms. It is also suggested that the monetary threshold include a part that limits the capture under the regulation of mergers with very small firms. This requirement will limit regulation of mergers of large firms, which meet the threshold alone, with very small ones, which generally do not raise significant anti-competitive concerns.

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[47] Gal, Competition Policy, supra, Chapter 6.

[48] There is no definitive connection between turnover and profit. However, there are some rough connections between the two that can be determined by economists.

It might also make sense to require different turnover thresholds for different types of mergers. Horizontal mergers[49] raise the strongest concerns for merger policy. Thresholds for such mergers should thus be set at a lower level than those for vertical mergers.[50] Conglomerate mergers[51] should be required to meet the most lenient threshold. Such a threshold should be set at a high level, because the competitive implications on Guernsey resulting from such mergers do not concentrate on a specific market, but rather on their sheer effect on the economy. It is also suggested that the turnover rates be calculated, to the extent possible, with regard to the specific relationship between the merging parties. This is best explained by the following example. Assume that firm A operates in six separate markets. It would like to merge with firm B, which operates in one of the six markets. In order to determine whether the merger will meet the threshold for horizontal mergers, the turnover of the two firms in the market in which they compete should be calculated. In order to determine whether the merger will meet the threshold for conglomerate mergers, the turnover of the two firms in all markets should be calculated. It is worth noting that the problem with the suggestions elaborated in this paragraph is that they require the merging parties to define the markets in which they operate, in order to determine the type of merger at hand. Yet the costs of defining the markets do not necessarily have to be accrued by all firms. In some situations the competitive relationship could be easily inferred. In addition, when such a definition is difficult to apply, and firms still do not meet the lowest turnover rate, then they will still be exempt from the regulation.

Let us now turn to the market share threshold. There is no simple answer as to how high (or low) concentration measures need to be to prompt (or dismiss) concerns about the impact of a merger on competition. Setting the market share threshold is a difficult task, since it should capture both unilateral and cooperative effects on competition. The threshold should not be set too low. Especially in a small economy, a low threshold implies that almost all mergers would be captured by the regulation, as firms generally must provide large market shares in order to operate at minimum efficient scales.[52] At the same time, the threshold should not be set too high, in order to capture mergers that might strengthen oligoplistic coordination.

Most jurisdictions employ a market share of 20-25% as a benchmark. Jersey, which

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[49] Horizontal mergers are mergers among actual or potential competitors.

[50] Vertical mergers are mergers among firms operating it the same chain of supply and demand of a certain product or service.

[51] Conglomerate mergers are mergers that are neither horizontal nor vertical. Yet, such merger can significantly affect Guernsey's overall economy. The reason is that large, diversified firms are often best placed to challenge incumbent firms in other markets, given their expertise, financial strength and economies of scope. Thus, when such firms decide to merge rather than enter a market on their own, such a merger might significantly affect potential competition. Moreover, if two conglomerate firms decide to merge, an extremely strong economic entity could be created. Beyond its effects on competitive conditions, such an entity might be able to translate economic power into political power.

[52] See definition of Minimum efficient scale in the attached glossary.

shares many economic traits with Guernsey, has also adopted such a threshold.[53] In my opinion, this threshold is much too low. It implies that a merger that allows five or four equal firms to operate in the market should be caught under the regulation because its likely anti-competitive effects will outweigh its pro-competitive ones. This is a problematic assumption to make in Guernsey. The market share should be set at a much higher level, which assumes that most mergers among competitors in small markets will be justified by the need to operate at efficient levels of production.

In addition, it is suggested that the threshold include two elements: (a) the share of the merging parties; and (b) the distribution of the remaining shares among the rivals. The latter element often signifies the existence and strength of other market players to whom customers can switch their demand in response to an increase in the merged entity's prices, which may act as a competitive constraint post merger. Such a threshold is employed by several small economies. In New Zealand, for example, the following threshold criteria have been adopted:

1. The three-firm concentration ratio in the relevant market is below 70% and the market share of the combined entity is less than 40%; or

2. The three-firm concentration ratio in the relevant market is above 70% and the market share of the combined entity is less than in the order of 20%.

The setting of the correct thresholds in Guernsey will depend on a detailed understanding of how the local economy operates and may require amendment from time to time. Yet, I would expect that the guideline threshold would be set at a higher level than in New Zealand, to fit the special circumstances of a micro-economy such as Guernsey. In particular, the second prong of the test is not based on realistic assumptions for Guernsey's micro markets. To illustrate, a merger of two firms with 11% each, where other three competitors have market shares of 26% each, would trigger new Zealand's merger review. Such a merger should be allowed to go through without regulation in Guernsey. Indeed, the threshold should be based on the assumption that mergers that allow firms to grow to relatively large sizes are generally justified and should not undergo any merger review. Accordingly, it is suggested that the basic threshold for application of the legislation should be set at 40% of the supply or purchase of a particular good or service, so long as at least three relatively large firms operate in the market. Accordingly, the threshold might require the three following conditions to be met in order to exempt the merger: (1) the merged entity's combined market share entity is below 40%; (2)there exist at least two competitors in the market, each with a market share of at least 20%. Yet if an economic study of Guernsey's markets indicated that in most markets there is no room for more than two competitors, then the threshold for the remaining competitors in the market might even have to be set at a higher level.

I also suggest that thresholds in some industries be set at lower level. This suggestion is

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[53] Competition (Mergers and Acquisitions) (Jersey) Order 2005.

based on the fact that competitive conditions are more important in some sectors than others. Such “strategic” sectors have a "domino effect" on the competitiveness and price levels of other industries, and thus it may be more important to ensure that they provide consumers with low prices and beneficial trade conditions. Accordingly, in order to ensure that mergers in such industries are captured by the merger regulation-- whilst not lowering the threshold for all other industries-- it is suggested that such industries be identified in the regulation and lower thresholds be set for them. Those include, *inter alia*, the market for transportation services in and out of Guernsey and storage facilities for good imported. This is because such industries create bottlenecks in the flow of traded goods in and out of Guernsey and thus determine, to a large extent, the degree to which Guernsey is economically integrated with its neighbours. The competitiveness of passenger transportation is also important, beyond its effects on the competitiveness of the financial industry as elaborated above, since the fact that passengers can actually buy most products offshore and self-import them into the island also creates pressures on competitive conditions on the Island. In order to provide flexibility, such thresholds should be set by an Order. Yet this will only be workable in practice if political economy issues are solved, so that the ability to set such thresholds would not be used in order to promote the interests of firms operating in such sectors. It is noteworthy that even if at the time that the Merger Regulation is adopted no competition exists in these markets, it may still be justified to set these lower thresholds, since market structures can change over time.

I also suggest that the market share thresholds vary in accordance with the type of the merger, to reflect the difference in the strength of the anti-competitive concerns, as elaborated above.[54] In particular, the market share suggested above should apply to horizontal and vertical mergers. Conglomerate mergers should be notified only if they have a market share of more than 60% in more than five markets, to signify their relative control over many markets. Of course, low turnovers can still exempt the mergers from the Regulation, as elaborated above.

The thresholds should be reevaluated several years after they have been tested in practice, to ensure that they are fine-tuned to the special needs of Guernsey.

Another possible option to ensure that the regulatory net is not cast too broadly is to create a list of markets to which the Merger Regulation will apply. Mergers in all other areas of the economy will not be regulated. Alternatively, the list should include all markets that will be exempted from the Regulation.

Such an exemption list (in either of its two forms) raises two significant issues, that should be taken into account should this method be adopted. First, the creation of the list might be resource-consuming. Such a list should be based on a thorough economic

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[54] Jersey's merger regulation reflects this difference, at least to some degree. Horizontal and vertical mergers that create a market share of 25% or more in one or more in the chains of production and supply should be notified, whereas conglomerate mergers should be notified only if they create a market share of over 40%.Competition (Mergers and Acquisitions) (Jersey) Order 2005.

analysis of market conditions. Moreover, as market conditions change over time, the maintenance of the list might require frequently updated studies of market conditions of all relevant sectors. The second issue involves political economy considerations. Once firms have a potential option of being exempt from the regulation, it is expected that some firms --especially those with economic power which might translate into political power-- will attempt to influence the regulator to grant them an exemption (political capture). This might be a real problem in a small economy such as Guernsey where political and business elites are often intertwined. A partial solution to the second problem involves requiring the regulator to clearly state the economic grounds for the exemption and the date it will be reviewed again, or subjecting his decision to an impartial judicial body.

Should an exemption list be adopted, I suggest that it be based on a pure economic criterion: the possible effects of further concentration in the specific industry on Guernsey's markets. Most importantly, it should be based on the height of entry barriers into the market (such as scale and scope economies, regulatory obstacles to entry, transportation costs, etc.). If entry barriers are low (or will be significantly reduced in the near future), then mergers might not cause serious problems as market constraints will still be significant enough to pressure firms to lower their prices and increase quality (potential competition). The exemption list might also include those markets that have a very limited effect on the economic welfare of Guernsey, because their scope of business is so small. Yet such a list is not really needed as such mergers will be exempt from the regulation anyway, since they will not meet the turnover threshold. I would not suggest basing the list on current concentration levels. This is because such levels might change quite quickly, even before the regulator would have time to update the list in order to capture the merger. In addition, the safe harbours suggested above already exempt mergers in industries that have low concentration levels. In any case, the list should be comprised by economists with specific and comprehensive knowledge of Guernsey's economy.

6. The Evaluation Criteria

Thresholds provide *initial* indicators of the possible anti-competitive effects of mergers. The last gate a merger must clear if it passed through the two previous ones is a more in-depth and case-specific evaluation of the merger against the legal benchmark. Accordingly, the evaluation criteria is the "heart" of the regulation- it defines the criteria which will be used in order to finally separate those mergers that will be prohibited from those that should be allowed to go through.

The setting of the evaluation criteria involves three interconnected issues: the illegality test, the balancing test and the burdens of proof imposed by each test.

The illegality test

The illegality test sets the standard against which the anti-competitive effects of the merger will be evaluated. If the proposed merger does not meet this test, then the merger will not be prohibited. In my view, the "Substantial lessening of competition"

(SLC) test, which is used by most jurisdictions around the world is also fit for Guernsey. Most importantly, it is sufficiently wide to capture both unilateral and cooperative anti-competitive effects which might be created by mergers: It applies to mergers that create a significant competitor with unilateral market power; It is also wide enough to capture those mergers that change market structure in a way which makes coordinated conduct much easier than in the pre-merger situation. In addition, the fact that most jurisdictions apply this criterion implies that Guernsey can enjoy learning and network externalities.

The central concept of any illegality test is a comparison of the prospects for competition with and without the merger, to better answer whether the merger itself makes a substantive difference. The key to the analytical process is addressing what would have happened to competition without the merger. The competitive situation without the merger is sometimes known as the counterfactual.[55] In this respect, it is worth noting that in many cases the counterfactual might indicate a low degree of competition in the market, even if the merger was prohibited, due to interdependence among market players. This limited competition should serve as the benchmark, unless a foreseeable change in market conditions would change the degree of competitiveness in it. It is noteworthy that this logic applies also to mergers that simply replace existing firms with new owners. Such mergers generally do not affect competitive conditions in the market (unless it can be proven that the new firm would have entered anyway, by creating its own subsidiary), and thus would not "significantly reduce competition in the market."

Another suggestion regards the factors to be analyzed. When applying the illegality test, structural indicators are often used by the regulatory authority to indicate post-merger market power. Yet it is crucial that the dynamic factors of the relevant market also be analyzed to determine the real effects of the merger. Given that many markets in small economies cross illegality thresholds based on market structure considerations alone, analysis of non-structural factors that affect the ability of firms to exercise market power in concentrated markets is crucial to a correct analysis of the real effects of a proposed merger. In particular, the height of entry barriers into the market should be carefully analyzed. These two general points should be clearly set in the merger guidelines.

The balancing test

As noted, Guernsey cannot simply evaluate the anti-competitive effects of a proposed merger. Rather, it is essential that the regulatory body be empowered to balance the anti-competitive effects of the merger with any pro-competitive or wider public policy effects that may result from it. Such a policy recognizes that a merger should be permitted if the improvements in efficiency or on other public policy grounds resulting from a merger are greater than and offset its anti-competitive effects.

The goals of merger regulation, discussed in Section II3 above, have important bearings

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[55] Cite to ICN.

on the balancing test. This is because if a wide consumer welfare test were to be adopted, then the merger would be approved only if the benefits to consumers from the merger outweighed its costs to consumers. If a total welfare test were to be adopted, then mergers that increase total welfare would also be approved.

A balancing provision is included in many Merger Regulations. There are several types of legal tools which allow for balancing. Those range with regard to the standard to be applied, the party which carries the burden of proof, and the institution which is empowered to perform the balance. Many jurisdictions, including the US, adopt a narrow efficiency defense. Under this regime, mergers that significantly limit competition will be allowed to go through only if the efficiencies proven by the merging parties are such that they reduce the merging firms' costs so significantly that their profit-maximizing post-merger price would not be higher than the pre-merger price.

Other jurisdictions adopt an even more limited balancing test. For example, Jersey's merger guidelines provide that "the focus is on whether the efficiencies will enhance rivalry between the remaining businesses in the market."[56] This focus is ill-suited for a small economy. It is too narrow- it will only let through those mergers in which the merger will allow less efficient firms to increase their efficiency and as a result will increase competition. While such mergers should, indeed, be approved, so should other mergers, which increase efficiency substantially although they also substantially reduce competition. Indeed, most mergers in a small economy that allow the parties to realize scale economies would not necessarily increase rivalry.

This can be best illustrated by an example. Assume that two firms operate in the market. Due to inefficient scales, the production costs of each firm are 10 pounds per widget. Now assume that a merger between the two firms will allow them to adopt a new technology that will reduce their costs to 8 pounds per widget. This merger substantially reduces competition as it reduces the number of firms from two to one. It also does not enhance rivalry in the market. Yet it does not necessarily harm consumers as the lower production cost may reduce the optimal price. It also does not necessarily reduce social welfare since producers and consumers are both well off. Thus, a focus on rivalry is not suggested.

In my view, the substantial lessening of competition test should be supplemented by an exception that applies when consumer welfare is not harmed due to the increased efficiency created by the merger. Benefits may include scale and scope economies, better use of existing capacity, cost reductions due to reduced labor costs, greater specialization in production, lower working capital and reduced transaction costs. The regulatory authority should be allowed to balance the pro- and anti-competitive effects of the merger, including its efficiencies, as based on the information provided to it by the parties and on its own market analysis.

[56] Competition (Jersey) Law 2005 Guidelines- Mergers and Acquisitions, p. 12. Can be downloaded from www.jcra.je/pdf/050810%20Competition%20guideline.%20Mergers%20and%20Acquisitions.pdf

In addition to pro-competitive and efficiency considerations, a wider public policy exemption should also be available in those rare cases in which there might be other justifications, that go beyond the economic performance of a market, which might still justify the external change in market structure. A similar arrangement was adopted by Jersey.[57] Like in Jersey, an exemption should be granted only in rare cases, where there are "exceptional and compelling reasons of public policy that make it desirable to do so."

In applying such a standard, a wide macro-economic analysis may be applied. This can be exemplified by the experience of New Zealand. For example, in the case of *Air New Zealand*[58] both the Commission as well as the High Court took into account public benefits relating to all aspects of the merger proposal such as increase of tourism in New Zealand and online benefits for consumers.[59] Those benefits that could not be easily quantified were taken into account intuitively.

With regard to institutional structure, the merger authority might not the right institutional vehicle to adopt decisions based on wide public policy considerations. This is because it does not have the expertise, nor the democratic mandate, to balance competing public policy considerations. Thus, such decisions should be taken by a ministerial body which is accountable to its constituents for its decision. To reduce the problem of capture by the decision-maker by interest groups, measures must be taken in order to limit such effects. The measures taken in Jersey in order to limit such effects are good ones and thus I recommend following them.[60] Those include the following:

- The decision-maker should be a committee rather than one person, in order to limit capture by interest groups.
- The Committee must hear the opinion of the Merger Authority on the case before it makes its decision.
- The Committee must publish its reasons for granting or refusing to grant the exemption, as the case may be. In particular, it should explain in detail why another policy was given primacy despite the merger's anti-competitive effects.

In addition,

- The Authority must publish the advice it gives to the Committee prior to the decision of the Committee, in order to allow for a public debate on the issues.

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[57] Article 25 of the Competition (Jersey) Law 2005.

[58] *Air New Zealand and Anor v Commerce Commission and* others HC AK CIV 2003 404 6590 (17 September 2004).

[59] See also *Goodman Fielder Ltd/Wattie Industries Ltd (1987) 1 NZBLC (Com) 104,108, at p 104,147; Qantas Airways Ltd/Air NZ Ltd* CC Decision No 511 (23/10/03) at para. 897.

[60] Competition (Mergers and Acquisitions) (Jersey) Order 2005.

- The procedure should be relatively short, to ensure that beneficial mergers can take place quickly.

Burdens and Standards of proof
It is essential that not only a balancing method be correctly set, but also that the burdens and standards of proof would be practical. The stricter the requirements, the less weight is given in practice to efficiencies and the more theoretical the ability to allow a merger based on efficiencies to go through. Several factors are positively correlated with the difficulty of proving an efficiency defense. The first is the stringency of the burden of proof to prove the alleged efficiencies that may result from the merger. The second involves the evidentiary weight attached to purely structural factors. In a small market characterized by scale economies, concentration levels are likely to be very high. If strong evidentiary weight is given to presumptions of illegality based on concentrated market structures, an efficiency defense may well become a theoretical possibility only. The third involves the balancing standard adopted, such as consumer or total welfare. The fourth factor involves other conditions for cognizable efficiencies, such as sufficiency and necessity. The higher the efficiencies must be to justify a merger, the harder it is to meet this standard.

It is thus suggested that Guernsey adopt rules and guidelines which will reduce such high burdens, in order to ensure that efficiency considerations are not only a theoretical possibility. For one, the problem of verifying efficiencies can be partly overcome by ranking efficiency claims on the basis of their credibility. Proposed efficiencies would be weighed by the probability that they will occur (expected value). For example, efficiency claims resulting from increased capacity utilization are particularly credible in declining markets. Another solution may lie in the adoption of a sliding-scale approach in which as the danger of an increase in the exercise of market power rises, the burden of proof of efficiencies rises accordingly.

In addition, the conditions required to prove efficiencies should not be set too stringently. In Jersey, for example, the court stated that efficiencies must be achieved in a short period of time, result as a direct consequence of the merger, increase rivalry among remaining firms, and benefits must be passed on to the consumers.[61] These requirements, except the second one, are too stringent. If efficiencies are significant and the possibility of them accruing in practice is high, then it might be justified to recognize such efficiencies even if it takes the merged entity some time to realize them. More importantly, it makes no economic sense to reject efficiencies just because they do not "increase rivalry among remaining firms." Indeed, in many situations the opposite might result from increased efficiencies: if the merged firm is highly efficient it would be more difficult to compete with it. Thus, requiring such a condition in order to recognize efficiencies would put an unjustifiable emphasis on competition rather than on its results. The requirement that the benefits be passed to consumers is an exposition of the consumer welfare standard for merger analysis. It is justified so long as it is not

[61] Jersey Ferry decision, para. 145.

applied too strictly, to suggest that all or most benefits should be passed on. As noted above, the merger should be allowed to pass through so long as consumers are not worse off as a result of the merger.

Instead, I suggest that Guernsey follow in the footsteps of New Zealand which has a relaxed attitude towards the proof of efficiencies. New Zealand has adopted a low burden of proof standard that requires the merging parties to establish "a tendency or real probability" that claimed public benefits will materialize. The comparison between public benefits and detriments is, inevitably, largely a qualitative judgment although quantification is encouraged.[62] Cognizable efficiencies must not be simple wealth transfers and the gain must be shown to be dependent on the proposed acquisition.[63]

7. Extra-territorial Reach of the Law

Extra-territorial mergers may affect Guernsey significantly. It might be the case that two or more international or foreign firms which compete in Guernsey's market or are potential competitors in it, decide to merge. For example, assume that the only two tyre manufacturers whose tyres are sold in Guernsey wish to merge. Both are foreign companies which sell their products through local distributors. This raises the issue of whether such mergers ought to be regulated under Guernsey's Merger Regulation, and if so, under which legal doctrines.

On a normative level, it's relatively easy to devise legal tools in order to capture such mergers under the Merger Regulation. Possibly the "effects doctrine" may apply in Guernsey through customary public international law doctrines.[64] But even if it does not, the Merger Regulation can clearly state that it has an extra-territorial each.

Yet such regulation raises serious practical problems. First, international firms may not have any assets in Guernsey. Their products might be traded on the island through local distributors. It might thus be difficult to impose a remedy in such a setting. Second, and more importantly, often sales in Guernsey comprise only a small fraction of the international firms' total revenues. Accordingly, Guernsey's merger authority would most likely not be able to prevent a merger from occurring. This is a problem in all small economies. Were the small jurisdiction to place significant regulatory burdens on the merger, the foreign firm would, most likely, choose to exit the small economy and not trade in it. The foreign firm will exit the small economy if its loss of revenues from terminating its trade is smaller than the increase of revenues it anticipates to achieve as a result of the proposed merger elsewhere. Also, the negative welfare effects of the exit of the foreign firm from the small economy may well be greater than the welfare effects from the continued operation of the merged entity within its borders. Accordingly, a

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[62] New Zealand Business Acquisition Guidelines.

[63] See, e.g., *Health Waikato Ltd./Midland Health* (Decision 275)(New Zealand Commerce Commission, unpublished, 1 August 1995).

[64] See, for example, Joseph P. Griffin, “Extraterritoriality in the U.S. and EU Antitrust Enforcement,” 67 *Antitrust L. J.* 159 (1999)

small economy can usually have no incentive to prevent it from trading within its borders if it merged. It thus cannot create a "credible threat" to block the merger. The foreign firm, acknowledging this effect, will not take into account, in its merger decision, the effect of its decision on the small economy.[65] Given those reasons, as well as the high costs involved in Merger Regulation, it may not be sensible to regulate such mergers, or at least not all such mergers.

At the same time, however, there are good reasons to empower the authority to regulate at least some such mergers, where such regulation is practical. Most importantly, in some cases --although not in all-- the Authority might be able to impose a remedy that will limit some of the anti-competitive effects of the merger on the Island. Such remedies are based on the assumption that mergers between foreign firms will generally take place regardless of the effects of the merger on the Guernsey market and instead attempt to regulate the merged entities with regard to the actions of these foreign firms in domestic markets. For example, by imposition of structural and behavioral conditions on the merging parties that apply only to their operation within the small economy.[66]

Moreover, if mergers involving foreign firms are not caught under the Merger Regulation while mergers among domestic firms are caught, domestic firms may prefer to merge with foreign firms so as not to get caught under the merger regulation, although merging with domestic firms might be more efficient and welfare-enhancing. This type of effect occurred in Israel when the merger regime defined a merger to be one among Israeli firms.

At the same time, given the limited effect that the Guernsey Authority can have on the merger decisions of firms generally operating outside its borders, it is essential that the procedure be structured so that the Authority will not incur high costs of merger review. Otherwise, the Authority might find itself spending a large part of its resources on reviewing mergers with no effective remedies at hand. Accordingly, the preferred set of legal rules should be as follows:

- In principle, Guernsey's Merger Regulation should be broad enough to include extra-territorial mergers that affect its markets.

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[65] Gal, Competition Policy, Chapter 6.

[66] To give an example, when Unilever acquired control over Ben & Jerry’s and the merger raised concerns regarding competition in the Israeli ice cream market, the Israeli Competition Authority conditioned its approval on the distribution of Ben & Jerry’s ice cream in Israel through an independent distributor who will be free to determine prices charged for the products. The Authority also required that the quality or quantity of the products be at least as high as those in the pre-merger situation, and that any new product would be made available to the distributor. These are limited remedies since they cannot totally erase the fact that both firms are controlled by the same entity that determines their strategic decisions. At the same time, the small economy can often rely on the fact that the international firm will not change its strategic decisions (such as Ben & Jerry’s introduction of a new product into world markets) only to reduce competition in the small economy. In fact, it "free rides" on competition in larger economies.

- Guernsey's Authority should be empowered to impose structural or conduct remedies upon the merger, and accept undertakings and commitments from the merging parties, if it has adverse effects on its markets.

- As elaborated in the next section, in most cases foreign firms operating in Guernsey should not be required to notify their merger decision to Guernsey's Authority and be subject to clearance. Rather, the burden of spotting those rare international mergers that significantly affect Guernsey's economy to which practical remedies exist would be placed upon the Merger Authority.

- Alternatively, it might be worth considering the following hybrid notification tool. The Merger Regulation would empower the Authority to list those international firms that should notify the Authority and be subject to clearance if they merge. This method will enable the Authority to identify ex ante those cases in which it can apply a practical remedy to limit possible significant anti-competitive effects and to limit the uncertainty for foreign firms.

Part III. Procedural and Institutional Issues in Merger Regulation

Institutions and the procedures they follow might largely determine the effectiveness and efficiency of a merger control regime. Accordingly, this part makes some suggestions with regard to institutional and procedural arrangements.

1. Notification of Mergers

In most jurisdictions mergers that pass through the first two gates (merger definition and the threshold for the application) often require notification to the regulatory Authority.[67] Such a notification serves many purposes. It provides the regulatory Authority with the information that a merger with possible anti-competitive effects has taken place. In addition, the need to notify the merger creates a "red light" for the merging parties, reminding them that the merger might be prohibited if it does not meet the evaluative criteria.

Oftentimes the notification requirement is coupled with a prohibition to merge before the merger is cleared by the Regulatory Authority, and a concomitant commitment of the Authority to reach its decision within a limited time frame.

Such a system generally works well for most economies, and thus has been adopted, with minor variations, by most jurisdictions with merger regulation. However, some qualifications must be necessary if it should be cost-effective in the case of Guernsey.

A wide notification requirement might create a high administrative burden on the Authority. The danger is that, as reported by some authorities,[68] dealing with

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[67] Cite to ICN
[68] See transcripts of conference on small economies.

notifications and clearing mergers will take such a large part of the Authority's resources, that there will be little left for the enforcement of the other parts of the law, including abuse of dominance and cartelistic conduct. It would also impose costs on the parties. As noted above, high regulatory costs may even prevent some efficiency-enhancing mergers.

The first question to be asked is thus whether the merging firms must go through a clearance process, at all. Alternatives include no notification or voluntary notification, in which any firm that wishes to verify that its merger meets the evaluation criteria can request clearance from the Authority. All other mergers are subject to penalties if the Authority determines that the merger did not meet the evaluation criteria. Such a suggestion should be rejected. In addition to the reasons provided above for a system of notifications, several reasons stem from the unique characteristics of Guernsey. The danger is that in a jurisdiction characterized by an established and powerful local business community, and where competition law principles are new, the law could be ignored. Having a mandatory notification system creates clear legal obligations. Moreover, if mergers are not notified to the Authority and thus it might learn about them after they took place, the Authority might have limited practical ability to change the situation ex post, as a break-up might seem very harsh. However, if the parties merge without giving notification and waiting for clearance, then the break-up would seem better justified. In addition, the burden on the Authority might be higher if it would need to find out, by spending its own resources, which mergers are taking place. Finally, as the experience of some jurisdictions signifies, a voluntary notification system does not necessarily reduce costs. Rather, as it may be very difficult and costly to unravel a merger once it has occurred, many merging parties may choose to notify the merger anyway.

Thus, a mandatory notification system is suggested. Yet, in order to reduce costs notification burdens should be minimized. In particular, I suggest that Guernsey employ the following three methods.

First, not all mergers that pass through the first two gates should be subject to mandatory notification. Rather, notification should be required only from a sub-set of mergers, to further separate those mergers that are unlikely to result in appreciable competitive effects within its territory or those in which the Authority would have limited practical ability to affect the decisions of the merging parties. In particular, mergers between multinational or international firms, that have subsidiaries within Guernsey, as well as mergers among firms with very high world-wide turnovers, should not be required to be notified. This is not because such mergers may not have any effects on Guernsey's markets, although in many cases this will be true as well. Rather, the reason is more practical: as noted in the previous section such mergers would rarely, if ever, be dropped if they were not cleared by Guernsey's merger Authority. In addition, such mergers will generally be regulated by the merger authorities of large jurisdictions which might create positive externalities for Guernsey.

Like in the previous section the fact that such mergers do not require mandatory

notification does not necessarily imply that they could not be potentially caught under the Merger Regulation. Rather, it only implies that such mergers do not have to be notified in advance and get clearance before they can be consummated. This system creates a double benefit: on the one hand it reduces the burden on the Authority and on the merging parties in cases in which there is very limited chance that the merger will be prohibited, for normative or practical reasons. On the other hand, it still leaves the door open for the Authority to impose a remedy in those rare cases in which the merger significantly lessens competition in Guernsey and there is a practical solution to remedy some or all such effects. To create certainty, the Authority should be empowered to impose conduct requirements only within six months of the date the merger was publicly announced.

The practical effect of this recommendation is the creation of a "corridor" for notification: mergers should only be notified if they are above a minimum threshold (elaborated above) and below a maximum threshold. The maximum threshold should be based only on world-wide turnovers. Such turnovers should be sufficiently high to indicate that the firm's main business activities are taking place elsewhere. Alternatively, the threshold can be set to compare the turnover in Guernsey to the firm's turnover elsewhere. If the firm's turnover in Guernsey is only a small fraction of its worldwide turnover, then it should not be notified. Such a limitation would significantly reduce the over-burdening of the Regulatory Authority.

In addition, the suggestion made above with regard to a hybrid notification system can also be coupled with the limited notification requirement. As elaborated, the Authority would be empowered to list those firms that should notify the Authority and be subject to clearance if they merge, despite the fact that they are above the maximum notification threshold.

The second tool that I suggest to employ is the imposition of minimal initial notification requirements on those mergers that should be notified, at least for the first phase of the Authority's review. As noted in the ICN best practices, initial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation.[69] There are various suggested ways to enable the Authority to accomplish its mission without imposing unnecessary burdens on merging parties.[70] Two methods are suggested for Guernsey: (1) adopting different *notification formats* varying with the likely complexity of competitive analysis of the transaction. Such formats may include short and long form notification options, enabling the merging parties to elect to submit abbreviated information in transactions that do not present material competitive concerns; (2) *Discretionary supplementation:* abbreviated initial notification requirements coupled with procedures providing the Authority's staff with discretion to seek additional information during the review period.

[69] ICN, V.A.
[70] ICN, comment 1.

The third tool in connected to the second one and involves dividing up the regulatory process into two stages for the consideration of proposed mergers. Mergers that prima facie do not raise significant anti-competitive concerns would be cleared by the Authority within a pre-specified and limited time period. Only mergers that seem to raise serious competitiveness concerns would be subject to a full investigation (or "second stage investigation" as it is sometimes called). As noted, only such mergers would be required to provide further information beyond that required in the minimal notification requirements.

2. Pre-Merger Consultation

Pre-merger consultation procedures, which enable market participants contemplating a merger to consult with the Authority before going forward with formal proceedings of notification, may also be a useful device. Such proceedings may be used as an informal device the aim of which is to verify, on a very preliminary level, whether the merger is likely to pose competition policy issues. Guidance is likely to be particularly valuable for transactions that present complex jurisdictional or competition issues. Although the Authority may reserve its right to change its mind and challenge a merger that did not seem likely to create anti-competitive concerns or to drop an investigation that seemed to be justified by the legal standards, it will, most likely, not reopen the issue for further evaluation except in exceptional circumstances.

Such pre-merger consultation procedures are especially important in Guernsey, given that the issues involved in balancing between efficiencies and anti-competitive conduct are often difficult to evaluate by market participants. Once the analysis goes beyond structural elements to evaluate the specific implications of each merger, preliminary proceedings can give the parties a general sense of which considerations are likely to be taken into account in evaluating their merger. Such a procedure enables parties to abandon a proposed merger without spending too many resources on its evaluation, but at the same time go forward with merger proposals that although raise anti-competitive concerns may well benefit consumers. Such procedures also comport with the ICN best practices.[71]

3. The Structure and Powers of the Regulatory Authority

The institutional features of the competition Authority reflect on its ability to carry out its task effectively. Therefore, I would like to make several suggestions with regard to the structure and powers of the Authority, beyond those already made above.

The structure of the Authority should be determined with regard to two main concerns. The first is that merger review requires the ability to analyze in depth the effects of changes in market conditions. The Authority should thus be appropriately staffed and

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[71] ICN, Recommendation C.

have sufficient expertise to perform its enforcement responsibilities effectively.[72] This suggests that the Authority should be comprised of or at least able to call on the services of at least one industrial organization economist and of at least one lawyer, in order to deal with legal issues that may arise from merger review. Since it is assumed that merger regulation in Guernsey would be quite limited and thus would not take up all the time of these professionals, it would be wise to couple those tasks with related ones. In particular, the staff of the Authority would be best placed to implement other parts of the competition law.

The second concern is that mergers may involve powerful firms, especially in a small economy such as Guernsey. Such firms might attempt to translate their economic power into political power and influence the decision–maker to make a decision in their favor, thereby harming the general public. Lack of objectivity -- or even a perceived lack of objectivity -- tends to frustrate legal certainty and predictability and, moreover, may undermine public confidence in the Authority and the merger review process. It is thus important to ensure that the Authority have sufficient independence to discharge its enforcement responsibilities based solely on an objective application of relevant legislation and judicial precedents. This can be achieved by a combination of factors, such as the following:[73]

(a) The ultimate decision-maker should not be one person, but rather a committee. This will reduce the incidence of regulatory capture.

(b) The Authority's decision must be transparent and detailed. In Jersey the Authority's refusal must be given in writing and must specify the reasons for the refusal.[74] This, however, is not wide enough, as regulatory capture can also lead the Authority to clear a merger when it should not be cleared. The Authority should thus also provide a reasoned decision when it decides to clear a merger.

(c) The final decision of the Authority should be subject to timely review on the merits by a separate adjudicative body. It would be best if the court was a specialized one, with some knowledge in economics. However, given the costs of such merger review, it should be stipulated in the legislation that the decision would be overturned only if the Authority significantly erred in its decision.

(d) The members of the Authority should be chosen by a ministerial committee, in accordance to pre-specified requirements, some of which should require professional expertise in the relevant fields.

(e) To limit external pressures, the powers and budget of the Authority should be clearly specified ex ante and be known to the public.

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[72] ICN
[73] For additional recommendations see ICN or OCED.
[74] Article 22.

With regard to the Authority's powers, it should have the authority and tools necessary for effective enforcement of the law. In particular, it should be granted the ability to obtain information relevant to its review of proposed transactions. It should be provided with appropriate investigative tools and mechanisms by which it can compel merging and third parties to produce relevant information. This can be done by providing the Authority with the ability to seek effective sanctions for non-compliance with formal requests for documents, testimony and other information.[75] The Authority must also possess the ability to initiate enforcement actions against proposed mergers and to seek sanctions for non-compliance with applicable legal requirements and Authority decisions and orders.[76]

In addition, the Authority should have the authority to permit proposed transactions to proceed subject to conditions that address perceived competitive concerns. Where conditional clearance is authorized, the Authority should also have effective means to ensure compliance with specified conditions and to seek sanctions for non-compliance. This compliance might extend to commitments and undertakings made by the merging parties themselves.

Given possible effects on its neighbouring jurisdictions, the Authority should have the ability to share information and design joint remedies with other Channel Islands, where appropriate.

The Authority should also follow the ICN best practices on procedural fairness[77]. For example, the merging parties should be advised no later than the beginning of a second stage of inquiry why the Authority did not clear the transaction within the initial review period. Also, prior to a final adverse enforcement decision on the merits, merging parties should be provided with sufficient and timely information on the facts and the competitive concerns that form the basis for the proposed adverse decision and should have a meaningful opportunity to respond to such concerns.

In order to reduce costs, the Authority should be allowed to refer and to use decisions and materials of other Authorities in relevant cases. In many cases a market may have already been investigated and defined in previous cases or by another Authority. Additionally, the same merger may be examined by other jurisdictions. Sometimes definitions or approaches of other Authorities can be informative when considering the appropriate product or area although care should be taken as the conclusions on these cases may not always be applicable to the merger in question.

Since it was determined that no fees will be required for merger regulation, I will not delve into this dilemma. Indeed, in my view there is a strong case for not requiring filing fees, at least not for mergers that pass only the initial phase of inquiry. Since most transactions in Guernsey are small in absolute terms, high filing fees will prevent them

[75] ICN, Comment 1.
[76] ICN, Comment 2.
[77] ICN

from happening. There is a stronger justification for imposing fees where a merger requires a full investigation.

4. Merger remedies

Remedies for non-compliance should be cost effective and operational, as otherwise they may frustrate the merger review process by adversely affecting the incentives of the merging parties to engage in anti-competitive mergers. Accordingly, this part suggests some guidelines for setting effective remedies for merger review.

There are two types of remedies in merger cases. The first are remedies which apply when a merger has been executed despite the fact that it was prohibited. The main goal of such remedies is to create disincentives for such mergers to take place. Remedies should be set at a level that is sufficiently high so it would not be cost-effective for a prohibited merger to take place. A common remedy is structural: break-up of an anti-competitive merger. Another type of remedy is the imposition of a high fine. The fine can also include a cumulative part which imposes a daily fine for each day that the merger is not nullified despite a decision of the Authority to the contrary.[78] For the fine to be prohibitive, it should have some relationship to the turnover of the merged entity within the jurisdiction.[79]

The second type of remedy relates to the conditions that can be imposed by the Authority on the merging parties.[80] The object of such remedies is to restore or maintain competition, thereby preventing some or all of the competitive harm that the merger would otherwise cause. There are instances in which only an outright prohibition can address the competitive concerns. However, in many instances other solutions can be found, and conditions imposed, to remedy most if not all of the anti-competitive harms. Such remedies can take two basic forms: (a) a structural remedy, which involves a change in the market structure (such as a commitment to divest assets), and (b) a behavioral remedy, which involves constraints on the conduct of the merged entity

The power to impose such remedies may serve as an important tool for Guernsey. This is because such remedies enable the merger to go through while ensuring that it does not create harmful externalities, or at least that such externalities have been minimized. Thus, a merger that allows its parties to increase productive and dynamic efficiencies might be approved even if it significantly increases the market power of the firm, so long as the concession of the parties ensure that the wide consumer welfare standard is met.

[78] See, for example, section 38 of the Competition (Jersey) Law 2005.

[79] For example, section 39(2) of the Competition (Jersey) Law 2005 allows the competition authority to impose a financial penalty up to 10% of the yearly turnover of the merging parties.

[80] For example, Article 22(1) of the Competition (Jersey) Law 2005 states that "On an application…the Authority may either approve the merger or acquisition, with or without attaching conditions or may refuse to approve it."

Structural remedies are easier to administer than behavioral remedies because they do not require medium or long-term monitoring to ensure compliance.[81] One example of such a remedy is the Jersey case of the *Ferryspeed/CHannelExpress* merger.[82] The JCRA found that the merger would significantly limit competition in the market for seaborne temperature-controlled freight services between Jersey and the UK. The main reason was the further concentration of suitable warehouse space in Jersey's harbor that would result from the merger, which creates a significant barrier for competition in the relevant market. The JCRA thus refused to approve the merger, as proposed. In response, the parties restructured their agreement, whereby the warehouse located in Jersey that belonged to one of the merging parties was sold to a third party freight operator. The JCRA concluded that the restructuring of the proposed acquisition substantially addressed the competitive concerns raised by the merger, as it provided the new entrant with a key asset necessary to compete in the market. It thus approved the merger in its new form.

However, merger remedies in a micro economy such as Guernsey may often be behavioral rather than structural. This is because a more concentrated market structure might be justified by productive efficiency requirements. Behavioral remedies do not prevent more efficient market structures from being erected, but limit their harmful consequences. The Jersey merger of *SPAR/several stores of Newsagents* serves as an example.[83] The proposed merger involved the acquisition of 13 stores owned by one distribution chain by another distribution chain. The JCRA concluded that the merger, as proposed, will have significant anti-competitive effects on competition in the market of retail services. These result from concentration of retail outlets in one part of the island and from a potentially wide non-compete clause. The JCRA thus conditioned its approval of the merger on the following conditions. First, the merged firm would commit to its current island-wide pricing policy for three years. This condition ensured that the merged entity would not take advantage of its market power in some parts on the island where limited competition exists. Second, the parties limited their non-compete clause to the duration of one year. This commitment ensured that potential competition was not restrained by the merger agreement.

Accordingly, the proposed law should empower the Authority to accept commitments that would ensure that the wide consumer welfare approach is achieved.

In addition, the Authority should have the means to investigate compliance, such as the ability to inspect and copy records or conduct reviews and/or to require periodic or one-time reporting obligations by the parties on the implementation of one or more

[81] ICN

[82] JCRA, Decision M005/05 Ferryspeed (C.I.) Ltd./CHannelExpress (C.I.) Ltd. (2005) http://www.jcra.je/pdf/060711%20final%20public%20version%20decision%20ferryspeed.pdf

[83] JCRA Decision M114/07 proposed acquisition by SPAR (C.I.) Ltd. Of several stores from C.I. Newsagents Ltd. Similar decisions were taken in other economies. See, for example, the Canadian case of DuPont in which the price of the merged entity was tied to a competitive benchmark.

components of the remedy.[84] In the event of a party's failure to comply with a remedy after a merger taken place, the terms of the remedy should be enforceable by the Authority directly.

To ensure that such wide remedial powers are not abused, or that the Authority might not become a hands-on regulator of the market, several tools can be employed. In particular, a remedy should be considered only if the Authority has a sound basis to believe that the proposed transaction, if implemented, would contravene the standard set in the merger regulation. Also, the remedy should adequately address the potential competitive harm identified, but should not have the objective of improving pre-merger competition.[85] In addition, concessions should be allowed only when they do not require the Authority to engage in a costly on-going regulatory role in the market and only in those rare cases in which the efficiencies created by the merger are sufficiently high to justify mitigating some or all of its anti-competitive effects to ensure that the wide consumer welfare standard is met.

Conclusion

In summary, the report suggests that there are strong justifications for adopting a merger regulation in Guernsey, so long as the regulation is designed as to take into account the special characteristics of the Island. It then suggested regulatory methods that can serve to create an effective and cost-efficient merger regulation.

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[84] ICN, Comment 3.

[85] ICN Best Practices, Merger Remedies, Comment 1.

Merger Regulation Report, February 2008

Glossary
Below are definitions of some terms that might be useful.

Comparative advantage
An advantage that an economic entity enjoys relative to its competitors. Such an advantage can be based on many factors, including lower costs of production, a better product, or better service.

Economic efficiency
Three main indicators of economic efficiency are generally recognized: allocative, productive, and dynamic efficiency.[86]
Allocative efficiency refers to the economy-wide allocation of resources. Ideally, the allocation of resources should reflect real, relative resource costs of producing the goods or services in each sector of the economy and the relative utility or satisfaction to each consuming unit of the various goods and services that are available.
Productive efficiency addresses the question of whether any given level of output is being produced at lowest cost. For example, assume that the minimum efficient scale (see below) is 10,000 units, and demand in the market is 20,000 units, then productive efficiency dictates that only two firms operate in the market, each producing half of the demand.
Dynamic efficiency focuses on the question of whether there are appropriate incentives to increase productivity and to engage in innovative activity that may yield less expensive or better goods.

Externalities
Externalities are effects on third parties that result from the actions of economic agents. Such effects might be intentional or uninterntional, positive or negative. For example, a polluting firm might impose negative externalities on inhabitants and facilities located near by, which now suffer from its pollution.

Industrial concentration
Industrial concentration signifies the static concentration of an industry as determined by the number and size of firms operating in it. Industrial concentration levels of an industry are heavily influenced by the size of demand. Generally, the smaller the economy, the higher the level of concentration, as most of its markets cannot accommodate many viable competitors, ceteris paribus.

The Invisible Hand of the Market a Phrase which originated in Adam Smith's seminal book, *The Wealth of Nations* (1776). It refers to the fact that even without regulation or external intervention the market mechanism creates a dynamic of competition whereby each competitor strives to increase his private wealthm but the joint effect of many competitors acting in such a way may lead to the maximization of social economic welfare. Of course, Smith himself recognized, as did many others, that in many

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[86] See, e.g., Massimo Motta, Competition Policy- Theory and Practice (Cambridge University Press, 2004), pp. 40-64.

situations the market's invisible hand has limited strength and extrenasl intervention might be required in order to achieve social welfare.

Market power
Market power is the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded. see William M. Landes and Richard A. Posner, “Market Power in Antitrust Cases,” 94 *Harv. L. Rev.* 937, 951 (1981). Some courts have adopted an additional test for market power that focuses on the ability to exclude competitors. See, for example, the EC case of *Europemballage Corp. and Continental Can Co. Inc. v. Commission* (6/72) [1973] ECR 215, [1973] CMLR 199.

Minimum efficient scale (MES)
MES is the scale of operation at which average unit costs of production are first minimized and is largely dependent on production techniques. Naturally, the smaller the market demand, the fewer the MES units that can operate profitably in it. MES should not be confused with the scale of operation that maximizes the revenues of the firm when taking into account demand and the interdependence of firms.

Non-tradable goods and services
Goods and services that cannot be easily traded with other jurisdictions and thus have to be domestically produced. There are numerous possible reasons for the non-tradability of products, including the fact that they have very short shelve lives, or that some regulation prevents their import or export.

Oligopolistic co-ordination (sometimes referred to as tacit collusion or conscious parallelism)
Oligopoly markets are characterized by rivalry among a small number of competitors in which no firm holds a dominant position. Rational behavior in such markets requires that each oligopolist take into account the effects of its actions on its rivals in its decision-making process. Accordingly, Oligopolistic Coordination occurs when firms act independently, while taking into account the predictable reactions of their rivals. Such conduct often leads to a supra-competitive market equilibrium in which firms coordinate their conduct without an agreement.

Scale and scope economies
Scale economies are unit-cost reductions achieved through the production of more of an output, which are internal to the firm. Accordingly, they contain an inherent tendency to decrease average unit costs until the level of output that minimizes average costs (MES) is attained. Economies of scale consist of three main categories: product-specific economies, associated with the volume of any single product made and sold; plant-specific economies, associated with total output (possibly encompassing many products) of an entire plant or plant complex; and firm scale economies, associated with firm scale. For example, product-specific economies are created when increased volumes of production of a specific product tend to decrease the average total cost per unit. They often result from production technologies that necessitate large investments merely to be

able to produce the product. When output expands, these fixed costs are spread over more units, such that the average cost per unit declines in inverse relation to the number of units produced. Product economies may also result from increased specialization of machinery and labor. With a larger output, down time for changes between products using the same machinery is reduced. Product economies also have a dynamic dimension: when complex process adjustments must be worked out through trial and error, unit costs fall as workers and operators learn by doing or develop cost-cutting measures and quality control in production. When product economies exist, plants constructed for higher levels of output of the same product will have lower average costs than smaller plants

Economies of Scope are unit-cost reductions achieved through the production of more than one output, which are internal to the firm. Such economies might arise, for example, from indivisibilities in plant management, maintenance, repair, inventories of raw materials, shipping, construction, and the like.

Appendix Two - Breakdown of Costs

The rationale for the costs shown in section 8 are detailed below.

(a) Staff Costs

It is proposed that there will be a Head of Competition. This post is essential to ensure that the overall work of the competition agency across its three key functions (Mergers & Acquisitions, Advocacy and control of Market Abuse) is undertaken in a structured manner. They will need to understand and be highly knowledgeable of competition law and its principles, be capable of leading market investigations, have a strong background in economics and be an effective communicator. This is a demanding role and one which will be required regardless of what 'flavour' of competition law is eventually put in place. The proposed cost of this post is reflective of the 'market price' for such expertise.

The second key post is a legal advisor. There is limited competition law expertise on-island. Local firms have never needed to be experts in this area so they would have no need to recruit staff from such a specialized area of law. In any event locally employed legal experts would be unlikely to leave to work for a competition body. If the competition body is to be effective it will need legal assistance. This will be necessary to support its education role and its market studies work. The education role is one that has been highlighted as being of key importance in Jersey (for example the Law Society ceasing to operate a price fixing arrangement).

A view might be taken that such assistance could be bought in (as the OUR currently does with its legal advice). However this has several draw backs.

- First it misses an opportunity to reduce legal costs across the regulation area as it is planned that a legal advisor will be shared across both competition and regulation work. **This would have the effect of reducing the total cost of regulation and competition law.**

- The second and more fundamental drawback is that having a local lawyer able to offer guidance on the application of law to businesses will reduce (but not eliminate) the need for businesses to seek their own legal advice from their advocates, which would merely increase the cost to business at a time when business can least afford such costs.

- Thirdly, such external advice comes at a significant premium and would probably have to be acquired from off-island. Given that in the early part of the competition body's life its key tasks will be to produce guidance on the various elements of competition law, meet with companies to discuss their specific issues or assist in market studies/abuse enquires, the need for legal input will be

large. The Department is of the view that the case for having an in-house lawyer to replace external bought in advice has been proven.

The third member of the competition team will be a case officer. Their role will be to support market studies, M&A reviews and liaison with industry on the advocacy role. It is expected that this post will be filled locally. This post is considered necessary given the likely workload of dealing with all three areas of competition legislation.

The remaining staff costs have been calculated on a 50:50 basis across competition and regulation. It will be important that such costs are appropriately treated to ensure that the regulated companies are not asked to fund activity related to competition law.

In summary therefore the staff costs proposed of £272,400 are necessary if the statutory role is to be carried out to the appropriate level.

(b) <u>Overheads</u>

Clearly, the increased staffing required to meet the needs of the restructured regulation and competition body will also result in additional overheads being incurred. An estimate of the likely scale of overheads is disaggregated below for information.

- rent; currently the OUR pays a rent of approximately £32,000 to States Property. The likely rent payable for a premises large enough to cater for the increased staff numbers to deal with competition and regulation, is estimated to be in the order of £57,000. The competition body's share of this will be £25,000. This is based on splitting this and other overheads proportionately by the ratio of staff involved with competition and regulation work (3.5 on competition, 4.5 on regulation).

- General overheads (electricity, telecoms, stationery, publication of guides, training seminars, workshops with industry etc) will also need to be split accordingly. Based on the average overheads for the OUR since the office was established and split on the same basis as rent this gives an estimate of annual costs attributable to competition law of £30,000.

(c) <u>Consultancy assistance</u>

It is likely that the competition body will only be able to manage two market studies/investigations in any one year. Given the lack of information available on key markets in Guernsey and the potential complexity of such investigations, it is both prudent and sensible to budget for external assistance. Based on the OUR's experience of engaging consultants with expertise in this area the estimate of £40,000 per project would appear to be reasonable. However this is an area where the actual expenditure may not materialise. It would be misleading however to propose a budget that does not make an allowance for this cost item.

(NB Anti-competitive practices lead to higher prices and ultimately a loss of competitiveness for the Guernsey economy. The recently published Fiscal and Economic Plan contains a proposed anti-inflation strategy as one of its four key strategies. Critical to this is the introduction of competition regulation. Pressures from the EU will mean that to maintain access to markets jurisdictions will have to comply with a host of common EU minimum standards including provision of competition regulation. Additionally, incorporating competition (and anti merger) staff and offices within the umbrella of the OUR is a sound approach to minimise the costs of regulation. By a majority, the Policy Council supports the proposals.)

(NB The Treasury and Resources Department is not convinced that the extent of these proposals is commensurate with the scale of the problems that the island faces or is likely to face in this area. However, on balance, and having regard specifically to the wider international issues identified in the Report, the Department is of the view that the proposals should be endorsed at this stage. In September, as part of the debate on the States Strategic Plan, the funding that is being sought by the Commerce and Employment Department to enable these proposals to proceed, will be considered. It remains to be seen whether or not, at that stage, the States decide that these particular proposals are of sufficient importance to justify the allocation of £400,000 of new money when ranked against the many other funding requests that have been submitted.)

The States are asked to decide:-

IX.- Whether, after consideration of the Report dated 29th May, 2009, of the Commerce and Employment Department, they are of the opinion:-

1. That the definition, thresholds, criteria, and other matters related to the administration of mergers and acquisitions legislation in Guernsey shall be along the lines set out in Sections 4 and 5 of that Report.

2. That competition legislation shall be administered by a Guernsey Competition and Consumer Authority, to be based on a restructuring of the current Office of Utility Regulation, as outlined in Section 6 of that Report.

3. To rescind Resolution 3 (a), Billet d'Etat XIII, 2006, Item 18, and to amend Resolution 4 of the same item by the omission of the words "in order to undertake such statutory reviews of specific market sectors as directed by the States".

4. (1) To amend Resolution 5, Billet d'Etat XIII, 2006, Item 18, to increase the separate vote by the States, currently of a maximum of £300,000 per year to meet the administration costs and all expenses, including staff and associated costs, of the Director General of Competition to a maximum of £410,000 per annum, to be allocated on a ringfenced basis to the budget of the Commerce and Employment Department,

(2) To direct the Treasury and Resources Department to review this revised sum in line with States' budgets generally and to agree that sums remaining in the budget at the end of the year may, with the agreement of that Department, be rolled over to the following year.

5. To note that following the publication of the Report by Consultancy Solutions for the Oil Industry into the Island's energy market, the Commerce and Employment Department will continue to monitor energy prices in the Island and report further to the States as necessary.

6. To direct the preparation of such legislation as may be necessary to give effect to the above decisions.

SOCIAL SECURITY DEPARTMENT

FINANCING OF CONTRIBUTORY SOCIAL SECURITY SCHEMES

The Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

29th May 2009

Dear Sir

Executive summary

1. This report is a follow-up to a report under the same title, dated 26 September 2008, that was considered by the States at the December 2008 meeting (Billet d'Etat XVII of 2008), hereafter called 'the December report'. The December report took the form of a consultation document and was accompanied by a major consultation exercise which engaged with the people of Guernsey and Alderney, with employers and with business representative groups.

2. The contributory social security schemes comprise the Guernsey Insurance Fund, the Guernsey Health Service Fund and the Long-term Care Insurance Fund. All of those Funds will come under strain from the changing demographic profile of Guernsey and Alderney as the population ages and the ratio of workers to pensioners significantly weakens. Actuarial projections show that if the current financing structures remain unchanged, the reserves of the Guernsey Insurance Fund, currently standing at approximately £500m, will be exhausted by around 2040.

3. The future sustainability of the Guernsey Insurance Fund can be secured through changing one or more of the factors which impact on revenue and expenditure. These factors include contribution rates for individuals and employers, upper earnings limits, the States grant to the fund from General Revenue, benefit uprating policy and pension age.

4. The Department has taken account of what it heard in the consultation process from individuals and from employers. Further consultation has taken place with the Treasury and Resources Department, which has been kept informed of the Department's developing proposals. The Treasury and Resources Department and the Policy Council, through the latter's Fiscal and Economic Sub-group, have requested that the Department postpone submission of this report to the

States until it can be considered as part of a wider consideration of addressing the fiscal deficit. The Department considers that the measures necessary to ensure the long-term sustainability of the contributory social security schemes may, and should be, considered separately from the fiscal deficit. The Department acknowledges that changes to the financing of social security, including contribution rates and the States grants from General Revenue, may in due course form part of the measures to address the fiscal deficit. But if that does materialise, then it would be more transparent for such measures to be applied identifiably and separately from the measures that are necessary for social security purposes.

5. In arriving at its recommendations, the Department has adopted an approach that finds a solution through relatively small changes in a number of areas, rather than a major change in just one or two areas. The Department has tried to minimise the additional costs put on individuals and businesses and its proposed solution is the minimum required. There is certainly no element of over-funding in the proposed solution.

6. The Department recommends the that the following measures be taken:

   a. that pension age should gradually be increased to 67 through increases of 2 months per year, starting in 2020.

   b. that, over a 5 year phasing-in period, the upper earnings limit or upper income limit for employed, self-employed and non-employed people, including people over 65 years of age, be increased from £69,108 p.a. (2009 terms) to £115,128 p.a.(2009 terms), being the upper earnings limit applicable to employers' contributions;

   c. that, from 1 January 2010, the percentage contribution rate for employers be increased by 0.5%;

   d. that, from 1 January 2010, an allowance of £6,177 per annum (in 2009 terms) be applied to income assessed for non-employed contributions:

   e. that, from 1 January 2010, the contribution rate for non-employed persons over 65 be increased from 2.6% of income to 2.9% of income;

   f. that the grant from General Revenue to the Guernsey Insurance Fund should remain on a formula-led basis, but the current 15% of contribution receipts to that Fund be reduced from 1 January 2010 to a percentage which, with the grant to the Guernsey Health Service Fund, results in the same overall cost to General Revenue as in 2009;

   g. that the grant from General Revenue to the Guernsey Health Service Fund should remain on a formula-led basis, continuing at 12% of contribution receipts to that Fund.

7. Low-earning employed and self-employed persons will not have to pay more under these proposals although, depending on their age, they may have to work for a longer period before receiving a pension. Low-income non-employed people will pay reduced social security contributions, through the introduction of an allowance on income. Higher-earning employed and self-employed persons, and high-income non-employed persons, will pay higher social security contributions as the upper earnings limits are increased over 5 years to match that of the employers. The proposals see no net effect on the amounts of the States Grants to the funds form General Revenue. There is, however, an additional cost to General Revenue of approximately £850,000 per year through the addition of 0.5% on the employers' contribution rate.

REPORT

Background

8. On 10 December 2008, having considered a report from the Social Security Department dated 26 September 2008, (Billet d' Etat XVII of 2008) the States resolved:

> *'that the Social Security Department, having regard to issues raised in the consultation process, report to the States during 2009 with proposals to ensure the financial sustainability of the contributory social security schemes.'*

9. The consultation process referred to in the above Resolution of the States included, in addition to the States report itself, a questionnaire delivered to all households in Guernsey and Alderney under the heading 'Guernsey's Pension Puzzle' and a questionnaire to all employers registered with the Social Security Department. The questionnaires were supported by a public meeting and a meeting for businesses.

10. It is worth noting at this point that the Pension Puzzle consultation exercise was not a form of referendum. While respondents were requested to score their preferences for various options, which helped with the statistical analysis, the collective responses serve to inform the Department and the States in deliberation of these matters. It does not necessarily follow that an option that scored highly through the consultation exercise will be pursued, nor that an item that scored lowly will not be pursued.

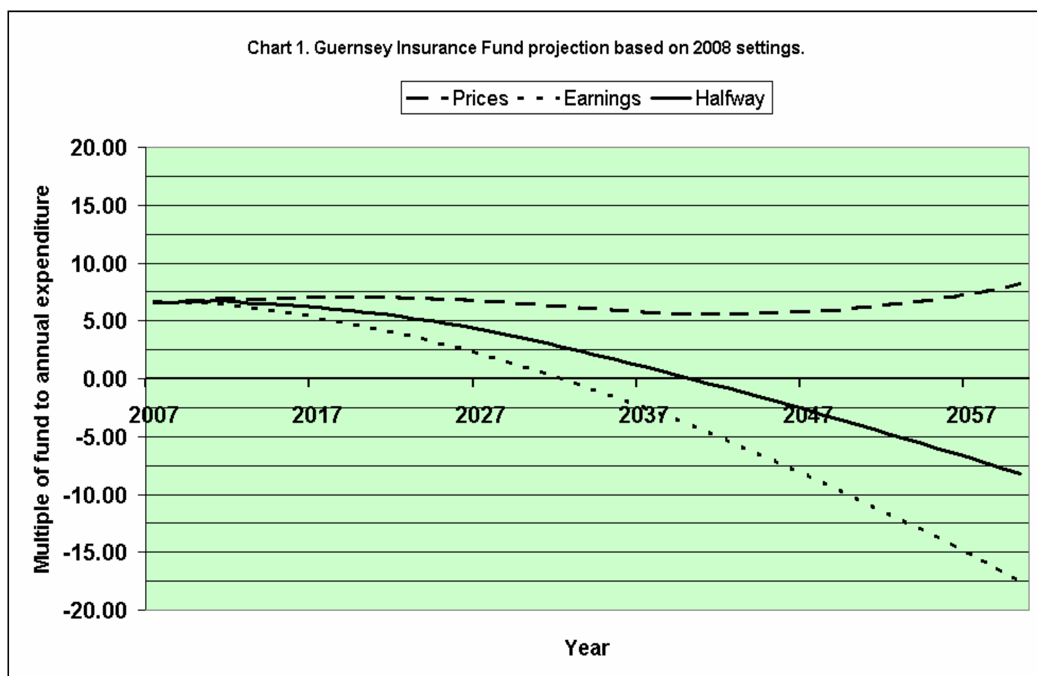
11. The December report contained the history and detailed information concerning the contributory social security funds, namely:

    The Guernsey Insurance Fund
    The Guernsey Health Service Fund
    The Long-term Care Insurance Fund.

12. The December report should be used to reference the history and details of the contributory schemes which, in the interests of brevity, will not be repeated in this report.

The pension puzzle

13. The financial projections of the Guernsey Insurance Fund can be taken as a proxy for the sustainability issues facing all three of the contributory funds. In the Department's public consultation exercise, the sustainability issue of the Guernsey Insurance Fund was called 'the pension puzzle' and was depicted as shown below.



14. The vertical axis of the chart is a measure of the value of the Guernsey Insurance Fund as a multiple of benefit expenditure and administration costs. For example, in 2007, the chart was based on the Fund having a value of approximately £586m and annual expenditure on benefits and administration is approximately £85m. The cover was therefore approximately 7 times annual expenditure (£586m/£85m).

15. Since the construction of the financial model, which underlies the above chart, the global economy has undergone massive market turmoil. This has affected the market valuations of many pension funds, sovereign wealth funds and other reserve funds, including those funds under the control and management of the Social Security Department. The market valuation of the Guernsey Insurance Fund, as of 31 December 2008, was £486m. The Department has not reworked the model with this lower starting point as it believes that the valuation of £586m remains an appropriate figure to use.

16. The horizontal axis on the chart is time, from 2007 to 2060.

17. There are 3 lines shown on the chart. The difference between the lines relates to different policies on the uprating of benefits, as follows:

    - top line (dashed) increases benefits by prices (RPI) each year
    - middle line (solid) increases prices halfway between prices and earnings.
    - bottom line (dotted) increases benefits by increase in earnings

18. The chart showed that if pensions and other benefits continued to be increased each year at the mid-point of prices and earnings and if there were no changes to the percentage rates of contributions and upper earnings limits (other than the small routine annual increases) then the currently substantial reserves of the Guernsey Insurance Fund would have been exhausted by around 2040. For the value of the Fund to be declining, as shown in the chart, it is implicit that the Fund is experiencing annual deficits in its income and expenditure account.

19. Since its establishment in 1965, the Guernsey Insurance Fund has generally experienced annual operating surpluses, which have been retained in the Fund. It is the accumulation of many years of operating surpluses, plus the investment returns on those surpluses that have enabled the Fund to grow to its current strong position, notwithstanding the recent reduction in market value from the turmoil in the global investment markets.

20. While generally having an annual surplus, the Fund has occasionally been in an operating deficit. This last occurred for each of the 3 years 1992 to 1994, inclusive, when the deficits, before investment income, were £0.98m, £1.03m and £0.13m respectively. From 1995 to 2008, the Fund has had continuous operating surpluses. But this will end in 2009, with an operating deficit of £2.3m being forecast, before taking account of investment income. Unless corrective measures are taken, the 2009 operating deficit, which for that year will be easily covered by investment income to the Fund, will become continuing and deepening annual deficits which will in time exceed the investment income and later erode the capital value of the Fund. That process will lead to the situation depicted in Chart 1, on the previous page.

Possible corrective measures

21. The possible measures for ensuring the sustainability of the Guernsey Insurance Fund involve either reducing expenditure or increasing income.

22. Reducing expenditure from the Fund could be achieved by cutting back on benefit levels or by increasing the age at which pension can first be paid. There is little scope for meaningful reductions on administrative expenditure, which at £3.52m in 2008 represented 3.9% of total expenditure from the Fund.

23. Increasing income could be achieved by increasing pension age, which would result in additional contributions being paid by individuals and employers. Income could also be increased by increasing the percentage rates of contributions paid by employed, self-employed and non-employed people, and by employers. There could also be increases in the upper earnings limits that apply to the different classes of contributors. There could also be an increase in the amount of the grant that is paid into the Fund from General Revenue (the 'States Grant') although the Department acknowledges that there is probably more pressure to maintain or reduce the States Grant than there is to increase it.

24. The Department notes that the Treasury and Resources Department's report on Capital Prioritization (Billet d'Etat IX of 2009), due for debate at the May States meeting, refers to Stage 2 of the Economic and Taxation Strategy. The report notes that the strategy will require measures that will either increase States income and/or reduce expenditure. The Department notes that *'reducing or eliminating the States Grant to the Social Security Funds'* is included in the permutations of measures that the Treasury and Resources Department has listed.

Reducing expenditure - the benefit uprating policy

25. The Department's policy on increasing the rate of pensions is, over the long-term, to increase benefit rates at the mid-point of the increase in RPI (prices) and the increase in earnings. On the rule-of-thumb that, over the long-term, earnings exceed prices by 2% per year, the Department's benefit uprating policy is, effectively, RPI plus 1%. In any particular year, however, the benefit uprating may be more or less than the long-term target, depending on the current economic conditions and how this is affecting pensioners. The Department's approach on benefit uprating requires the endorsement of the States through the approval of the annual proposals and associated legislation.

26. While, instinctively, pension increases of RPI may sound perfectly adequate - and increases of RPI plus 1% generous, the December report explained that if pensions are not increased in line with the increase in earnings, then pensioners do not share the generally increasing prosperity of the community. The buying power of the pension may well keep pace with the items against which RPI is measured, but the lifestyles and social inclusion of pensioners will fall relative to that of the population of working age.

27. By way of example, when the Guernsey social insurance scheme switched from flat-rate contribution stamps to earnings related contributions, in 1979, full rate old age pension was £20 per week. Had that pension been increased by Guernsey RPI, its rate in 2008 would have been £90.71, which would surely now be considered grossly inadequate. Had the pension been increased by RPI plus 1%, it would have been £129.93 in 2008. Instead, the 2008 Guernsey pension was £160.75 per week, proving that the target long-term uprating of RPI

plus 1% has been exceeded in the past. The pension is £171.25 in 2009.

28. However, although Guernsey can take some satisfaction from the extent to which its basic state pension has exceeded the increase in RPI over time, this should be balanced by acknowledgement that the uprating policy is one that knowingly falls short of the increase in earnings. In the same way that the current level of the UK basic state pension at £90.70 per week, demonstrates the inadequacy of the UK benefit uprating policy, so will the 'half-way house' uprating policy for the Guernsey pension be proven inadequate, albeit on a much longer timescale. It should be noted that, since 1998, Jersey old age pensions have been uprated in line with earnings.

29. The Department is mindful that the lower the rate of the contributory old age pension, the higher the expenditure on general revenue financed supplementary benefit for low income pensioners.

30. In view of the foregoing, the Department intends to continue its policy of increasing the pension at the mid-point of prices and earnings over the medium and long-term. There will be annual variations below and above this long-term policy in response to shorter-term economic conditions.

Reducing expenditure - increasing pension age

31. The other main opportunity for reducing expenditure from the Guernsey Insurance Fund would be to increase the age at which old age pension can first be drawn. Pension age is currently 65 for both men and women and has been so since 1965, when the first comprehensive, compulsory social insurance legislation came into force. Between 1926 and 1965, when Guernsey's old age pension scheme went through several phases of development in terms of financing and scope, the pension age was 70 throughout.

32. In the Department's consultation exercise on 'The Pension Puzzle' it was the issue of pension age that attracted the most attention. The Department invited comment on 3 options:

    1. Keeping the pension age at 65;

    2. Increasing pension age to 67 by 2032; and

    3. Increasing pension age to 70 by 2050.

33. In Options 2 and 3, the Department proposed making no change to the pension age before 2020, but from that point to increase it annually by 2 months. In other words, over the course of 6 years, the pension age would increase by 1 year (2 months x 6).

34. Responses to the consultation exercise showed strong support for keeping pension age at 65. The results are shown below.

1.) Pension age - Keeping it at 65				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	484	16.64	27.92
3 - 4	Dislike	168	5.78	
5	Slightly Dislike	160	5.50	
6	Slightly Like	55	1.89	54.26
7 - 8	Like	139	4.78	
9 - 10	Strongly Like	1384	47.59	
N/A	No Answer	518	17.81	17.81
Total		**2908**		

35. Surprisingly, given the above response, there was considerable support for increasing pension age to 67, by 2032, as shown in the results below.

2.) Pension age - Increasing it to 67 (by 2032)				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	603	20.74	37.00
3 - 4	Dislike	199	6.84	
5	Slightly Dislike	274	9.42	
6	Slightly Like	129	4.44	46.97
7 - 8	Like	425	14.61	
9 - 10	Strongly Like	812	27.92	
N/A	No Answer	466	16.02	16.02
Total		**2908**		

36. There was a strong dislike for increasing pension age to 70, by 2050, as shown in the results below.

3.) Pension age - Increasing it to 70 (by 2050)				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	1204	41.40	51.65
3 - 4	Dislike	194	6.67	
5	Slightly Dislike	104	3.58	
6	Slightly Like	75	2.58	29.26
7 - 8	Like	177	6.09	
9 - 10	Strongly Like	599	20.60	
N/A	No Answer	555	19.09	19.09
Total		**2908**		

37. The Department's interpretation of the responses to the questions in the consultation exercise concerning pension age is that, while there is a strong preference for maintaining a pension age of 65, there is also a degree of

acceptance that it may be necessary for the pension age to increase. That being so, there was an expression of opinion that the increase should be the smaller of the two options proposed.

38. Through the consultation process, the Department received many comments concerning the impracticality of increasing pension age for people working in heavy, manual jobs. The Department understands and acknowledges those concerns. However, the same situation will apply in the countries which were cited in the December report as increasing state pension age to 67 or more, namely the UK, USA, Germany and Denmark. Those countries are raising pension age in response to the well-documented issues concerning demographic change, the progression of the post-war baby boomers into retirement and through retirement, increasing longevity and, consequently, a major shift in the number of people of working age relative to the number of people of pension age.

39. Furthermore, if the great majority of Guernsey's labour force is not engaged in heavy manual labour, it would seem wrong to base pension policy on a minority. It would be preferable to accommodate the special circumstances of the minority by another means. The usual solution in social security schemes is to allow, effectively, an early retirement through the award of invalidity benefit. This is an approach that in some schemes has been abused by people who are seeking early retirement. However, administered and controlled properly and fairly, it should address the concern over the capacity of workers from heavy occupations to work up to an increased retirement age. A complementary approach would be for the Department and the wider States to invest further in retraining programmes. This could open up new employment opportunities in occupations which are less physically demanding.

Employers views on increasing pension age

40. Responses were received from 277 employers. Generally, the employers' views on increasing pension age were different to those of the employees. The great majority of employers viewed an increase in pension age as having no impact on their business, indeed most welcomed it. The employers did not, to any great extent, refer to people of around 65 years of age being unable physically or mentally to continue working. Many employers made a note that they were already employing people over 65. Interestingly, a large firm in one of the heaviest industries fully supported increasing pension age.

Pension age and demography

41. According to Social Security Department records, the population of Guernsey and Alderney in March 2007 was 64,071, with the broad divisions of school age, working age and pension age as follows:

March 2007 Population of Guernsey and Alderney	
People aged 0 to 15	10,682
People aged 16 to 64	43,056
People aged 65 and over	10,334
	64,071

42. The figures show that in 2007 there were 4.2 people of working age for every 1 person of pension age resident in Guernsey and Alderney. This is called 'the support ratio'.

43. Assuming that there is no growth in the overall population of Guernsey and Alderney between 2007 and 2060, which is the current States policy on population levels, the age profile within the population is projected to change to that shown below:

2060 Population of Guernsey and Alderney (no growth)	
People aged 0 to 15	8,900
People aged 16 to 64	36,703
People aged 65 and over	18,468
	64,071

44. The 2060 projections are that there will be just under 2 people of working age for every 1 person of pension age resident in Guernsey and Alderney. This is the projection if the pension age remains at 65. This dramatic reduction has serious implications with regard to the size of the working population necessary to generate wealth and to finance and service the infrastructure and social services, in their widest sense

45. If the pension age were to increase to 67, in 2060 there would be 1,540 more people of working age and 1,540 less people of pension age, as shown below.

2060 Population of Guernsey and Alderney (no growth)	
People aged 0 to 15	8,900
People aged 16 to 66	38,243
People aged 67 and over	16,928
	64,071

46. With a pension age of 67, there would be 2.3 people of working age to people of pension age in Guernsey and Alderney. That is not to say that the extra 1,540 people will all be working, but it is reasonable to expect that the majority would be working and this would make a significant and much needed contribution to the workforce.

Recommendation on pension age

47. Having given careful consideration to the issue, the Department will be recommending a gradual increase in pension age, starting with effect from 2020 and increasing by 2 months per year, to reach a pension age of 67 in the year 2031.

48. The Department anticipates that there will be some support among States members for retaining a pension age of 65. If the support is such as to move an amendment to the report on the relevant proposition, the Department would draw attention to the need, consequentially, to add or amend one or more further propositions in order to restore the financial sustainability of the scheme. For example, staying with the order listed in this report, the financial consequences of keeping a pension age of 65 could be addressed through:

   a. changing the benefit uprating policy in order to pay lower pensions in future;

   b. further increasing the upper earnings limits for employers or individuals, or both;

   c. increasing contribution rates for employers or individuals, or both;

   d. increasing the States Grants from General Revenue.

Increasing income to Fund - increasing upper earnings limits

49. In 2009, the upper earnings limit for employed, self-employed and non-employed persons who, collectively, are termed 'individuals' in this report, is £1,329 per week (£69,108 per annum). The upper earnings limit for employers is £2,214 per week (£115,128 per annum).

50. The consultation process put forward the following options regarding the upper earnings limits.

   1. Increasing the upper earnings limits for individuals to match the upper earnings limit for employers;

   2. Increasing the upper earnings limits for individuals and employers;

   3. Removing the upper earnings limits for employers;

   4. Removing the upper earnings limits for individuals.

Increasing the upper earnings limit for individuals to the employers' level

51. The responses to the consultation process showed strong support for increasing the upper earnings limits for individuals, to the level that applies to employers, as shown in the results below.

4.) Upper Earnings Limit - Increasing the UEL for individuals to match the employers' level				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	553	19.02	30.33
3 - 4	Dislike	147	5.06	
5	Slightly Dislike	182	6.26	
6	Slightly Like	77	2.65	48.18
7 - 8	Like	350	12.04	
9 - 10	Strongly Like	974	33.49	
N/A	No Answer	625	21.49	21.49
Total		**2908**		

52. In 2008, up to 8% of employees had earnings at or above the 2008 upper earnings limit of £64,896 per annum. The percentage declined with each successive quarter of the year as shown below, presumably with most bonus payments in respect of 2007 performance being paid in the first 2 quarters of the year.

2008	Employees earning £64,896 or more p.a.	
	No.	%
Quarter 1	2312	8.0%
Quarter 2	2331	7.8%
Quarter 3	2022	6.7%
Quarter 4	1909	6.5%

53. In 2008, 17% of self-employed people had earnings at or above the 2008 upper earnings limit of £64,896 per annum. Self-employed and non-employed people are assessed for contributions based on their annual earnings or income The small quarterly variations shown below, therefore, reflect only changes in the number of self-employed people or re-assessments of their income

2008	Self-employed earning £64,896 or more p.a.	
	No.	%
Quarter 1	536	17.9%
Quarter 2	538	17.7%
Quarter 3	541	17.6%
Quarter 4	520	17.4%

54. In 2008, 15% of non-employed people, including under 65s and over 65s, had income at or above the 2008 upper earnings limit of £64,896 per annum.

2008	Non-employed income of £64,896 or more	
	No.	%
Quarter 1	695	15.5%
Quarter 2	715	15.6%
Quarter 3	718	15.7%
Quarter 4	705	15.3%

55. It is clear from the forgoing that if the upper earnings limits were increased for individuals, additional contributions would be collected from approximately 3,000 people. The extra payments that would be made, and consequently the total additional contributions collected. would depend on the amount by which individuals' earnings or incomes exceed the current upper earnings limit.

Increasing the upper earnings limit for individuals and employers

56. Support was nearly as strong for increasing the upper earnings limits for both individuals and employers, as shown in the results overleaf.

5.) Upper Earnings Limit - Increasing the UEL for individuals and employers				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	547	18.81	34.42
3 - 4	Dislike	195	6.71	
5	Slightly Dislike	259	8.91	
6	Slightly Like	133	4.57	45.56
7 - 8	Like	403	13.86	
9 - 10	Strongly Like	789	27.13	
N/A	No Answer	582	20.01	20.01
Total		**2908**		

Removing the upper earnings limits for employers

57. Opinion was fairly evenly divided on the merits as regards removing the upper earnings limit for employers.

6.) Upper Earnings Limit - Removing the UEL for employers				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	731	25.14	39.44
3 - 4	Dislike	216	7.43	
5	Slightly Dislike	200	6.88	
6	Slightly Like	69	2.37	36.55
7 - 8	Like	217	7.46	
9 - 10	Strongly Like	777	26.72	
N/A	No Answer	698	24.00	24.00
Total		**2908**		

58. In 2008, less than 3.5% of employees had earnings at or above the 2008 upper earnings limit of £108,108 per annum. The figures for the four quarters of the year are shown below.

2008	Employees earning £108,108 or more p.a.	
	No.	%
Quarter 1	926	3.2%
Quarter 2	792	2.7%
Quarter 3	545	1.8%
Quarter 4	461	1.6%

59. It is clear, therefore, that if the upper earnings limit were to be removed for employers, the additional contribution income coming from that initiative would be in respect of a very small proportion of the employed workforce. It is noted that there is no upper earnings limit on employers' contributions in the UK or the Isle of Man, but there is in Jersey, where the limit is currently £42,480 per annum. Details of the contribution rates and upper earnings limits that apply in those territories appear in the Appendix to this report.

60. While the removal of the upper earnings limits may appear an attractive option, the Department has reservations. Removing the cap from the employers' side of the contribution would affect the top 3% of earners. Any estimated additional contribution returns from those earners would have to be treated with caution as it could easily be affected by organisational change, or avoidance, leading to diminishing returns from the initiative. As a simple illustration, an organisation employing very high earning staff may choose to have them based in Jersey, where the upper earnings limit of £42,480 per annum applies. Such relocation would not only lose Guernsey the social security contributions but also the high earning employee's 20% personal income tax returns.

Removing the upper earnings limits for individuals

61. Responses to the consultation process showed a dislike for removing the upper earnings limit for individuals, namely employed, self-employed and non-employed people.

7.) Upper Earnings Limit - Removing the UEL for individuals				
Score	***Description***	***Total***	***%***	
1 - 2	Strongly Dislike	822	28.27	42.61
3 - 4	Dislike	216	7.43	
5	Slightly Dislike	201	6.91	
6	Slightly Like	55	1.89	35.73
7 - 8	Like	173	5.95	
9 - 10	Strongly Like	811	27.89	
N/A	No Answer	630	21.66	21.66
Total		**2908**		

Recommendations on upper earnings limits

62. The Department will recommend that the upper earnings limit for employed, self-employed and non-employed persons, including non-employed persons over 65 years of age, be increased to the same level as applies to employers. In 2009 terms this would increase the upper earnings limit from £69,108 per annum to £115,128 per annum. The impact on high earning employed and self-employed persons would be substantial, as shown in the tables below. The Department has considered the impact of aligning the upper earnings limits in a single move and has concluded that it would be preferable to have a phasing-in period. The Department will recommend that the phasing-in period should take place over 5 years.

Effect on employed and self-employed persons

63. The effect, on employed and self-employed persons, of increasing the upper earnings limit to match that applied to employers is shown in the 2 tables below. The effect on non-employed persons is not shown because, later in this report an allowance on non-employed income is recommended. The combined effects of the allowance of income and the increase in the upper income limit is shown in paragraphs 74 and 75.

Employed persons			
Annual earnings	Weekly contribution		
	Current rules	Proposed rules	Difference
£5,000	£0.00	£0.00	£0.00
£10,000	£11.54	£11.54	£0.00
£20,000	£23.08	£23.08	£0.00
£30,000	£34.62	£34.62	£0.00
£40,000	£43.16	£43.16	£0.00
£50,000	£57.70	£57.70	£0.00
£60,000	£69.24	£69.24	£0.00
£70,000	£79.74	£80.77	£1.03
£80,000	£79.74	£92.31	£12.57
£90,000	£79.74	£103.85	£24.11
£100,000	£79.74	£115.38	£35.64
£110,000	£79.74	£126.92	£47.18
£115,128	£79.74	£132.84	£53.10

Self-employed persons			
Annual earnings	Weekly contribution		
	Current rules	Proposed rules	Difference
£5,000	£0.00	£0.00	£0.00
£10,000	£20.19	£20.19	£0.00
£20,000	£40.38	£40.38	£0.00
£30,000	£60.57	£60.57	£0.00
£40,000	£80.72	£80.72	£0.00
£50,000	£100.96	£100.96	£0.00
£60,000	£121.15	£121.15	£0.00
£70,000	£139.54	£141.35	£1.81
£80,000	£139.54	£161.54	£22.00
£90,000	£139.54	£181.73	£42.19
£100,000	£139.54	£201.92	£62.38
£110,000	£139.54	£222.12	£82.58
£115,128	£139.54	£232.47	£92.93

Increasing income to Fund - increasing contribution rates

64. Social Security contributions are collected for the Guernsey Insurance Fund, the Guernsey Health Service Fund and the Long-term Care Insurance Fund. The contribution rates for the 3 funds, shown in their component parts and combined, are as follows:

2009 contribution rates

Employed persons		
Employee		
Social insurance	3.2%	
Health insurance	1.4%	
Long-term care	1.4%	
		6.0%
Employer		
Social insurance	4.9%	
Health insurance	1.6%	
Long-term care	0.0%	
		6.5%
Total		12.5%

Self-employed persons		
Social insurance	6.3%	
Health insurance	2.8%	
Long-term care	1.4%	
		10.5%

Non-employed persons under 65		
Social insurance	5.7%	
Health insurance	2.8%	
Long-term care	1.4%	
		9.9%

Non-employed persons over 65		
Social insurance	0.0%	
Health insurance	1.2%	
Long-term care	1.4%	
		2.6%

65. Contribution rates that apply in the United Kingdom, Jersey and the Isle of Man appear in the Appendix to this report.

66. The December report explained the reasons for the differences in the contribution rates for the different classes of contributor. The report also acknowledged that the substantial changes, over the last 2 years, in the upper earnings limits and the additional 1% contribution payable by employers had had a distorting effect on the precise allocation of contributions across the three funds. Recommendations of the allocations between the funds will be contained in the Department's annual benefit and contributions uprating report, which will be submitted for the September meeting of the States. The allocation issue does not affect the headline rates of the combined contributions for all funds.

67. In the consultation exercise, the Department invited comment on 4 options:

1. Increasing employers' contributions by 0.5%;
2. Increasing employers' contributions by 1.0%;
3. Increasing individuals' contributions by 0.5%;
4. Increasing individuals' contributions by 1.0%;

Increasing the contribution rate for employers

68. The responses to the consultation process showed support for increasing employers' contributions by 0.5%, meaning that the contribution rate of 6.5% of earnings would increase to 7.0%, as seen in the table below.

8.) Employer contributions - Increasing contribution rates by 0.5%				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	495	17.02	34.18
3 - 4	Dislike	156	5.36	
5	Slightly Dislike	343	11.80	
6	Slightly Like	125	4.30	50.00
7 - 8	Like	501	17.23	
9 - 10	Strongly Like	828	28.47	
N/A	No Answer	460	15.82	15.82
Total		**2908**		

69. There was significantly less support for increasing employers' contributions by 1.0%, to 7.5%, as seen in the table below.

9.) Employer contributions - Increasing contribution rates by 1.0%				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	823	28.30	46.97
3 - 4	Dislike	283	9.73	
5	Slightly Dislike	260	8.94	
6	Slightly Like	92	3.16	34.53
7 - 8	Like	220	7.57	
9 - 10	Strongly Like	692	23.80	
N/A	No Answer	538	18.50	18.50
Total		**2908**		

Employers' views on increasing contribution rates

70. The majority of the responses from employers were strongly opposed to any increases in employers' contribution rates. Many employers warned that the profitability of the business was only marginal and that further costs imposed by government could not be absorbed. Not surprisingly, employers were more opposed to the 1% increase in contribution rates than the 0.5% increase in contribution rates. A small number of employers were unconcerned about increases of either 0.5% or 1% in the contribution rate.

Increasing the contribution rate for individuals

71. The responses to the general consultation process showed a near-even split for and against increasing individuals' contribution rates by 0.5%. This would have the effect of taking an employed person's contribution rate to 6.5% and a self-employed person's contribution rate to 11.0%. A non-employed person under 65 would pay 10.4%. The responses are shown below.

10.) Individual contributions - Increasing contribution rates by 0.5%				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	658	22.63	42.16
3 - 4	Dislike	231	7.94	
5	Slightly Dislike	337	11.59	
6	Slightly Like	134	4.61	44.43
7 - 8	Like	441	15.17	
9 - 10	Strongly Like	717	24.66	
N/A	No Answer	390	13.41	13.41
Total		**2908**		

The balance shifted to a strong dislike for a proposed increase of 1% in the contribution rates for individuals, as seen in the table below.

11.) Individual contributions - Increasing contribution rates by 1.0%				
Score	**Description**	**Total**	**%**	
1 - 2	Strongly Dislike	1171	40.27	57.50
3 - 4	Dislike	281	9.66	
5	Slightly Dislike	220	7.57	
6	Slightly Like	78	2.68	22.70
7 - 8	Like	154	5.30	
9 - 10	Strongly Like	428	14.72	
N/A	No Answer	576	19.81	19.81
Total		**2908**		

Recommendations on contribution rates

72. The Department considers that an increase in contribution rates is an essential part of the measures to ensure financial sustainability of the Fund. In formulating its package of proposals, the Department has chosen to apply relatively small measures across the various options available for increasing income or reducing expenditure. This is seen as preferable to making a very large change in just one or two areas. Taking into account the entirety of responses from the consultation process, including responses from individuals, from individual employers and from their representative groups, the Department will recommend a 0.5% increase in the percentage rate of contributions paid by employers, but no increase in the percentage rate paid by employed persons, self-employed persons and non-employed persons under 65. An increase of 0.3% will be proposed on the contribution rate for non-employed people over 65, but this will be accompanied by the introduction of an allowance on income on which the rate is applied, with the net effect that people with income below £50,000 per year will pay less. The Department wishes to avoid, if at all possible, an increase in the contribution rate for individuals as this would affect all individual contributors, including the very low paid or low income. The highly paid contributors, and non-employed persons with high income, will already be paying more through the proposed increase in the upper earnings and income limits (see paras. 61 and 62 above).]

An income allowance for non-employed contributions

73. The Department has previously announced its intention to introduce an allowance on income for non-employed contributions. The current situation is that if a non-employed person has annual income of £14,559 per annum, there is no requirement to pay a contribution. But if a person has income of £14,560, that person pays a contribution of 9.9% of the full £14,560, if under 65 years of age and 2.6% of that amount if over 65.

74. In calculating the amount of an allowance, which would be deducted from the lower income limit of £14,560, the Department needs to have regard to the total loss of contribution income that would result applying the allowance to the approximate 4,500 people who pay income-related non-employed contributions. It will be necessary to recoup some, but perhaps not all, of that lost income through an increase in percentage rates of the non-employed contributions. This would not remove the advantage of the allowance on income for people for whom it is designed, being those whose income is just above, or not significantly above, £14,560 per annum.

Non-employed people over 65

75. For non-employed persons over 65, the contribution rate is currently 2.6% of income. The Department will recommend an allowance on income of £6,177 per year, in 2009 terms, and a new contribution rate of 2.9%, to take effect from 1 January 2010. Taking into account the proposed increase in the upper income limit from £69,108 to £115,128 per year, which it is intended to phase-in over 5 years, the combined effect will be to bring in approximately the same amount of contributions to the funds from people over 65. But the lower income contributors will pay less and the higher income contributors will pay more, as shown in the table below:

Non-employed people over 65			
Annual income	Weekly contribution		
	Current rules	Proposed rules	Difference
£14,559	£0.00	£0.00	£0.00
£14,560	£7.28	£4.68	-£2.60
£20,000	£10.00	£7.71	-£2.29
£30,000	£15.00	£13.29	-£1.71
£40,000	£20.00	£18.86	-£1.14
£50,000	£25.00	£24.44	-£0.56
£60,000	£30.00	£30.02	£0.02
£70,000	£34.55	£35.59	£1.04
£80,000	£34.55	£41.17	£6.62
£90,000	£34.55	£46.75	£12.20
£100,000	£34.55	£52.32	£17.77
£110,000	£34.55	£57.90	£23.35
£115,128	£34.55	£60.76	£26.21

Non-employed people under 65

76. For non-employed persons under 65, the contribution rate is currently 9.9% of income. As there is no change being proposed to the employed and self-employed contribution rates, the latter being 10.5%, the Department considers that the non-employed contribution rate for persons under 65 cannot reasonably be increased. The Department will, however, recommend an allowance on income of £6,177 per year, in 2009 terms, to take effect from 1 January 2010. Taking into account the proposed increase in the upper income limit from £69,108 to £115,128 per year, which it is intended to phase in over 5 years, and the introduction of an allowance on income, the effects on non-employed contributors under 65 is shown in the table below.

Non-employed people under 65			
Annual income	Weekly contribution		
	Current rules	Proposed rules	Difference
£14,559	£0.00	£0.00	£0.00
£14,560	£27.72	£15.96	-£11.76
£20,000	£38.07	£26.32	-£11.76
£30,000	£57.11	£45.35	-£11.76
£40,000	£76.15	£64.39	-£11.76
£50,000	£95.19	£83.43	-£11.76
£60,000	£114.23	£102.47	-£11.76
£70,000	£131.57	£121.51	-£10.06
£80,000	£131.57	£140.55	£8.98
£90,000	£131.57	£159.59	£28.02
£100,000	£131.57	£178.62	£47.05
£110,000	£131.57	£197.66	£66.09
£115,128	£131.57	£207.42	£75.85

The States Grants from General Revenue

77. Currently, the Guernsey Insurance Fund receives a grant from general revenue equal to 15% of the total amount collected in contributions. The Guernsey Health Service Fund receives a similar grant equal to 12% of the contributions collected for that Fund.

78. In 2008, the grant to the Guernsey Insurance Fund was £12.12m and the grant to the Guernsey Health Service Fund was £3.88m. The grants budgeted for 2009 are £12.74m and £4.07m respectively.

79. Until 2007, contributions to the Funds were made on the pay-as-you-go insurance principle, meaning that the maximum amount paid by an individual was broadly equal to the average expenditure per individual. People who were paying contributions at the upper earnings limit were paying the full pay-as-you-go contribution, but no more than that. The purpose of the States grants was to make good, from general revenue, the deficiency in the contributions paid by people with earnings below the upper earnings limit.

80. Part of the Future Taxation and Economic Strategy, which took partial effect in 2007 and full effect in 2008, was to reduce the amount of the States grants to the Funds and to increase contribution rates to compensate. This has eroded the insurance principle and means that the percentages of the States grants can no longer be calculated in the same manner.

81. The future position of the States grants to the Funds remains under scrutiny, with referral to reducing or removing the grants being made in the Treasury and Resources Department's report on Capital Prioritisation (Billet d'Etat IX of 2009). Reduction or removal of the grants would, of course require any loss of grant income to the Funds to be replaced by the individual contributors and employers.

82. The consultation exercise asked 2 questions on the States grants. The first question was whether the current arrangements should remain in place. The second question was whether the amount of the States grants should decrease. The questions were accompanied by a note explaining that maintaining the States grants meant less money to spend on other services provided by the States and that reducing the States grant meant more money to spend on other services provided by the States. The responses showed a strong liking for maintaining the current arrangements and a strong dislike for reducing the amount of the grants, as shown below.

12.) States grant - Keeping the current arrangement				
Score	***Description***	***Total***	***%***	
1 - 2	Strongly Dislike	394	13.55	38.86
3 - 4	Dislike	268	9.22	
5	Slightly Dislike	468	16.09	
6	Slightly Like	142	4.88	50.76
7 - 8	Like	408	14.03	
9 - 10	Strongly Like	926	31.84	
N/A	No Answer	302	10.39	10.39
Total		**2908**		

13.) States grant - Decreasing the amount paid by the States				
Score	***Description***	***Total***	***%***	
1 - 2	Strongly Dislike	1068	36.73	61.59
3 - 4	Dislike	345	11.86	
5	Slightly Dislike	378	13.00	
6	Slightly Like	116	3.99	22.08
7 - 8	Like	240	8.25	
9 - 10	Strongly Like	286	9.83	
N/A	No Answer	475	16.33	16.33
Total		**2908**		

Recommendations on States Grants

83. The Department is very aware of the competing demands for general revenue funding, but considers that the States grants to the Guernsey Insurance Fund and the Guernsey Health Service Fund should continue in their current form and with the current percentages.

84. A range of options for the States grants could include:

    1. Maintaining the formula-led States grant in current form;
    2. Future States grants at 2009 levels plus annual RPI;
    3. Future States grants at 2009 levels with no RPI;
    4. Partial or full removal of States grants.

85. The Department considers it a strength of the system that the percentage based system of the States grants means that the draw from general revenue is high when contribution income is high and low when contribution income is low. As movements in contribution income will reflect the general economic conditions, this means that the demand for the higher levels of States grant will be made when States revenues are relatively healthy.

86. The Department understands the attraction of the States grants to the Funds as a target for cuts in general revenue expenditure, or redirection, not least by the ease of execution. But any reduction in the grants would require a pound for pound replacement through increased contributions from individual contributors and employers. By way of example, if it were decided that the States grants to the funds had to be removed entirely and that the replacement income should come from employers and not individuals, the Department estimates that it would require an increase in the employers' percentage rate of 2%, from 6.5% of earnings to 8.5% of earnings.

87. Recommendations which appear earlier in this report include a 0.5% increase in the employers' contribution rate, plus a phased-in increase in the upper earnings limits for employed, self-employed and non-employed contributors. This will produce additional contribution income and, if the formula-led grants remained unchanged, a consequent increase in the amount of the grant from General Revenue.

88. The Department acknowledges the pressures on general revenue and is not seeking to increase the amount of the States Grants. The Department will recommend a continuation of the formula-led structure of the States Grants but will recommend a reduction in the percentage rate of the grant to the Guernsey Insurance Fund, from 15% of contribution income to a lower figure calculated so that the total amount of the grants to the Guernsey Insurance Fund and the Guernsey Health Service Fund in 2010 stay at the same level as budgeted for 2009, being £16.81m (see para.77).

Cost to States as employer

89. The proposed increase in the employers' contribution rate will of course increase the payroll costs of the States of Guernsey, the Island's largest employer. It is estimated that the £0.85m will be added to the public sector payroll costs through this measure.

Consultation

90. This report has been produced following extensive consultation with individuals and employers in Guernsey and Alderney. The Department has also consulted with the Treasury and Resources Department as the content of the report has significant implications for public revenues.

Concerns of Policy Council and Treasury and Resources Department

91. Through the submission of this report to the Policy Council and the Treasury and Resources Department, as is required for States Reports from Departments, the Department has been informed of a number of concerns. The Policy Council, through its Fiscal and Economic Policy Sub-group (FEPG) and the Treasury and Resources Department have requested that the Department postpone submission of this report to the States until it can be considered as part of a wider consideration of addressing the fiscal deficit.

92. The Department considers that the measures necessary to ensure the long-term sustainability of the contributory social security schemes may, and should be, considered separately from the fiscal deficit. The Department acknowledges that changes to the financing of social security, including contribution rates and the States grants from General Revenue, may in due course form part of the measures to address the fiscal deficit. But if that does materialise, then it would be more transparent for such measures to be applied identifiably and separately from the measures that are necessary to ensure the financial sustainability of the Guernsey Insurance Fund.

93. In the following paragraphs, the Department addresses a number of comments made by the FEPG and the Treasury and Resources Department.

Relationship with fiscal reforms and annual budgetary process

94. The FEPG has suggested that the Department's specific proposals on social security financing should only be considered as part of the full review of taxation options for the second phase of the 'zero-10' fiscal reforms.

95. The Department does not share that view. The Department considers that there needs to be transparency and separation of the changes that need to be made to social security financing for social security purposes and any further changes that may need to be made as part of the second phase of the fiscal reforms.

96. The Department considers it most unlikely that any changes to social security contribution rates or the States Grants that may in future be necessary as part of the fiscal reforms, would reverse any of the proposals contained in this report specifically for social security financing. It is far more likely that any subsequent measures for fiscal reform would be additive, continuing in the same direction as the proposals in this report.

97. The FEPG has also suggested that the process for setting of social security contributions and benefit rates should be realigned to be consistent with the annual general States budget process.

98. The Department reports to the States in September each year, with proposed rates of social security contributions and benefits to take effect from the following January. That timetable accommodates the shortest possible interval to allow the preparation and approval of Ordinances and the administrative functions to enable new rates of benefits and contributions to apply from January. The Department believes that there are merits in this timetable, in particular in the implementation of new rates of pensions and other benefits as soon as possible following the decision of the States. This immediacy, which can take account of current conditions was seen as preferable to the timetable which prevailed until 1998, when the States considered the social security proposals in June or July, for implementation the following January. Under that timetable, having heard what the States members had decided by way of increased benefits, pensioners were waiting for six months to receive it.

99. If the Department's contributions and benefits uprating proposals were to be considered at the same time as the general States budget, as the Policy Council suggests, then the general budget debate would have to be brought forward to the September States meeting if the custom of applying the social security changes from the following January were to be maintained. If the budget debate continued to take place in November, then the Department's preferred timetable could not be met. It would mean either that the social security changes would have to be implemented from the first of January one year hence, which the Department considers too distant from the decision or implemented at some point during the year, which has practical difficulties. These include the fact that the weekly rates of self-employed and non-employed contributions are based on a calendar year figure of income provided by the Income Tax Office, to which upper and lower earnings limits and contribution rates applicable to the current calendar year are applied. The existing collection systems would not allow 2 sets of parameters to be held and processed for the same year, which is what would happen if it were decided to give effect to contributions uprating changes at any point other than at the start of a calendar year. These difficulties would be magnified in the processing, for contributions purposes, of revised income figures as and when received from the Income Tax Office.

Taxation levers and international competition issues

100. Similar to the comments of the Policy Council Sub-group, the Treasury and Resources Department has observed that the Social Security Department no longer administers a pure social insurance framework and that, since the introduction of the new Economic and Taxation Strategy, social insurance contributions have become closer to a form of taxation. The Treasury and Resources Department further observes that, arguably, the Social Security Department now has a very influential taxation lever at its disposal and expresses the view that the use of that lever has to be more closely integrated with the States Economic and Taxation Strategy.

101. The Department agrees that social security contributions have become more like a tax. The Department itself made that comment in the December report albeit qualifying the social security contributions as a hypothecated tax, as the income is used only to pay social security benefits and does not enter general revenue to meet other governmental expenditure obligations.

102. That said, the Department has no more and no fewer income collection levers than it ever has had. The material change, which the Treasury and Resources Department has confirmed, is that in the post zero-10 environment the States has limited scope for increasing direct taxes on companies. This leads to the Department's requirement for social security contributions from employers, although not new, to be looked at anew.

103. The Treasury and Resources Department believes that there is considerable scope for increasing the contribution rates for employers, noting that the current 6.5% contribution rate compares very favourably against the 12.8% rate for employers in the UK and the Isle of Man. Furthermore, the employer's contribution in the UK and Isle of Man is not subject to any upper earnings limit.

104. The Department accepts those facts, but considers that the contribution rates of Jersey, the Island's closest competitor, are also relevant. The contribution rate for Jersey employers is 6.5% of earnings, up to an upper earnings limit of £42,484 per annum.

105. In making comparison between the social security rates of different jurisdictions, it is important to remember that there are differences in the benefits provided. For example, the Jersey social security contributions do not provide cover for unemployment, nor long-term care insurance nor specialist medical services. In Jersey, specialist medical care is financed from general revenue. Furthermore, comparisons between jurisdictions on the rates of social security contributions should also have regard to differences in the tax systems of those jurisdictions.

106. The Treasury and Resources Department has also commented on the Department's proposal to increase, over a 5 year period, the upper earnings limit for employed, self-employed and non-employed persons from £69,108 per annum to £115,128 per annum (those figures being in 2009 terms). The Treasury

and Resources Department has commented that the increased contributions will be borne by the same people who have shouldered most of the extra burden of increases in social security contributions arising from the move away from corporate taxation.

107. The Treasury and Resources Department is concerned about the effect that the additional contributions required of individuals, particularly those earning high salaries could have on Guernsey's competitive position.

108. The Department would summarise the Treasury and Resources Department's views on the proposed changes in contribution rates and upper earnings limits to be that the majority of the extra burden should be placed on the employer, with little or no extra burden being placed on the individual, whether they be employed, self-employed or non-employed.

109. In responding to the forgoing views, the Department refers back to the consultation process, in particular the consultation with all Guernsey employers. While it is to be expected that employers would be averse to paying increased social security contributions, the Department judged their concerns for the viability of their businesses to be material, particularly those employers whose businesses are not in the financial services sector. So although comparison of the Guernsey, UK and Isle of Man employer contribution rates does appear to contain considerable scope for movement, the Department considers that on a practical level this may not be the case. The Department is mindful that, following the introduction of the zero-10 reforms, locally owned businesses are still paying tax on the distributed profits and are also paying substantially higher rates of tax on real property for their business premises.

110. With regard to the higher contributions that would be required of individuals with high earnings or high income (in the case of the non-employed), the Department detected considerable support for this measure in the consultation process and among States members. The Department noted that in the course of the September 2008 debate on the Department's contributions and benefit uprating proposals (Billet d'Etat X of 2008) there was considerable support for an amendment moved by Deputy Fallaize which, if carried, would have raised the upper earnings limits for individuals to the same level as for employers. The Department believes that, had it not given an assurance that this measure was being actively investigated and would be included in the December report, the amendment would have been carried and the upper earnings limits would, by now, have been equalised at the higher level.

111. The Treasury and Resources Department has noted that, although this report contains proposals for an income allowance on non-employed contributions (see paras. 73 to 76) there are no plans for an earnings allowance to apply to employed and self-employed contributions. This means that it will remain the case that when an employed or self-employed person has earnings of £112 per week or more, contributions are charged on the entire earnings. In the UK and

the Isle of Man, which have the same social security legislation in this area, the first £110 of earnings per week is deducted from gross earnings before the contributions are calculated.

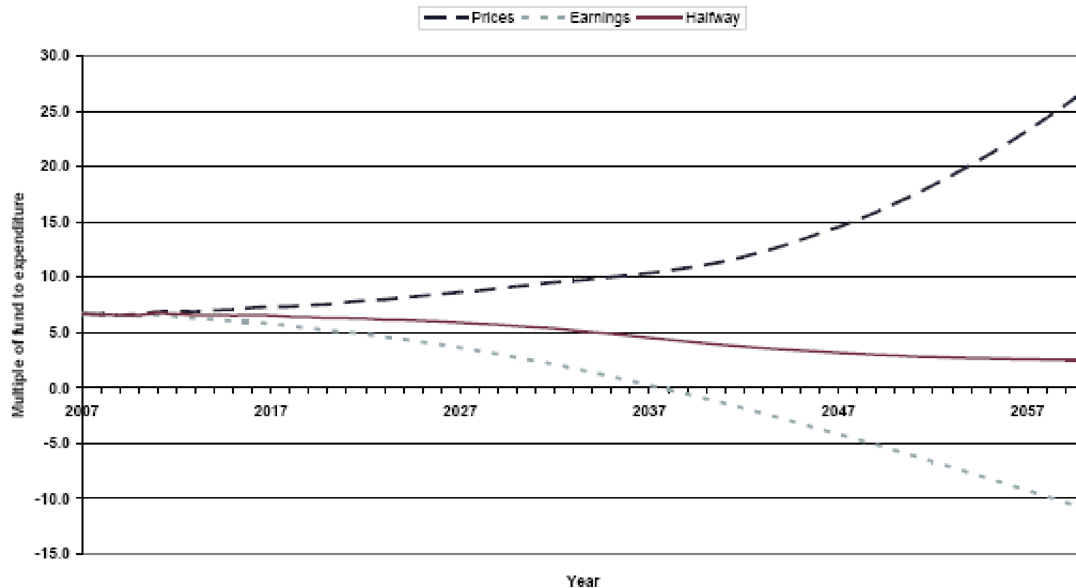
112. The Department notes that many people with low earnings are not reliant on that single source of earnings for their livelihood. A person may have low earnings from 2 or more jobs which together provide a reasonable level of earnings. Other people on low earnings may be doing just part-time work and may have a spouse or partner with substantial earnings. With these factors in mind, the Department considers that income support should not be attempted through adjusting social security contributions, but should be achieved through supplementary benefit or whatever system will improve or replace it in due course. However, if the Department was to follow the UK system and apply an earnings allowance of £112 per week on contributions for employed persons, it is estimated that the current combined contribution rate of 12.5% (6.5% for employer and 6.0% for employees) would have to increase by nearly 3% in order to replace the contribution income foregone. This would have the redistributive effect that the Treasury and Resources Department appears interested in, as the contributions for low earners would reduce and the contributions for high earners would increase. But there would be a question as to whether the employer, the employee or both parties would bear the additional 3% contribution rate. In the light of the Treasury and Resources Department's comments on the need to avoid further burdens on the higher earners (see para.106) the presumption would be that the extra 3% would be placed on the employer. The Department does not consider that reasonable.

Conclusion

113. The Department believes that best solution to ensuring the financial sustainability of the contributory social security schemes is found through applying changes in several areas rather than a more substantial change in a single area.

114. In arriving at its proposed package of proposals, the Department has been mindful of the financial pressures currently being felt by individuals, in particular those on low incomes, the pressures on employers and also the pressures on States revenues. Accordingly, the Department is proposing what it considers to be the minimum measures required for sustainability of the funds.

115. The recommendations that have been made in the course of this report are summarised in paragraph 116 below. The combined effect of this package of proposals on the Guernsey Insurance Fund can be seen in the projection below. This is a sustainable projection, unlike that shown in paragraph 13 of this report, which depicted the financing problem.



Summary of recommendations

116. The Department recommends:

a. that pension age should gradually be increased to 67 through increases of 2 months per year, starting in 2020;

b. that, over a 5 year phasing-in period, the upper earnings limit or upper income limit for employed, self-employed and non-employed people, including people over 65 years of age, be increased from £69,108 p.a. (2009 terms) to £115,128 p.a.(2009 terms), being the upper earnings limit applicable to employers' contributions;

c. that, from 1 January 2010, the percentage contribution rate for employers be increased by 0.5%;

d. that, from 1 January 2010, an allowance of £6,177 per annum (in 2009 terms) be applied to income assessed for non-employed contributions:

e. that, from 1 January 2010, the contribution rate for non-employed persons over 65 be increased from 2.6% of income to 2.9% of income;

f. that the grant from General Revenue to the Guernsey Insurance Fund should remain on a formula-led basis, but the current 15% of contribution receipts to that Fund be reduced from 1 January 2010 to a percentage which, with the grant to the Guernsey Health Service Fund, results in the same overall cost to General Revenue as in 2009;

g. that the grant from General Revenue to the Guernsey Health Service Fund should remain on a formula-led basis, continuing at 12% of contribution receipts to that Fund.

h. that the States direct the preparation of such legislation as may be necessary to give effect to the foregoing.

Yours faithfully

M H Dorey
Minister

APPENDIX

Comparison of contribution rates and upper earnings limits in Guernsey, Jersey, UK and Isle of Man

The table below contains a comparison of contribution rates and upper earnings limits in Guernsey, Jersey, the UK and Isle of Man. It should be noted that these headline contribution rates cover different benefits between the territories. For example, Guernsey is the only territory that has a contribution for long-term care.

Table to be read with notes overleaf	**Guernsey** 2009	**Jersey** 2009	**UK** (09/10)	**Isle of Man** (09/10)
Employed persons	**Employer/Employee**	**Employer/Employee**	**Employer/Employee**	**Employer/Employee**
Percentage rate up to upper earnings limit	6.5% / 6.0%	6.5% / 6.0%	12.8% / 11%	12.8% / 10%
Percentage rate after upper earnings limit			12.8% / 1%	12.8% / 0%
Upper Earnings Limit per week	£2,214 £1,329	£817	Unlimited / £ 844	Unlimited / £730
Lower Earnings Limit per week	£112	£173	£95	£95
Threshold per week			£110	£110
Self-employed				
Percentage rate up to upper earnings limit	10.5%	12.5%	8%	8%
Percentage rate after upper earnings limit			1%	
Annual Earnings Max Min	£69,108 £5,824	See below See below	£43,875 £5,075 / £5,715	£37,960 £5,715
UK flat rate payable weekly as well as % rate on earnings			£2.40	£2.40
Non-employed	9.9% 2.6 % (over 65)			
Annual Income Max Min	£69,108 £14,560		Flat rate £12.05 p/w	Flat rate £12.05 p/w

Notes

UK/IOM apply a 1.6% employee's contracted out rebate.

UK/IOM apply a 3.7% employers' contracted out rebate (salary related schemes) and 1.4% (money purchase schemes).

UK/IOM retain (with conditions) a married woman's rate of 4.85% UK and 3.85% IOM.

UK/IOM calculate liability after deducting the value of the Earnings Threshold from gross earnings (in the UK, for the self employed, the value of the Lower Profit Limit is first deducted - £5,715).

UK/IOM have no payment of Class 1 National Insurance Contributions on earnings up to the Earnings Threshold (ET). However, once earnings reach the Lower Earnings Limit (LEL), National Insurance Contributions are treated as having been paid on earnings from the LEL up to and including the ET.

Jersey calculates liability on a monthly basis; figures shown have been converted to weekly values for comparison purposes.

Jersey retains a married woman's option (applies if liable and married before 1 April 2001) where the married woman can choose to pay or not to pay contributions.

Jersey does not distinguish between self-employed and non-employed contributions, which are both based upon income.

Jersey applies an upper limit for self-employed and non-employed of £42,480 on earnings and £56,640 on the total of earnings and unearned income.

Jersey applies a lower limit for self-employed and non-employed of £8,220 of earnings with total income below £28,320 or £14,290 of total income.

Upper Accrual Point (UAP)

The UK also apply an Upper Accrual Point which is set at £770 a week, £3,337 a month, and £40,040 a year (2009/2010). Employers and their employees who are members of contracted-out occupational pension schemes pay NICs at the reduced contracted-out rate up to the UAP only. They then pay NICs at the higher standard rate on the employee's earnings between the UAP and the UEL.

Lower Earnings Limit

In the UK the Lower Earnings Limit (LEL) which is the point at which employees start to build up entitlement to contributory benefits, the LEL is statutorily tied to the rate of the basic State retirement pension. It is fixed each year.

(NB A majority of the Policy Council is concerned that the Social Security Department's proposals for financing contributory social security schemes have been developed in isolation from the much wider context of the States Economic and Taxation Strategy.

With the introduction of the new Economic and Taxation Strategy, the Social Security Department now has a very influential lever at its disposal, and its use has to be more closely integrated within this overall Strategy. With limited scope, in the post zero-10 environment, for increasing direct taxes on companies, the main routes for additional revenue are property taxes, taxes on employment and increases of impot.

Under the Social Security Department's current proposals much of the further increase in contributions will be borne by the same people who perceive themselves to have already shouldered most of the extra burden of the increase in social security contributions arising from the move away from corporate taxation. This is particularly true of the self-employed, and is no incentive for entrepreneurial endeavour. It is also true of the non-employed.

Notwithstanding the above, the Policy Council recognises that it is necessary for the Social Security Department to present its proposals for the 2010 social security upratings to the States now, so that the States resolutions can be implemented with effect from 1st January 2010. A majority of the Council therefore reluctantly accept the report and recommend the States to approve it.)

(NB The Treasury and Resources Department strongly opposes this Report at this time. It does so because the Report fails to accept that a more corporate response is required to address wider policy issues. As a consequence, the Department would encourage the States to defer consideration of the Report so that the proposals it contains can be considered by the States within the necessary wider, strategic context.)

The States are asked to decide:-

X.- Whether, after consideration of the Report dated 29th May, 2009, of the Social Security Department, they are of the opinion:-

1. That pension age shall gradually be increased to 67 through increases of 2 months per year, starting in 2020.

2. That, over a 5 year phasing-in period, the upper earnings limit or upper income limit for employed, self-employed and non-employed people, including people over 65 years of age, be increased from £69,108 p.a. (2009 terms) to £115,128 p.a.(2009 terms), being the upper earnings limit applicable to employers' contributions.

3. That, from 1 January 2010, the percentage contribution rate for employers be increased by 0.5%.

4. That, from 1 January 2010, an allowance of £6,177 per annum (in 2009 terms) be applied to income assessed for non-employed contributions.

5. That, from 1 January 2010, the contribution rate for non-employed persons over 65 be increased from 2.6% of income to 2.9% of income.

6. That the grant from General Revenue to the Guernsey Insurance Fund shall remain on a formula-led basis, but the current 15% of contribution receipts to that Fund be reduced from 1 January 2010 to a percentage which, with the grant to the Guernsey Health Service Fund, results in the same overall cost to General Revenue as in 2009.

7. That the grant from General Revenue to the Guernsey Health Service Fund shall remain on a formula-led basis, continuing at 12% of contribution receipts to that Fund.

8. That the States direct the preparation of such legislation as may be necessary to give effect to their above decisions.

STATES ASSEMBLY AND CONSTITUTION COMMITTEE

AMENDMENTS TO
THE REFORM (GUERNSEY) LAW, 1948, AS AMENDED
THE RULES OF PROCEDURE OF THE STATES OF DELIBERATION
THE RULES RELATING TO THE CONSTITUTION AND OPERATION OF STATES DEPARTMENTS AND COMMITTEES AND
THE CODE OF CONDUCT FOR MEMBERS OF THE STATES OF DELIBERATION

The Presiding Officer
The States of Guernsey
Royal Court House
St. Peter Port

15th June 2009

Dear Sir

Executive Summary

This report proposes amendments to:

- the Reform (Guernsey) Law, 1948, as amended
  - changing the quorum of the States of Deliberation to 24
  - including a caution as a sanction to be available against an offending People's Deputy
- the Rules of Procedure of the States of Deliberation
  - defining the meaning of a proposition "to take note of the report"
  - allowing notice of oral questions to be given either in writing or electronically
  - requiring proposed answers to oral questions to be sent to the Presiding Officer and HM Procureur by noon on the day preceding the States meeting and to the questioner by 5.00 p.m. that day
  - requiring proposed answers to written questions to be sent to the Presiding Officer and HM Procureur by noon on the day preceding the day on which it is proposed to reply to the questions
  - requiring Members to ensure that all mobile telephones and other electronic devices remain switched off whilst the States are sitting

- o requiring the names of seconders of amendments and sursis to be furnished prior to circulation
- o providing that the rules which presently apply to the elections held quadrennially following General Elections shall also apply in respect of casual vacancies
- o providing that the election of the Minister of the Treasury and Resources Department shall be held before those of the ministers of the other departments
- o requiring the Chief Minister to publish the order in which the election of ministers and chairmen is to be held and the names of the candidates whom he intends to nominate for those offices not later than 4.00 p.m. on the day preceding the elections
- o excluding candidates who gain fewer than six votes in preliminary ballots from taking part in later ballots
- o determining that elimination ballots be held when two or more candidates have equal fewest votes
- o providing that the rules applicable to the election of chairmen and members of committees shall apply to the election of chairmen and members of non-governmental bodies
- o revising the procedure to be followed when it is sought to debate an appendix report
- o requiring Members to declare in the States the interests of their spouse, infant children and companies in which they have a controlling interest on their or their spouse's or children's behalf
- o extending the meaning of "spouse" to include cohabitees insofar as it relates to the declaration of financial interests

❖ the Rules relating to the Constitution and Operation of States Departments and Committees

- o providing that if the Deputy Chief Minister ceases to be a minister he shall automatically cease to be Deputy Chief Minister
- o providing that a Deputy Minister or other member shall represent the department concerned at Policy Council meetings in the absence of the minister and during a vacancy in the office of minister
- o making provision for urgent decisions to be taken in cases where a department or committee is inquorate
- o making special provisions for the Emergency Powers Authority in the event of it being inquorate

- o extending the meaning of "spouse" to include cohabitees insofar as it relates to the declaration of interests at meetings of departments and committees
- o changing the titles of Chief Minister, Deputy Chief Minister, Minister and Deputy Minister to President of the Policy Council, Vice-President of the Policy Council, President and Vice-President respectively

❖ the Code of Conduct for Members of the States of Deliberation

- o confirming that 'confidential information' includes minutes and other papers circulated to members of departments and committees
- o extending the sanctions which a Code of Conduct Panel may recommend to including removal from a particular office
- o determining that the States may caution a Member who has refused a caution offered by a Code of Conduct Panel
- o making provision for complaints relating to members of the States Assembly and Constitution Committee to be referred to a special panel rather than to the Chief Minister
- o applying the provisions relating to the declaration of gifts etc. to include those received from companies or organisations in which Members or their close family have a controlling interest
- o extending the meaning of "close family" to include cohabitees insofar as it relates to the declaration of gifts and hospitality received
- o excluding mediation from the code of conduct process.

Report

The Reform (Guernsey) Law, 1948, as amended

Article 3 – Quorum

1. Article 3 of the Law states that the quorum of the States is the Presiding Officer and 20 Members. However, if 30 or fewer Members are present there are special voting provisions which require a recorded vote to be taken. In those circumstances a resolution or amendment is not declared carried or lost unless at least 20 Members vote and the majority vote is at least twice as great as the minority vote. When a resolution or an amendment is declared ineffective for those reasons the Presiding Officer has to bring it before the States on a subsequent day when (regardless of whether or not there are 30 Members present) it shall be declared carried or lost by a simple majority.

2. At meetings of departments and the committees the quorum applicable is the nearest whole number above one-half of the number of voting members. The

Committee is of the opinion that the quorum of the States of Deliberation should not be less than that applicable at meetings of departments and committees. This would mean that 24 Members would form a quorum: with the quorum increased from 20 to 24 the Committee does not believe that there would be a continuing necessity for the rather complicated provisions currently applicable when the number of voting Members present is between 20 and 30.

3. The quorums in the parliaments of the Crown Dependencies is as follows:

	Members	*Quorum*	*%*
Guernsey - present	47	20	42.5
Guernsey - proposed	47	24	51.1
Jersey	53	27	50.9
Isle of Man: House of Keys	24	13	54.2
Legislative Council	11	5	45.5

4. The following change to Article 3 of the Reform (Guernsey) Law, 1948, as amended is proposed:

- Repeal the provisions Article 3(1), (2) and (3) and replace with a provision setting the quorum of the States of Deliberation as the nearest whole number above one-half of the number of voting members.

The Rules of Procedure of the States of Deliberation

Rule 2 – Reports etc. – "To Note" propositions

5. In a number of recent debates Members have expressed concern as to the implication of approving a proposition "to note the report". A "to note" proposition is put when the report concerned does not call for any specific action or policy to be approved but it may contain statements which some Members would not wish to endorse. The difficulty is that Members do not wish to vote in favour of noting the report if doing so is taken as support for the entire content of the report.

6. Whilst the Committee acknowledges that there are occasions when a proposition "to note the report" is appropriate for the very reason that it lacks specificity it does also accept the concerns noted above. For that reason it recommends that such a proposition be formally defined in the Rules as being a neutral proposition.

7. The following changes to Rule 2 are therefore proposed:

- before the words "The matters" insert: "(1)";

- after sub-paragraph (c) insert:

"(2) A proposition the effect of which is to note the report shall be construed as a neutral motion, neither implying assent for, nor disapproval of, the contents of the report concerned.".

Rule 5 – Questions (oral)

8. Rule 5 provides that a Member may direct a question, not relating to the business of the day, to the Chief Minister, the Minister of a department or the Chairman of a committee provided that he has furnished the Presiding Officer and the person to whom the question is addressed with a copy of the question not less than five clear days before the date of the meeting.

9. There is no requirement in the Rules for a copy of the proposed answer to be sent to the Presiding Officer by the person answering the question although it has become the general practice to do so. It has been submitted to the Committee that there are often legal aspects which have been identified by neither the questioner nor the department/committee responding and that it would be helpful if Her Majesty's Procureur saw both the questions and proposed answers before the States meeting.

10. The Committee concurs with that view and recommends that the Rules be amended in that respect and also to require proposed replies to be submitted to the Presiding Officer. It is also recommended that provision be made requiring the proposed answers to be so circulated by noon on the day prior to the meeting of the States and that the said copies may be provided electronically.

11. The rules presently contain no requirement for the Member answering the question to send a copy of the proposed reply to the questioner. In most cases this does happen on a voluntary basis but the Committee is of the opinion that the questioner should be entitled to receive a copy of the reply in advance, rather than having to rely on the goodwill of the Member answering the question.

12. The following changes to Rule 5 are therefore proposed:

- in both sub-paragraphs (1)(a) and (1)(b) delete the words "a written copy thereof to the Presiding Officer," and substitute therefor: "a copy either in writing or electronic format to the Presiding Officer, Her Majesty's Procureur";

- after paragraph (1) insert:

"(2) The Chief Minister, Minister or Chairman, as the case may be, shall furnish a copy of the proposed answer either in writing or electronic format to

(a) the Presiding Officer and to Her Majesty's Procureur not later than noon on the day (excluding Saturdays, Sundays

and Public Holidays) preceding the meeting of the States;

(b) the Member asking the question not later than 5.00 p.m. on the day (excluding Saturdays, Sundays and Public Holidays) preceding the meeting of the States."

and re-number paragraphs (2) and (3) as (3) and (4).

Rule 5 – Questions (written reply)

13. As with oral questions, so with written questions legal aspects arise from time to time which have been identified by neither the questioner nor the department/committee responding. The Committee agrees that it would be helpful if Her Majesty's Procureur saw both the questions and proposed answers before the answer is distributed.

14. The following changes to Rule 6 are therefore proposed:

- in paragraph (1) before the full stop, insert: "and Her Majesty's Procureur";

- in paragraph (2) before the proviso, insert:

  "PROVIDED THAT The Chief Minister, Minister or Chairman, as the case may be, shall furnish a copy of the proposed answer either in writing or electronic format to the Presiding Officer and to Her Majesty's Procureur not later than noon on the day (excluding Saturdays, Sundays and Public Holidays) preceding the day on which it is proposed to reply to the Member who placed the question";

- in paragraph (2) delete the existing words "PROVIDED THAT" and substitute therefor: "PROVIDED FURTHER THAT".

Rule 12(8) – Communication with Non-Members

15. Rule 12(8) states: *"A Member shall not, while present in the States Chamber during a meeting, communicate (whether orally or in writing or otherwise) with any person present in the Public Gallery thereof."*. When this rule was introduced its effect was to prevent Members from communicating with anyone (other than a fellow Member) whether within or without the Chamber. In the present day, however, it would be technically possible for a Member, whilst in the Chamber, to communicate with someone on the other side of the world.

16. In the House of Commons Members must not read any book, newspaper or letter in their places except in connection with the business of the debate, nor should they conduct correspondence in the Chamber. The position regarding the use of electronic equipment in the House of Commons was set out in a statement by the Speaker on the 10th February 2005 in the following terms:

> *"I have a statement to make about the use of electronic devices in the Chamber. I am aware that a new generation of such devices is being used by Members. My predecessor ruled in 1997 that Members carrying such devices should turn off the audio function before coming into the Chamber. She also ruled that it was totally unacceptable for a Member speaking in the Chamber to be prompted by information on the screen of such a device. I have no objection to instruments that silently prompt the Members carrying them. Clearly, many Members use these devices and they serve a useful purpose, provided that they are unobtrusive.*
>
> *But I am not prepared to accept the use of electronic devices to communicate outside the Chamber nor to act as an aide-memoire by a Member participating in proceedings. This also applies to the wearing of earpieces used to receive messages. In future, the Chair will order a Member seen to be using such an electronic device while speaking to resume his or her seat immediately. ... Seated Members who disregard my ruling and use devices actively to communicate outside the Chamber will be asked to leave the Chamber forthwith."*.

17. In the Isle of Man the Tynwald Standing Orders state: *"Members shall not read a document or use electronic apparatus in the Chamber, except in connection with business before the Court."*.

18. The Jersey Standing Orders state: *"Before entering the Chamber, a member of the States must switch off any mobile telephone and every other electronic device he or she has with him or her that would be likely to disturb the proceedings of the States."* and *"A member of the States must not ... read any book, newspaper, periodical or other document in the Chamber unless its content is directly relevant to the business of the States."*.

19. A proliferation of business mobile telephones has been noted in the States Assembly in recent months. Amongst other functions these devices enable the receiving and sending of emails. The use of electronic devices distracts not only the Member using the device but also other Members sitting in close proximity. The Committee is of the opinion that the tradition of not communicating with persons in the public gallery or outside the Chamber is founded on sound principles and therefore recommends that the Rules be brought up to date to take into account modern means of communication.

20. The following changes are therefore proposed.

    - in Rule 12 delete paragraph (8) and re-number paragraphs (9) to (11) as (8) to (10);

    - after Rule 11 insert:

"Communication with Non-Members

11A (1) A Member shall not, while present in the States Chamber during a Meeting, communicate (whether orally or in writing or otherwise) with any person present in the Public Gallery thereof.

(2) Prior to the entrance of the Presiding Officer, Members shall ensure that all mobile telephones and other electronic devices are switched off and remain switched off whilst the States are sitting.".

Rule 13 – Amendments and Sursis

21. Consideration was given to the placing of amendments and sursis, in particular whether they should be supported at the time of proposition by more than two Members. The Committee, mindful of Rule 13(4) which provides a mechanism whereby amendments and sursis are not debated if they fail to attract the support of seven Members, concluded that the support of two Members was sufficient to permit an amendment or sursis to be laid before the States.

22. However, it was noted that many amendments are circulated by Her Majesty's Greffier prior to meetings of the States where the name of the seconder is not stated. The Committee has concluded that that States Members should know the identity of both the proposer and seconder of an amendment or sursis in advance of the States meeting and is therefore recommending that the Rules be amended to require the names of both movers to be notified prior to circulation.

23. The following change to Rule 13(1) is therefore proposed:

- after the words "the States" insert ", or which is delivered to the Greffier for circulation to Members,".

Rule 20 – Election of a Chief Minister, etc.

24. Rule 20 (1) states the order in which elections are to be held following each General Election of People's Deputies. The rule is silent, however, as to the procedure to be adopted if the Chief Minister and ministers all resign mid-term, as happened in early 2007. On that occasion the Presiding Officer used his discretion and proceeded as if the rule applied to mid-term elections. The Committee considers that the matter should be put beyond doubt by the introduction of an amendment to the rule.

25. The rule also states that the Chief Minister shall determine the order in which the ministers are elected. Subject to one reservation, the Committee agrees that the Chief Minister should continue to have unfettered discretion in determining the order of the elections.

26. The reservation relates to the position of the Minister of the Treasury and Resources Department. In the report to the States entitled 'The Future Machinery of Government in Guernsey'[1], a clear distinction is drawn between the 'corporate' nature of the mandates of the Policy Council and the Treasury and Resources Department and those of the other departments. The Committee believes that this corporate aspect of the Treasury and Resources Department sets it apart from the other departments and that its minister should, therefore, be elected before all the other ministers. For this reason the Committee is proposing that the rule be amended accordingly.

27. The Committee also considered whether the Chief Minister should be required to publish in advance of the States meeting the order in which the election of ministers and chairmen are to proceed and the candidates whom he intends to propose. The Committee agreed by a majority that he should be required to do so. In view of the short period which elapses between the election of the Chief Minister and the election of the ministers and chairmen it is recommended that the Rules be amended to require the Chief Minister to notify Her Majesty's Greffier by 4.00 p.m. on the day preceding the election of the ministers and chairmen of the order of the elections and the proposed candidates and that the Greffier in turn forward the said information electronically to the Members of the States.

28. Rule 20(2) (c) provides that when there are more than two candidates for the office of Chief Minister and no candidate has received a majority of the votes cast, further ballots are held, excluding the candidate who received the fewest votes in the previous ballot.

29. In the election for a Chief Minister held on the 1st May, 2008 there were six candidates. In the first ballot the candidates X, Y and Z polled four, three and three votes respectively. The second ballot was an elimination vote between Y and Z to determine which of them would not go forward to the next round. In the third ballot (Z have been eliminated) X and Y polled five and three votes respectively: Y was consequently eliminated. In the fourth ballot X polled four votes and was eliminated.

30. There can be a reasonable expectation that each candidate will receive a minimum of three votes (his/her own, the proposer and the seconder). The Committee is of the view that any candidate who cannot secure at least three other votes should be eliminated in the first ballot and therefore recommends that any candidate securing less than six votes in any ballot shall not proceed to subsequent ballots. Had this rule been in place in 2008 X, Y and Z would have been excluded in the first ballot and the election would have been determined in three, rather than six, ballots.

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[1] Report of the Advisory and Finance Committee - Billet d'État VII of 2003

31. Reference is made above to the need for a ballot to be held between the two candidates who had secured only three votes each in the 2008 election. The Rules are, in fact, silent on this matter but the Presiding Officer again used his discretion to order an elimination ballot. Whilst the matter was satisfactorily resolved, the Committee takes the view that the matter should be put beyond doubt by the introduction of an appropriate rule.

32. The following changes to Rule 20 are therefore proposed:

- in paragraph (1) delete the words "The elections held quadrennially following each General Election of People's Deputies" and substitute therefor: "When at any time there are vacancies in two or more of the following offices, the elections to fill those vacancies";

- in paragraph (1) delete sub-paragraph (b) and substitute therefor:

  "(b) the Minister of the Treasury and Resources Department;

  (c) the Ministers of the other departments"

  and re-letter existing sub-paragraphs (c) to (g) as (d) to (h);

- after paragraph (1) insert:

  "(1A) (a) The Chief Minister shall notify the Greffier not later than 4.00p.m. on the day preceding the meeting of the States convened for the election of Ministers and Chairmen, of –

  (i) the order in which the election of the Ministers and Chairmen is to be held;

  (ii) the names of the candidates whom he intends to propose for the respective offices.

  (b) The Greffier shall forward the information referred to in (a) above to the Presiding Officer and, in electronic format, to every Member who has furnished him with an email address.";

- in sub-paragraph (2)(c) after the word "excluding" insert:

  "every candidate who received fewer than six votes in the previous ballot or, when there is no such candidate,";

- after sub-paragraph (2)(c) insert:

  "(d) if two or more candidates having secured six votes or more are

tied in polling the fewest votes, or if the process set out in sub-paragraph (c) would result in the elimination of all but one of the candidates, a further ballot shall be held in respect of such candidates only to determine which of them shall be eliminated from further ballots.".

Rule 20 (5) and (6) – election of Chairmen and Members of Non-Governmental Bodies

33. Rule 20(5) sets out the procedure regarding the election of chairmen of committees and Rule 20(6) relates to the election of members of departments and committees. The Rules do not, however, make any provision regarding the election of chairmen or members of the non-governmental bodies (i.e. Elizabeth College Board of Directors, Ladies' College Board of Governors and Priaulx Library Council).

34. The Committee believes that elections of persons to serve on the non-governmental bodies should be conducted in accordance with the rules applicable to the election of chairmen of committees and members of departments and committees and therefore proposes the following changes to Rule 20:

- in paragraph (5) after the word "Committee" insert "or Non-Governmental Body";

- after paragraph (6) insert:

  "(7) On a proposition to elect members of a Non-Governmental Body, the Presiding Officer shall first invite the Chairman thereof, if he be a Member of the States, and thereafter other Members to propose eligible candidates. Nobody shall speak about a candidate at that stage; and if no more candidates are proposed and seconded the Presiding Officer shall put the election of the candidate(s) to the vote without speeches. If there are more candidates than vacancies the Presiding Officer shall invite each proposer to speak, for not more than 5 minutes in respect of each candidate proposed by him, before voting takes place; and neither the candidates nor any other member shall be entitled to speak.".

Rule 21(4) – Motion to debate an Appendix Report

35. Rule 21(4) states that when notice of a motion to debate an appendix report has been given, the Presiding Officer shall, immediately after the conclusion of the ordinary business listed for debate in the Billet d'État and having heard the proposer of the motion and the minister or chairmen of the department or committee concerned thereon, put the motion to the vote. If the vote is carried the States then proceed to debate the appendix report; if the motion is lost that is the end of the matter.

36. It has been submitted to the Committee that this procedure can take place at the conclusion of a session which may have lasted several days and at a time when Members do not relish further debate and that their opinion on the merits or otherwise of debating the appendix report are thus coloured. The suggestion was made that the decision as to whether or not an appendix report be debated should be made at the start of the session but that the debate itself would still take place after the ordinary business. The Committee accepts this reasoning therefore recommends that the Rules be amended accordingly.

37. The following changes to Rule 21 are therefore proposed:

- in paragraph (4) delete the words "after the conclusion" and substitute therefor "before the commencement";

- in paragraph (5) after the words "is carried" insert: "the matter shall stand adjourned to the conclusion of the ordinary business listed for debate in the said Billet d'État at which time".

Rule 12(9) and Schedule 1 – Declaration of Financial Interests

38. In the course of its deliberations the Committee considered the rules relating to the registration of interests and declarations of interests in both Jersey and the Isle of Man. Whilst it was of interest to note the systems in those jurisdictions the Committee concluded that, with the exception of the matters referred to in the following paragraphs, our rules remain appropriate and should continue un-amended.

39. Rule 12(9) requires a Member who has a direct or special interest in the matter being debated to declare that interest before speaking on the proposition or, if he does not speak, before voting thereon.

40. Rule 23 provides that Members shall lodge with Her Majesty's Greffier a declaration of their financial interests and prescribes that declarations shall be made in the form set out in Schedule 1 to the Rules. Parts 3 and 4 of the Declaration requires Members to declare interests they, or their spouses or infant children, have in real property in the Bailiwick and in shareholdings and other material interests in companies.

41. There is, therefore, an inconsistency between the declarations which have to be made verbally in the States and the written declarations which have to be lodged with HM Greffier in that the verbal declarations relate only to the Member's own interests and not to those of his spouse, infant children or companies in which he or they have a controlling interest. The Committee recommends that Rule 12(9) should be amended to require the declaration of interests relating to spouses, infant children and companies in which he has a controlling interest on his own or their behalf.

42. Whilst a spouse's interests have to be declared there is no requirement for a member to declare the interests of his/her partner or cohabitee. The Committee accepts the necessity for a spouse's interests to be declared and believes that it is illogical not to require a partner's or cohabitee's interests to be similarly declared. The Committee recommends that references to the word "spouse" in Rule 12(9) and Schedule 1 of the Rules be defined as including co-habiting partners.

43. The following change to Rule 12(9) is therefore proposed:

- after the words "A Member who" add

  "(or whose spouse, cohabiting partner, infant children or any company in which he has a controlling interest on his or their behalf)".

44. The following change to Schedule 1 to the Rules is therefore proposed:

- delete the Note at the end of the Schedule and substitute therefor:

  "Notes:

  1. Members are not required to disclose the monetary value of any interest.

  2. In this Declaration of Financial Interests 'spouse' includes any co-habiting partner.".

The Rules for the Constitution and Operation of States Departments and Committees

Rule 3 – Deputy Chief Minister must also be a minister: attendance of departmental representatives at meetings of the Policy Council

45. Rule 20(1) of the Rules of Procedure provides that after ministers have been elected there shall be the election of "one of the Ministers as Deputy Chief Minister". As worded it means that being a minister is a condition precedent to election as a Deputy Chief Minister. However, there is no provision stating that a Deputy Chief Minister, once elected can only hold office as Deputy Chief Minister for so long as he remains a minister. The Committee takes the view that the matter should be put beyond doubt by the introduction of an appropriate rule.

46. Rule 3(4) states that when a minister is unable to attend a meeting of the Policy Council he may nominate either the deputy minister or another voting member to attend a meeting of the Council in his stead. It is therefore at the discretion of the Minister concerned as to whether or not he nominates a member of his department to attend meetings of the Policy Council when he is unable to do so. A fundamental rôle of the Policy Council is to provide co-ordination between

the departments and the Committee is of the view that each department should be represented at all meetings of the Council whenever possible.

47. It is proposed therefore that the rules be amended to provide that when a Minister is unable to attend a meeting, or when that office is vacant, the department concerned shall be represented by the Deputy Minister and in his absence by one of the ordinary members in order of seniority. As there may be rare occasions when a minister is unable to give notice of his non-attendance (for example if he is taken ill immediately before a meeting) it is proposed that the rule will take effect other than in unforeseen circumstances. For that reason it is not proposed to make any changes to the quorum of the Policy Council which will remain at six.

48. The following changes to Rule 3 are therefore proposed:

- after paragraph (2) insert:

  "(3) If the Deputy Chief Minister ceases to be a minister before his term of office as Deputy Chief Minister has been completed a new Deputy Chief Minister shall be elected to serve the unexpired portion of the Deputy Chief Minister's term of office."

  and re-number paragraphs (3) to (5) as (4) to (6)

- Delete re-numbered paragraph (5) and substitute therefor:

  "(5) Other than in unforeseen circumstances, when a Minister is unable to attend a meeting of the Policy Council, or when there is a vacancy in that office, the Department concerned shall be represented by the Deputy Minister or, if he is unable to attend, or when there is a vacancy in that office, by one of the other voting members of the Department (the order of which shall be determined by reference to the said members' length of service as members of the Department or, when two or more members have the same length of service, by resolution of the Department) , save that the representative shall not be the Minister of another department. Such representatives shall be entitled to vote at Policy Council meetings.".

Rules 13 and 17 – Quorum

49. Rule 13 provides that the quorum of the Policy Council and of the departments and committees is the nearest whole number above one-half of the number of voting members, i.e. for all the departments the quorum is three members. Whilst it is usually possible to avoid inquoracies by planning absences from the Island, inevitably there are occasions when a department or committee is rendered inquorate because the majority of its members are either indisposed or

absent from the Island, or there are vacancies in membership.

50. However the situation is more likely to arise in the period commencing on the 1st May following a General Election of People's Deputies and ending when the elections of the ordinary members of departments and committees have been concluded. This period may be up to 10 days in length.

51. The Committee is of the opinion that provision should be made in the Rules to allow an inquorate department or committee to take urgent decisions notwithstanding its inquoracy. It is not intended that the provision should allow for non-urgent matters to be considered: the only business transacted under the new provision would be that which could not await a normally constituted meeting.

52. It is proposed that the remaining available members of the department or committee be supplemented by the most senior Member(s) of the States by length of service. However, when an inquoracy has been anticipated, it is proposed that the department or committee will be given the discretion to decide by resolution to authorise the remaining member(s) to take urgent decisions.

53. The following changes to Rule 13 are therefore proposed:

- after paragraph (3), insert

"(4) When a department or committee is inquorate and an urgent decision is required, the insufficiency of members shall be replaced by the most senior Member(s) of the States by length of service.

(5) Notwithstanding the foregoing, when, whilst still quorate, an inquoracy has been anticipated the department or committee concerned may by resolution authorise the remaining one or two member(s) thereof to take decisions on behalf of the department or committee, but only in respect of matters of urgency which cannot be deferred until the department or committee again becomes quorate.".

54. Rule 17 provides that the quorum of the Emergency Powers Authority is two. That rule also prescribes the constitution of the Authority. It is absolutely essential that the Authority should never be rendered inquorate given its vital rôle in times of emergency. As the Emergency Powers Authority is constituted as "an authority of the Policy Council" it is proposed that any inquoracy shall first be made up from ministers who are not panel members (the order of which is to be determined by reference to their length of service as Members of the States) and thereafter by Members of the States by length of service. Given its special constitution it will also be necessary to prescribe the precedence for determining the Chairman of the Authority.

55. The following changes to Rule 17 are therefore proposed:

- Before the full stop at the end of paragraph (3) insert:

  "', save that when the Authority is inquorate and an urgent decision is required, the insufficiency of members shall be replaced by minister(s) who are not members of the Panel (the order of which shall be determined by reference to their length of service as Members of the States) and, if there remains an insufficiency, by the most senior Member(s) of the States by length of service";

- Delete the words in parentheses at the end of paragraph (1) and substitute therefor:

  "The precedence for determining the Chairman of the Authority shall be:

  (i) The Chief Minister;
  (ii) The Deputy Chief Minister;
  (iii) The senior Panel member or the minister of the Home Department if he is senior to any Panel member;
  (iv) The senior minister who is not a Panel member;
  (v) The senior Member of the States by length of service.".

Rule 15 – Declaration of Interest at Department and Committee Meetings

56. Earlier in this report reference is made to the declaration of financial interests required pursuant to the Rules of Procedure of the States of Deliberation. In the Committee's view the same principle applies in respect of the declaration of interests at department and committee meetings. Consequently the Committee recommends that the word "spouse" in Rule 15 be defined as including co-habiting partners.

57. The following change to Rule 15 is therefore proposed:

- after paragraph (1) insert:

  "(2) In the preceding paragraph 'spouse' includes any co-habiting partner."

  and re-number paragraphs (2) and (3) as (3) and (4).

Title of Chief Minister, Deputy Chief Minister, Minister and Deputy Minister

58. In the course of its consultations regarding the revision of the Rules, the Committee received a number of representations regarding the use of the title of "Minister". The arguments against the use of that title might be summarised as

follows:

- The title is inaccurate because Guernsey does not (unlike Jersey and the Isle of Man) have an executive form of government;

- Guernsey has a committee system and the ministers would be more correctly styled president or chairman;

- It is misleading to claim to have ministers when they do not have ministerial powers.

It was felt that people outside the Island would have greater respect for a title which accurately reflects the rôle of the office-holder.

59. The Committee considers that the arguments against the retention of the title are substantial. The simple fact is that Guernsey Ministers do not have the authority to conclude an agreement with another party without having obtained the prior authority of the States of Deliberation (or when appropriate their Department). Outside this Island there is likely to be a presumption that a Guernsey minister has the same degree of authority as that enjoyed by a United Kingdom or Jersey or Isle of Man minister but that is plainly not the case.

60. But does it really matter what title is used? A title has to be an honest reflection of the position held by the office-holder – something which does not hold true in respect of Guernsey ministers.

61. That being so, what should they be called if it is not "minister"? Since the States first established boards and committees in the 18th/19th centuries they have almost invariably been headed by presidents and we believe that that tradition serves as a worthy precedent. We have concluded therefore that as the present departments replaced the pre-May 2004 authorities, boards, councils and committees of the States, all of which were headed by a president, that the title of minister be replaced with "president". Thus, for example, the minister of the Treasury and Resources Department would become the President of the Treasury and Resources Department and the deputy ministers would be renamed vice presidents.

62. It follows that if the title of minister is changed then the title of Chief Minister should also be changed. The Committee has concluded that the appropriate title for that office would be President of the Policy Council with a parallel change in the title of the Deputy Chief Minister.

63. A number of enactments contain a reference to the titles which it proposed to change and it would be necessary to enact a brief Ordinance pursuant to the Public Functions (Transfer and Performance) (Bailiwick of Guernsey) Law, 1991.

64. The following are therefore proposed:

- that for the titles of Chief Minister, Deputy Chief Minister, Minister and Deputy Minister wherever they occur in the Rules of Procedure of the States of Deliberation, the Rules relating to the Constitution and Operation of States Departments and Committees, the Code of Conduct for Members of the States of Deliberation, the Rules for Payments to States Members, Former States Members and Non-States Members of States Departments and Committees and in paragraph (a)(v) of the mandate of the States Assembly and Constitution Committee there shall be substituted respectively the titles of President of the Policy Council, Vice President of the Policy Council, President and Vice President;

- that legislation be enacted pursuant to the Public Functions (Transfer and Performance) (Bailiwick of Guernsey) Law, 1991 renaming the said offices.

Code of Conduct for Members of the States of Deliberation

Confidential Information

65. In the course of the Committee's consultations with Members of the States the point was raised as to whether department/committee minutes and other papers circulated to members thereof in the discharge of their duties were to be treated as confidential. The Committee is of the opinion that such documents ought to be treated at all times as confidential unless the department or committee concerned resolves otherwise. The Committee therefore recommends that paragraph 18 of the Code be amended accordingly.

66. The following changes to the Code are therefore proposed:

- after paragraph 18 add:

  "18A. For the avoidance of doubt the 'confidential information' referred to in the previous paragraph includes, but is not limited to, Department and Committee minutes and other papers circulated to members thereof. The content of such minutes and other papers is not to be disclosed to any third party other than by resolution of the Department or Committee concerned.".

Paragraphs 33 and 34 – Sanctions which may be recommended by the Investigation Panel

67. The Code provides that where a complaint has been substantiated and the Panel is of the opinion that the breach of conduct is of a minor nature it can dispose of the matter by way of a caution. If the Member refuses to accept the caution (and in all other cases) the Panel must refer the matter to the States Assembly and

Constitution Committee. In April 2009 the Panel reported to the Committee that a certain Member had refused to accept a caution but, in so reporting, did not express any opinion as to what proposal should be laid before the States in their consideration of the matter.

68. It was therefore left to the Committee to determine what recommendation should be made to the States. Having taken into account legal advice, the Committee concluded that it could recommend that the Member concerned be cautioned by the States, notwithstanding that he had refused to accept the caution offered by the Investigation Panel. However, the Committee believes that it should be made explicit in the Code that a caution may be administered by the States in cases where a Member has declined to accept a caution from the Investigation Panel.

69. When the Panel deems that a caution is not sufficient, it may recommend either a reprimand, suspension or expulsion. Thus whilst the Panel can recommend that a Member be expelled totally as a People's Deputy it has no power to recommend that the Member be removed from a particular office.

70. This was considered by some Members to be a short-coming in the Rules when the States debated a Panel report relating to a certain Member in January 2009. In that case the Panel had recommended a formal reprimand and in its report had stated *"Whether the Deputy should be relieved of his duties as …[named offices] … is one purely for the States of Deliberation as a whole to consider, if so minded."*. The result was that the States were faced with two debates effectively on the same matter: the report of the Investigation Panel and a vote of no confidence requête.

71. It seems to the Committee to be illogical that the Panel can recommend the expulsion of a Member from the States but cannot recommend the less far-reaching remedy of recommending that he or she be removed from a particular office. Consequently the Committee recommends that the Code of Conduct be amended to so allow.

72. The following changes to the Code are therefore proposed:

- at the end of paragraph 33 insert: "Notwithstanding a Member's refusal to accept a caution, the States may resolve that the Member be cautioned.";

- in paragraphs 33 and 34 delete the words "or expelled," wherever they occur and substitute therefor: ", removed from a particular office or expelled,".

73. Article 20(F) of the Reform (Guernsey) Law, 1948, as amended is the section of the Law which empowers the States to adopt a code of conduct. Paragraph 2(e) of that Article states that the sanctions available against an offending People's

Deputy may include reprimand, suspension or expulsion. The Committee has been advised that it would be sensible to amend the list of sanctions available to include specifically a caution. Consequently the Committee recommends that the Reform Law be amended accordingly.

Complaints relating to the Chairman or Members of the States Assembly and Constitution Committee

74. Rule 34 provides that where the complaint concerns the Chairman or a member of the States Assembly and Constitution Committee and where the Panel is of the opinion that the member should be formally reprimanded, etc. it shall report its findings to the Chief Minister, who in turn shall report to the States. This provision was drafted before a distinction was made between Parliamentary Committees and other bodies. That distinction now having been made, the Committee is of the view that it is no longer appropriate for the Chief Minister to be required to deal with such matters. The Committee has therefore considered what alternative provision should be made. It has concluded that the rôle normally fulfilled by the States Assembly and Constitution Committee should, in the case of a complaint against the Chairman or a member of that Committee be carried out instead by a panel comprising the five most senior members of the States who do not have a seat on the Committee.

75. The following change to paragraph 34 of the Code is therefore proposed:

- delete the words “the Chief Minister” and substitute therefor: “a panel comprising the five most senior Members of the States by length of service who do not have a seat on the States Assembly and Constitution Committee”.

Schedule 1 – Gifts, Benefits and Hospitality

76. The Law Officers have drawn the Committee’s attention to paragraph 3 of Schedule 1 to the Code. The final sentence of that paragraph states: *“Any similar gift or benefit which is received by any company or organisation in which the Member and any of his close family jointly have a controlling interest must also be registered.”*. Presently therefore the only gifts or benefits declarable under this provision are those received from companies or organisations in which the Member and close family jointly have a controlling interest. It would not include gifts or benefits received where there was not a joint controlling interest. The Committee concurs with the Law Officers in their belief that that was not the original intention of the States and consequently recommends an appropriate amendment to rectify the matter.

77. Earlier in this report reference is made to the declaration of interests required pursuant to the Rules of Procedure of the States of Deliberation and also at department and committee meetings. In Schedule 1 to the Code Members are required to declare gifts or material benefits received by any close family or

associates. The Committee recommends that the word "close family" in the Schedule be defined as including co-habiting partners.

78. The following change to Schedule 1 to the Code is therefore proposed:

- in paragraph 3 delete the words "and any of his close family jointly" and substitute therefor: "and/or any of his close family";
- after paragraph 8 insert:

  "9. In this Schedule 'close family' includes any co-habiting partner.".

Mediation process

79. In one of the first cases to be referred to the Code of Conduct Panel the Chairman thereof instituted what amounted to a mediation process between the two parties involved although the Code makes no provision for such a process. The Chairman has advised the Committee that the mediation process "could not have proceeded without the consent of both parties" and that in the case in question the mediation proceeded "with the co-operation of both parties".

80. Whilst the Committee does not doubt the good intentions of the Chairman of the Panel it has reservations regarding the introduction of a mediation process for two reasons. Firstly, it does not believe that it was the intention of the States for such process to take place otherwise express provision would have been made for it in the Code. Secondly – and perhaps more importantly – it does not necessarily bring about a closure to the matter.

81. The Committee believes that when a matter is formally referred to the Code of Conduct Panel it is because circumstances are such that a formal procedure is required to determine the culpability or otherwise of the accused Member. The recommendation of the Committee is that it should be made explicit in the Rules that a mediation process does not fall within the ambit of the Code.

82. The following change to the Code is therefore proposed:

- after paragraph 34 insert:

  "34A. For the avoidance of doubt mediation between the complainant and the accused Member is not permitted in the processing of complaints made pursuant to this Code of Conduct.".

Consultation

83. The Presiding Officer and HM Greffier have advised the Committee on matters which relate to the Rules of Procedure of the States of Deliberation as required by Rule 14(5) of the Constitution and Operation of States Departments and Committees. The Law Officers have also been consulted.

Recommendations

84. The States Assembly and Constitution Committee recommends the States to resolve:

 1. that the Reform (Guernsey) Law, 1948, as amended[2] be further amended as follows:

  (a) repeal Articles 3 (1), (2) and (3) and replace with a provision setting the quorum of the States of Deliberation as the nearest whole number above one-half of the number of voting members;

  (b) in paragraph 2 (e) of Article 20F include a caution in the list of sanctions to be available against an offending People's Deputy;

 2. that the Rules of Procedure of the States of Deliberation shall be amended with immediate effect as follows:

  (a) in Rule 2 –

   (i) before the words "The matters" insert: "(1)";

   (ii) after sub-paragraph (c) insert:

    "(2) A proposition the effect of which is to note the report shall be construed as a neutral motion, neither implying assent for, nor disapproval of, the contents of the report concerned.";

  (b) in Rule 5 –

   (i) in both sub-paragraphs (1)(a) and (1)(b) delete the words "a written copy thereof to the Presiding Officer," and substitute therefor:

---

[2] It may assist Members of the States to have the precise wording of Article 3(4) of The Reform (Guernsey) Law, 1948, as amended which applies to the above recommendation.

"... any resolution of the States of Deliberation directing the preparation of legislation to repeal or vary any of the provisions of this Law which is carried by a majority of less than two-thirds of the members present and voting shall not be deemed to have been carried before the expiration of seven days from the date of the resolution:

Provided that where before the expiration of the aforesaid seven days an application in writing signed by not less than seven members of the States of Deliberation is made in that behalf to the Presiding Officer such resolution shall be brought back before the States of Deliberation by the Presiding Officer as soon as may be after the expiration of three months from the date of the resolution whereupon such resolution shall be declared lost unless confirmed by a simple majority.".

"a copy either in writing or electronic format to the Presiding Officer, Her Majesty's Procureur";

(ii) after paragraph (1) insert:

"(2) The Chief Minister, Minister or Chairman, as the case may be, shall furnish a copy of the proposed answer either in writing or electronic format to

(a) the Presiding Officer and to Her Majesty's Procureur not later than noon on the day (excluding Saturdays, Sundays and Public Holidays) preceding the meeting of the States;

(b) The Member asking the question not later than 5.00 p.m. on the day (excluding Saturdays, Sundays and Public Holidays) preceding the meeting of the States."

and re-number paragraphs (2) and (3) as (3) and (4);

(c) in Rule 6 –

(i) in paragraph (1) before the full stop, insert:

"and Her Majesty's Procureur";

(ii) in paragraph (2) before the proviso, insert:

"PROVIDED THAT The Chief Minister, Minister or Chairman, as the case may be, shall furnish a copy of the proposed answer either in writing or electronic format to the Presiding Officer and to Her Majesty's Procureur not later than noon on the day (excluding Saturdays, Sundays and Public Holidays) preceding the day on which it is proposed to reply to the Member who placed the question";

(iii) in paragraph (2) delete the existing words "PROVIDED THAT" and substitute therefor:

"PROVIDED FURTHER THAT";

(d) after Rule 11 insert:

"Communication with Non-Members

11A (1) A Member shall not, while present in the States Chamber during a Meeting, communicate (whether

orally or in writing or otherwise) with any person present in the Public Gallery thereof.

(2) Prior to the entrance of the Presiding Officer, Members shall ensure that all mobile telephones and other electronic devices are switched off and remain switched off whilst the States are sitting.";

(e) in Rule 12 –

(i) in paragraph (9) after the words "A Member who" add:

"(or whose spouse, co-habiting partner, infant children or any company in which he has a controlling interest on his or their behalf)";

(ii) delete paragraph (8) and re-number paragraphs (9) to (11) as (8) to (10);

(f) in Rule 13(1) –

after the words "the States" insert:

", or which is delivered to the Greffier for circulation to Members,";

(g) in Rule 20 –

(i) in paragraph (1) delete the words "The elections held quadrennially following each General Election of People's Deputies" and substitute therefor:

"When at any time there are vacancies in two or more of the following offices, the elections to fill those vacancies";

(ii) in paragraph (1) delete sub-paragraph (b) and substitute therefor:

"(b) the Minister of the Treasury and Resources Department;

(c) the Ministers of the other departments"

and re-letter existing sub-paragraphs (c) to (g) as (d) to (h);

(iii) after paragraph (1) insert:

"(1A) (a) The Chief Minister shall notify the Greffier not later than 4.00p.m. on the day preceding the meeting of the States convened for the election of Ministers and Chairmen, of –

(i) the order in which the election of the Ministers and Chairmen is to be held;

(ii) the names of the candidates whom he intends to propose for the respective offices.

(b) The Greffier shall forward the information referred to in (a) above to the Presiding Officer and, in electronic format, to every Member who has furnished him with an e-mail address.";

(iv) in sub-paragraph (2)(c) after the word "excluding" insert:

"every candidate who received fewer than six votes in the previous ballot or, when there is no such candidate,";

(v) after sub-paragraph (2)(c) insert:

"(d) if two or more candidates having secured six votes or more are tied in polling the fewest votes, or if the process set out in sub-paragraph (c) would result in the elimination of all but one of the candidates, a further ballot shall be held in respect of such candidates only to determine which of them shall be eliminated from further ballots.";

(vi) in paragraph (5) after the word "Committee" insert

"or Non-Governmental Body";

(vii) after paragraph (6) insert:

"(7) On a proposition to elect members of a Non-Governmental Body, the Presiding Officer shall first invite the Chairman thereof, if he be a Member of the States, and thereafter other Members to propose

eligible candidates. Nobody shall speak about a candidate at that stage; and if no more candidates are proposed and seconded the Presiding Officer shall put the election of the candidate(s) to the vote without speeches. If there are more candidates than vacancies the Presiding Officer shall invite each proposer to speak, for not more than 5 minutes in respect of each candidate proposed by him, before voting takes place; and neither the candidates nor any other member shall be entitled to speak.".

(h) in Rule 21 –

(i) in paragraph (4) delete the words "after the conclusion" and substitute therefor:

"before the commencement";

(ii) in paragraph (5) after the words "is carried" insert:

"the matter shall stand adjourned to the conclusion of the ordinary business listed for debate in the said Billet d'État at which time";

(i) in Schedule 1 –

delete the Note at the end of the Schedule and substitute therefor:

"Notes:

1. Members are not required to disclose the monetary value of any interest.

2. In this Declaration of Financial Interests 'spouse' includes any co-habiting partner.";

3. that the Rules relating to the Constitution and Operation of States Departments and Committees shall be amended with immediate effect, as follows:

(a) in Rule 3 –

(i) after paragraph (2) insert:

"(3) If the Deputy Chief Minister ceases to be a minister before his term of office as Deputy Chief Minister has been completed a new Deputy Chief

Minister shall be elected to serve the unexpired portion of the Deputy Chief Minister's term of office."

and re-number paragraphs (3) to (5) as (4) to (6);

(ii) Delete re-numbered paragraph (5) and substitute therefor:

"(5) Other than in unforeseen circumstances, when a Minister is unable to attend a meeting of the Policy Council, or when there is a vacancy in that office, the Department concerned shall be represented by the Deputy Minister or, if he is unable to attend, or when there is a vacancy in that office, by one of the other voting members of the Department (the order of which shall be determined by reference to the said members' length of service as members of the Department or, when two or more members have the same length of service, by resolution of the Department), save that the representative shall not be the Minister of another department. Such representatives shall be entitled to vote at Policy Council meetings.";

(b) in Rule 13 –

after paragraph (3), insert:

"(4) When a department or committee is inquorate and an urgent decision is required, the insufficiency of members shall be replaced by the most senior Member(s) of the States by length of service.

(5) Notwithstanding the foregoing, when, whilst still quorate, an inquoracy has been anticipated the department or committee concerned may by resolution authorise the remaining one or two member(s) thereof to take decisions on behalf of the department or committee, but only in respect of matters of urgency which cannot be deferred until the department or committee again becomes quorate.";

(c) in Rule 15 -

after paragraph (1) insert:

"(2) In the preceding paragraph 'spouse' includes any co-habiting partner."

and re-number paragraphs (2) and (3) as (3) and (4);

(d) in Rule 17 -

(i) Before the full stop at the end of paragraph (3) insert:

", save that when the Authority is inquorate and an urgent decision is required, the insufficiency of members shall be replaced by minister(s) who are not members of the Panel (the order of which shall be determined by reference to their length of service as Members of the States) and, if there remains an insufficiency, by the most senior Member(s) of the States by length of service";

(ii) delete the words in parentheses at the end of paragraph (1) and substitute therefor:

"The precedence for determining the Chairman of the Authority shall be:

(i) The Chief Minister;
(ii) The Deputy Chief Minister;
(iii) The senior Panel member or the minister of the Home Department if he is senior to any Panel member;
(iv) The senior minister who is not a Panel member;
(v) The senior Member of the States by length of service.";

4. that the Code of Conduct for Members of the States of Deliberation shall be amended with immediate effect, as follows:

(a) after paragraph 18 add:

"18A. For the avoidance of doubt the 'confidential information' referred to in the previous paragraph includes, but is not limited to, Department and Committee minutes and other papers circulated to members thereof. The content of such minutes and other papers is not to be disclosed to any third party other than by resolution of the Department or Committee concerned.";

(b) at the end of paragraph 33 insert:

"Notwithstanding a Member's refusal to accept a caution, the States may resolve that the Member be cautioned.";

(c) in paragraphs 33 and 34 delete the words "or expelled," wherever they occur and substitute therefor:

", removed from a particular office or expelled,";

(d) in paragraph 34 delete the words "the Chief Minister" and substitute therefor:

"a panel comprising the five most senior Members of the States by length of service who do not have a seat on the States Assembly and Constitution Committee"

(e) after paragraph 34 insert:

"34A. For the avoidance of doubt mediation between the complainant and the accused Member is not permitted in the processing of complaints made pursuant to this Code of Conduct.";

(f) in Schedule 1 –

(i) in paragraph 3 delete the words "and any of his close family jointly" and substitute therefor:

"and/or any of his close family";

(ii) after paragraph 8 insert:

"9. In this Schedule 'close family' includes any co-habiting partner.";

5. (a) that for the titles of Chief Minister, Deputy Chief Minister, Minister and Deputy Minister wherever they occur in –

(i) the Rules of Procedure of the States of Deliberation;
(ii) the Rules relating to the Constitution and Operation of States Departments and Committees;
(iii) the Code of Conduct for Members of the States of Deliberation;
(iv) the Rules for Payments to States Members, Former States Members and Non-States Members of States Departments and Committees;
(v) paragraph (a)(v) of the mandate of the States Assembly and Constitution Committee

there shall be substituted respectively the titles of President of the Policy Council, Vice President of the Policy Council, President and Vice President;

(b) that legislation be drafted pursuant to the Public Functions (Transfer and Performance) (Bailiwick of Guernsey) Law, 1991 renaming the said offices.

Yours faithfully

Ivan Rihoy
Chairman

The States are asked to decide:-

XI.- Whether, after consideration of the Report dated 15th June, 2009, of the States Assembly and Constitution Committee, they are of the opinion:-

1. That the Reform (Guernsey) Law, 1948, as amended be further amended as follow:

   (a) repeal Articles 3(1), (2) and (3) and replace with a provision setting the quorum of the States of Deliberation as the nearest whole number above one-half of the number of voting members;

   (b) in paragraph 2 (e) of Article 20F include a caution in the list of sanctions to be available against an offending People's Deputy.

2. That the Rules of Procedure of the States of Deliberation shall be amended with immediate effect as follows:

   (a) in Rule 2 –

      (i) before the words "The matters" insert: "(1)";

      (ii) after sub-paragraph (c) insert:

         "(2) A proposition the effect of which is to note the report shall be construed as a neutral motion, neither implying assent for, nor disapproval of, the contents of the report concerned.";

   (b) in Rule 5 –

      (i) in both sub-paragraphs (1)(a) and (1)(b) delete the words "a written copy thereof to the Presiding Officer," and substitute therefor:

         "a copy either in writing or electronic format to the Presiding Officer, Her Majesty's Procureur";

      (ii) after paragraph (1) insert:

         "(2) The Chief Minister, Minister or Chairman, as the case may be, shall furnish a copy of the proposed answer either in writing or electronic format to

            (a) the Presiding Officer and to Her Majesty's Procureur not later than noon on the day (excluding Saturdays, Sundays and Public Holidays)

preceding the meeting of the States;

(b) The Member asking the question not later than 5.00 p.m. on the day (excluding Saturdays, Sundays and Public Holidays) preceding the meeting of the States."

and re-number paragraphs (2) and (3) as (3) and (4);

(c) in Rule 6 –

(i) in paragraph (1) before the full stop, insert:

"and Her Majesty's Procureur";

(ii) in paragraph (2) before the proviso, insert:

"PROVIDED THAT The Chief Minister, Minister or Chairman, as the case may be, shall furnish a copy of the proposed answer either in writing or electronic format to the Presiding Officer and to Her Majesty's Procureur not later than noon on the day (excluding Saturdays, Sundays and Public Holidays) preceding the day on which it is proposed to reply to the Member who placed the question";

(iii) in paragraph (2) delete the existing words "PROVIDED THAT" and substitute therefor:

"PROVIDED FURTHER THAT";

(d) after Rule 11 insert:

"Communication with Non-Members

11A (1) A Member shall not, while present in the States Chamber during a Meeting, communicate (whether orally or in writing or otherwise) with any person present in the Public Gallery thereof.

(2) Prior to the entrance of the Presiding Officer, Members shall ensure that all mobile telephones and other electronic devices are switched off and remain switched off whilst the States are sitting.";

(e) in Rule 12 –

(i) in paragraph (9) after the words "A Member who" add:

"(or whose spouse, co-habiting partner, infant children or any company in which he has a controlling interest on his or their behalf)";

(ii) delete paragraph (8) and re-number paragraphs (9) to (11) as (8) to (10);

(f) in Rule 13(1) –

after the words "the States" insert:

", or which is delivered to the Greffier for circulation to Members,";

(g) in Rule 20 –

(i) in paragraph (1) delete the words "The elections held quadrennially following each General Election of People's Deputies" and substitute therefor:

"When at any time there are vacancies in two or more of the following offices, the elections to fill those vacancies";

(ii) in paragraph (1) delete sub-paragraph (b) and substitute therefor:

"(b) the Minister of the Treasury and Resources Department;

(c) the Ministers of the other departments"

and re-letter existing sub-paragraphs (c) to (g) as (d) to (h);

(iii) after paragraph (1) insert:

"(1A) (a) The Chief Minister shall notify the Greffier not later than 4.00p.m. on the day preceding the meeting of the States convened for the election of Ministers and Chairmen, of –

(i) the order in which the election of the Ministers and Chairmen is to be held;

(ii) the names of the candidates whom he intends to propose for the respective offices.

(b) The Greffier shall forward the information referred to in (a) above to the Presiding Officer

and, in electronic format, to every Member who has furnished him with an e-mail address.";

(iv) in sub-paragraph (2)(c) after the word "excluding" insert:

"every candidate who received fewer than six votes in the previous ballot or, when there is no such candidate,";

(v) after sub-paragraph (2)(c) insert:

"(d) if two or more candidates having secured six votes or more are tied in polling the fewest votes, or if the process set out in sub-paragraph (c) would result in the elimination of all but one of the candidates, a further ballot shall be held in respect of such candidates only to determine which of them shall be eliminated from further ballots.";

(vi) in paragraph (5) after the word "Committee" insert

"or Non-Governmental Body";

(vii) after paragraph (6) insert:

"(7) On a proposition to elect members of a Non-Governmental Body, the Presiding Officer shall first invite the Chairman thereof, if he be a Member of the States, and thereafter other Members to propose eligible candidates. Nobody shall speak about a candidate at that stage; and if no more candidates are proposed and seconded the Presiding Officer shall put the election of the candidate(s) to the vote without speeches. If there are more candidates than vacancies the Presiding Officer shall invite each proposer to speak, for not more than 5 minutes in respect of each candidate proposed by him, before voting takes place; and neither the candidates nor any other member shall be entitled to speak.".

(h) in Rule 21 –

(i) in paragraph (4) delete the words "after the conclusion" and substitute therefor:

"before the commencement";

(ii) in paragraph (5) after the words "is carried" insert:

"the matter shall stand adjourned to the conclusion of the ordinary

business listed for debate in the said Billet d'État at which time";

(i) in Schedule 1 –

delete the Note at the end of the Schedule and substitute therefor:

"Notes:

1. Members are not required to disclose the monetary value of any interest.

2 In this Declaration of Financial Interests 'spouse' includes any co-habiting partner.".

3. That the Rules relating to the Constitution and Operation of States Departments and Committees shall be amended with immediate effect, as follows:

(a) in Rule 3 –

(i) after paragraph (2) insert:

"(3) If the Deputy Chief Minister ceases to be a minister before his term of office as Deputy Chief Minister has been completed a new Deputy Chief Minister shall be elected to serve the unexpired portion of the Deputy Chief Minister's term of office."

and re-number paragraphs (3) to (5) as (4) to (6);

(ii) Delete re-numbered paragraph (5) and substitute therefor:

"(5) Other than in unforeseen circumstances, when a Minister is unable to attend a meeting of the Policy Council, or when there is a vacancy in that office, the Department concerned shall be represented by the Deputy Minister or, if he is unable to attend, or when there is a vacancy in that office, by one of the other voting members of the Department (the order of which shall be determined by reference to the said members' length of service as members of the Department or, when two or more members have the same length of service, by resolution of the Department), save that the representative shall not be the Minister of another department. Such representatives shall be entitled to vote at Policy Council meetings.";

(b) in Rule 13 –

after paragraph (3), insert:

“(4) When a department or committee is inquorate and an urgent decision is required, the insufficiency of members shall be replaced by the most senior Member(s) of the States by length of service.

(5) Notwithstanding the foregoing, when, whilst still quorate, an inquoracy has been anticipated the department or committee concerned may by resolution authorise the remaining one or two member(s) thereof to take decisions on behalf of the department or committee, but only in respect of matters of urgency which cannot be deferred until the department or committee again becomes quorate.”;

(c) in Rule 15 -

after paragraph (1) insert:

“(2) In the preceding paragraph ‘spouse’ includes any co-habiting partner.”

and re-number paragraphs (2) and (3) as (3) and (4);

(d) in Rule 17 -

(i) Before the full stop at the end of paragraph (3) insert:

“, save that when the Authority is inquorate and an urgent decision is required, the insufficiency of members shall be replaced by minister(s) who are not members of the Panel (the order of which shall be determined by reference to their length of service as Members of the States) and, if there remains an insufficiency, by the most senior Member(s) of the States by length of service”;

(ii) delete the words in parentheses at the end of paragraph (1) and substitute therefor:

“The precedence for determining the Chairman of the Authority shall be:

(i) The Chief Minister;
(ii) The Deputy Chief Minister;
(iii) The senior Panel member or the minister of the Home Department if he is senior to any Panel member;

(iv) The senior minister who is not a Panel member;
(v) The senior Member of the States by length of service.”.

4. That the Code of Conduct for Members of the States of Deliberation shall be amended with immediate effect, as follows:

(a) after paragraph 18 add:

“18A. For the avoidance of doubt the ‘confidential information’ referred to in the previous paragraph includes, but is not limited to, Department and Committee minutes and other papers circulated to members thereof. The content of such minutes and other papers is not to be disclosed to any third party other than by resolution of the Department or Committee concerned.”;

(b) at the end of paragraph 33 insert:

“Notwithstanding a Member’s refusal to accept a caution, the States may resolve that the Member be cautioned.”;

(c) in paragraphs 33 and 34 delete the words “or expelled,” wherever they occur and substitute therefor:

“, removed from a particular office or expelled,”;

(d) in paragraph 34 delete the words “the Chief Minister” and substitute therefor:

“a panel comprising the five most senior Members of the States by length of service who do not have a seat on the States Assembly and Constitution Committee”

(e) after paragraph 34 insert:

“34A. For the avoidance of doubt mediation between the complainant and the accused Member is not permitted in the processing of complaints made pursuant to this Code of Conduct.”;

(f) in Schedule 1 –

(i) in paragraph 3 delete the words “and any of his close family jointly” and substitute therefor:

“and/or any of his close family”;

(ii) after paragraph 8 insert:

"9. In this Schedule 'close family' includes any co-habiting partner.".

5. (a) That for the titles of Chief Minister, Deputy Chief Minister, Minister and Deputy Minister wherever they occur in –

(i) the Rules of Procedure of the States of Deliberation;
(ii) the Rules relating to the Constitution and Operation of States Departments and Committees;
(iii) the Code of Conduct for Members of the States of Deliberation;
(iv) the Rules for Payments to States Members, Former States Members and Non-States Members of States Departments and Committees;
(v) paragraph (a)(v) of the mandate of the States Assembly and Constitution Committee

there shall be substituted respectively the titles of President of the Policy Council, Vice President of the Policy Council, President and Vice President;

(b) that legislation be drafted pursuant to the Public Functions (Transfer and Performance) (Bailiwick of Guernsey) Law, 1991 renaming the said offices.

6. To direct the preparation of such legislation as may be necessary to give effect to their above decisions.

REQUÊTE

KERBSIDE COLLECTION OF RECYCLABLES

THE HUMBLE PETITION of the undersigned Members of the States of Deliberation

SHEWETH THAT:

1. In January 2007 the States supported an amendment to adopt a target of 50% recycling of the islands household and commercial waste by 2010.

2. Up to the end of June 2008, the Public Services Department claimed that household recycling had risen to 30.8%.

3. In August 2008 consultants Integrated Skills Ltd reported that with kerbside collections of dry recyclables recycling would reach 46% and with food waste collection of wet recyclables we could progress to 61%.

4. In the opinion of your Petitioners kerbside collection of recyclables will channel efforts into resource recovery, intensive waste segregation, recycling and composting and extend the life of Mont Cuet.

5. In the opinion of your Petitioners kerbside collection of recyclables will help enable the States to achieve the waste policy to attain 50% recycling target for household and commercial waste by 2010.

6. In that kerbside collection is considered a low risk strategy to reduce waste volumes and increase recycling rates, your Petitioners believe that it would promote a positive image to the recycling efforts of the States of Guernsey.

THESE PREMISES CONSIDERED, YOUR PETITIONERS humbly pray that the States may be pleased to resolve as follows:-

1. To direct the Public Services Department to report back to the States by no later than January 2010 with a scheme of kerbside collection of dry recyclables to be introduced as soon as possible and island wide, as far as practicable, to be funded in whole by additional charges levied on the disposal of solid waste.

2. To direct that when returning to the States the details of the funding mechanism for kerbside collection of dry recyclables should give options for levying a charge at the point of sale on bags permitted for the disposal of household waste.

AND YOUR PETITIONERS WILL EVER PRAY

GUERNSEY, this 28th day of May, 2009

C N K Parkinson
D de G De Lisle
M J Fallaize
C A Steere
M M Lowe
D B Jones
G P Dudley-Owen
B L Brehaut
J A B Gollop
S J Ogier
R R Matthews

(NB In pursuance of Article 17 of the Rules of Procedure the views of the Departments and Committees consulted by the Policy Council, as appearing to have an interest in the subject matter of the Requête, are set out below.)

ENVIRONMENT DEPARTMENT

Deputy L S Trott
Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

12th June 2009

Dear Deputy Trott

REQUÊTE – KERBSIDE COLLECTION OF RECYCLABLES

Thank you for your letter dated 2nd June 2009, requesting the Environment Department's comments on the Requête dated 28th May 2009 signed by Deputy Parkinson and nine other States Members concerning the kerbside collection of recyclables.

The comments set out below largely repeat those raised by the Environment Department in a letter of comment responding to the Requête dated 10th December 2008 signed by Deputy De Lisle and eighteen other States Members. The Department is disappointed to note that despite that previous letter being included in the relevant Billet, the terms of the Requête continue to repeat fundamental errors.

Paragraph 1 of the Requête refers to the Amendment placed before the States Assembly in January 2009, which Amendment was subsequently commented on and clarified within the Environment Department report on Waste Arisings, Recycling and Growth, Billet d'Etat XXIV 2007. In that report at paragraph 7.2, the Environment Department explains that "the Amendment placed was open to interpretation as it did not specify whether the target was to recycle 50% of the combined household and commercial waste arisings or 50% of each of the two categories". The report, therefore, went on to

clarify the position and the States, in accepting the Environment Department's report, accepted that clarification – namely that the target adopted by the States was to recycle 50% of household waste and 50% of commercial waste with a target delivery date of 2010. **For the avoidance of any further misunderstanding, the States has adopted a target of recycling of 50% of household waste and separately 50% of commercial waste.**

Paragraph 5 of the Requête states "in the opinion of your petitioners, kerbside collection of recyclables will help enable the States to achieve the waste policy to attain 50% recycling target for household **and commercial waste** by 2010." The Environment Department can not endorse this opinion. Kerbside collection of household recyclates will do little, if anything, to contribute to attaining the 50% recycling target for commercial waste.

Whilst paragraph 4 of the Requête suggests that kerbside collection of recyclables will channel efforts into resource recovery and intensive waste segregation, it should be noted that the plant and equipment needed for processing dry recyclables collected from the kerbside are very different to those required to deal with commercial recyclables created by business and industry. As such, the infrastructure and costs associated with installing kerbside collection of recyclables should be considered to have minimal application to meeting the recycling target for commercial waste.

Clause 6 of the Requête also repeats a fundamental error, namely that kerbside collection is a low risk strategy to reduce **waste volumes**. Kerbside collection is a process for dealing with waste – recyclables are waste. Whilst recycling diverts waste away from landfill, it does not stop waste from existing. As such, the waste volumes will remain exactly the same. Kerbside collection can not, therefore, be a low risk strategy to reduce waste volumes. It may, arguably, be a low risk strategy to deal with waste but that itself is not certain and any report prepared by the Public Services Department should look at the life-cycle issues, cost and risks in order that the risk profile of kerbside recycling can be compared against any other waste treatment method.

Yours sincerely

Peter Sirett
Minister

PUBLIC SERVICES DEPARTMENT

The Chief Minister
Policy Council
Sir Charles Frossard House
La Charroterie
St Peter Port

18th June 2009

Dear Deputy Trott

REQUÊTE – KERBSIDE COLLECTION OF RECYCLABLES

Thank you for your letter dated 2 June 2009, with which you enclosed a copy of a Requete concerning the above subject.

The Board of the Public Services Department has considered the Requête and is of the opinion that the points made in its States Report considered at the May States meeting (Billet d'Etat XIII, 2009 refers) remain valid. Consequently it does not consider there to be merit in bringing forward the Requête seeking to revisit the issue of kerbside collections so soon after the May debate.

Notwithstanding this, the Department will, of course, carry out the work necessary to fulfil the terms of the Requête if this proves to be the will of the States. However, as you will appreciate, it will be necessary to carry out extensive research and consultation if the end result is to be meaningful. Consequently the time scale given of reporting back to the States by January 2010 is considered unachievable, as it effectively leaves only the period between the beginning of August and the end of October for the work to be carried out, given that the resultant report will have to be approved by the Public Services Department Board and submitted to the Policy Council by the end of November.

The Department's view remains that the Requête should be rejected, however if it is to be accepted it would request that the time scale be extended in order to allow time for adequate investigations to be carried out into the matters raised in the Requête.

Yours sincerely

B M Flouquet
Minister

(NB By a majority, the Policy Council supports the views of the Public Services Department and the Environment Department on this matter – principally, that kerbside collection of recyclables implemented island-wide, represents a high-cost option that would be likely to achieve only a modest increase in the rate of domestic recycling – and therefore, by a majority, recommends that the States reject the prayer of this Requête.)

(NB The Treasury and Resources Department has no comment on the proposals.)

The States are asked to decide:-

XII.- Whether, after consideration of the Requête, dated 28th May, 2009, signed by Deputy C N K Parkinson and ten other Members of the States, they are of the opinion:-

1. To direct the Public Services Department to report back to the States by no later than January 2010 with a scheme of kerbside collection of dry recyclables to be introduced as soon as possible and island wide, as far as practicable, to be funded in whole by additional charges levied on the disposal of solid waste.

2. To direct that when returning to the States the details of the funding mechanism for kerbside collection of dry recyclables shall give options for levying a charge at the point of sale on bags permitted for the disposal of household waste.

STATUTORY INSTRUMENTS LAID BEFORE THE STATES

THE CRIMINAL JUSTICE (PROCEEDS OF CRIME) (FINANCIAL SERVICES BUSINESSES) (BAILIWICK OF GUERNSEY) (AMENDMENT) REGULATIONS, 2009

In pursuance of section 54 (1) (c) of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) (Amendment) Regulations, 2009, made by the Policy Council on 8th June, 2009, are laid before the States.

EXPLANATORY NOTE

These Regulations amend the Criminal Justice (Proceeds of Crime) (Financial Services Businesses) (Bailiwick of Guernsey) Regulations, 2007 ("the Principal Regulations) which impose requirements on financial services businesses for the purpose of forestalling and preventing money laundering and terrorist financing. These Regulations amend the Principal Regulations as follows:

Regulation 4(1)(b)(i) has removed the subjective test from the establishment by a financial services business of whether or not an account is in a fictitious name.

The amended definition of "enhanced customer due diligence" under regulation 5(2)(a) prescribes a more pro-active approach in obtaining enhanced customer due diligence.

Regulation 5(4) has been amended to clarify that this regulation is only relevant to customers who are non Guernsey residents.

Regulation 8(1)(a) has been amended to clarify the fact that prescribed businesses must not set up accounts in fictitious names (and has therefore removed the subjective test from this provision).

Regulation 14(4)(b) is amended so that documents and customer due diligence information kept under this regulation must be made available only to a police officer, the Financial Intelligence Service, the Guernsey Financial Services Commission or any other Bailiwick competent authority.

THE CRIMINAL JUSTICE (PROCEEDS OF CRIME) (LEGAL PROFESSIONALS, ACCOUNTANTS AND ESTATE AGENTS) (BAILIWICK OF GUERNSEY) (AMENDMENT) REGULATIONS, 2009

In pursuance of section 54 (1) (c) of the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999, the Criminal Justice (Proceeds of Crime) (Legal Professionals, Accountants and Estate Agents) (Bailiwick of Guernsey) (Amendment) Regulations, 2009, made by the Policy Council on 8th June, 2009, are laid before the States.

EXPLANATORY NOTE

These Regulations are made under the Criminal Justice (Proceeds of Crime) (Bailiwick of Guernsey) Law, 1999 and amend the Criminal Justice (Proceeds of Crime) (Legal Professionals, Accountants and Estate Agents) (Bailiwick of Guernsey) Regulations, 2008 ("Principal Regulations"). These Regulations amend the Principal Regulations in the following manner -

The amended definition of "enhanced client due diligence" under regulation 5(2)(a) prescribes a more pro-active approach in obtaining enhanced client due diligence.

Regulation 5(4) has been amended to clarify that this regulation is only relevant to clients who are non Guernsey residents.

Regulation 8(a) has been amended to clarify the fact that prescribed businesses must not set up accounts in fictitious names (and has therefore removed the subjective test from this provision).

Regulation 14(4)(b) is amended so that documents and customer due diligence information kept under this regulation must be made available only to a police officer, the Financial Intelligence Service, the Guernsey Financial Services Commission or any other Bailiwick competent authority.

APPENDIX I

STATES ASSEMBLY AND CONSTITUTION COMMITTEE

RECORD OF MEMBERS' ATTENDANCE AT MEETINGS OF
THE POLICY COUNCIL, DEPARTMENTS AND COMMITTEES
AND IN THE STATES OF DELIBERATION

The Presiding Officer
The States of Guernsey
Royal Court House
St Peter Port

22nd May 2009

Dear Sir

On the 28th January 2004 the States resolved, inter alia:

> *"That Departments and Committees shall maintain a record of their States Members' attendance at, and absence from, meetings, including sub-committee meetings and the reasons for absence given shall also be recorded.*
>
> *That the records of States Members' attendance at, absence from and reasons for absence from meetings, shall be made available to the House Committee* to monitor and to take such action as it sees fit within its powers and the records shall also be available for inspection by the public."*
>
> *[*name changed on 1st August 2008 to States Assembly and Constitution Committee]*

This report deviates from the States resolution in that the States Assembly and Constitution Committee has deemed it appropriate to accede to a request that statistics relating to attendance in the States of Deliberation are also included.

I would be grateful if you would arrange for this report, in respect of statistics provided by H. M. Greffier, Departments and Committees for the six months ended 30th April 2009, to be published as an appendix to a Billet d'État.

Yours faithfully

Ivan Rihoy
Chairman

PART I - REPORT BY DEPARTMENT/COMMITTEE

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
POLICY COUNCIL							
L. S. Trott	18	17	1				
B. M. Flouquet	18	16	2				
A. H. Adam	18	14	1		2	1	
M. H. Dorey	18	17			1		
D. B. Jones	18	16		1		1	
G. H. Mahy	18	17				1	
C. S. McNulty Bauer	18	16	1		1		
M. G. O'Hara	18	16				2	
C. N. K. Parkinson	18	13	4			1	
P. R. Sirett	18	14	1			3	
C. A. Steere	18	14	1		1	1	1 no notice
Alternate Members:							
B. L. Brehaut	1		1				
M. G. G. Garrett	2	2					
G. Guille	2	2					
J. Honeybill	1		1				
A. H. Langlois	1	1					
S. L. Langlois	1	1					
F. W. Quin	1	1					
J. M. Tasker	1	1					
COMMERCE AND EMPLOYMENT DEPARTMENT							
C. S. McNulty Bauer	21	21					
R. W. Sillars	21	19				2	
P. L. Gillson	21	19	1			1	
M. S. Lainé	21	20				1	
M. J. Storey	21	18	2			1	
CULTURE AND LEISURE DEPARTMENT							
M. G. O'Hara	6	6					
M. G. G. Garrett	6	5				1	
G. P. Dudley-Owen	6	6					
J. A. B. Gollop	6	3	3				
F. W. Quin	6	4	1		1		
EDUCATION DEPARTMENT							
C. A. Steere	15	15					
A. H. Langlois	15	10	2			3	
M. W. Collins	15	13		1		1	
D. de G. De Lisle	15	15					
M. J. Fallaize	15	14	1				

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
ENVIRONMENT DEPARTMENT							
P. R. Sirett	13	13					
J. M. Tasker	13	12	1*		*		
J. Honeybill	13	8	3			2	
J. M. Le Sauvage	13	13					
B. J. E. Paint	13	11	1			1	
HEALTH AND SOCIAL SERVICES DEPARTMENT							
A. H. Adam	12	10	1			1	
B. L. Brehaut	12	10	2				
M. P. J. Hadley	6	4	1			1	
A. R. Le Lièvre	12	10	1			1	
M. M. Lowe	6	5			1		
R. G. Willmott	12	12					
HOME DEPARTMENT							
G. H. Mahy	15	15					
F. W. Quin	15	15					
S. J. Maindonald	15	9	1	3		2	
J. M. Tasker	15	13	1			1	
M. S. Lainé	15	14	1				
HOUSING DEPARTMENT							
D. B. Jones	14	14					
G. Guille	14	14					
T. J. Stephens	14	14					
G. P. Dudley-Owen	14	13				1	
S. J. McManus	14	14					
PUBLIC SERVICES DEPARTMENT							
B. M. Flouquet	13	12				1	
S. J. Ogier	13	12				1	
T. M. Le Pelley	13	11				2	
A. Spruce	13	10	1			2	
W. Walden	13	11					2 unknown
J. Kuttelwascher	2		2				
SOCIAL SECURITY DEPARTMENT							
M. H. Dorey	15	15					
A. H. Brouard	15	11	4				
M. W. Collins	15	13	2				
A. R. Le Lièvre	15	12	1			2	
S. J. Ogier	15	9	3			2	1 unknown
TREASURY AND RESOURCES DEPARTMENT							
C. N. K. Parkinson	26	25	1				
A. H. Langlois	26	22	1			3	
S. L. Langlois	26	25	1				
R. Domaille	26	22				4	
J. Honeybill	26	23			1	2	

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
LEGISLATION SELECT COMMITTEE							
J. A. B. Gollop	4	4					
R. R. Matthews	4	4					
L. R. Gallienne	4	4					
S. J. Maindonald	4	2				2	
T. J. Stephens	4	4					
PUBLIC ACCOUNTS COMMITTEE							
L. R. Gallienne	10	10					
M. G. G. Garrett	10	7	1			2	
B. J. E. Paint	10	7	1			2	
T. J. Stephens	10	9	1				
M. J. Storey	10	8	2				
PUBLIC SECTOR REMUNERATION COMMITTEE							
A. H. Brouard	17	16				1	
A. Spruce	17	15				2	
B. L. Brehaut	17	11	3	1	1	1	
M. W. Collins	17	11	3	1		2	
R. Domaille	17	12			2	2	1 conflict of int
A. R. Le Lièvre	0						
SCRUTINY COMMITTEE							
B. L. Brehaut	8	8					
M. J. Fallaize	8	7			1		
M. G. G. Garrett	8	6	1			1	
J. A. B. Gollop	8	7	1				
M. P. J. Hadley	1					1	
J. Kuttelwascher	8	8					
M. M. Lowe	7	6				1	
R. R. Matthews	8	8					
S. J. McManus	8	7	1				
M. J. Storey	8	7				1	
STATES ASSEMBLY AND CONSTITUTION COMMITTEE							
I. F. Rihoy	9	7	1	1			
M. M. Lowe	9	8	1*				* date change clash with other meeting
M. J. Fallaize	9	7	2				
S. L. Langlois	9	7				1	1 no notice
T. M. Le Pelley	9	7				1	1 no notice
INHERITANCE LAW REVIEW COMMITTEE							
M. M. Lowe	5	5					
P. R. Sirett	5	4	1				
R. W. Sillars	5	4			1		
PAROCHIAL ECCLESIASTICAL RATES REVIEW COMMITTEE							
T. M. Le Pelley	0						
J. A. B. Gollop	0						
B. M. Flouquet	0						
M. M. Lowe	0						
S. L. Langlois	0						

PART II - REPORT BY SUB-COMMITTEES

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
POLICY COUNCIL – Population Policy Group							
B. M. Flouquet	4	3			1		
C. S. McNulty Bauer	4	4					
D. B. Jones	4	4					
G. H. Mahy	4	2		1	1		
M. H. Dorey	4	4					
POLICY COUNCIL – Social Policy Group							
A. H. Adam	5	4				1	
M. H. Dorey	5	5					
G. H. Mahy	5	5					
C. A. Steere	5	3				1	1 unknown
C. N. K. Parkinson	5	3					2 unknown
A. R. Le Lièvre	5	4	1				
G. Guille	5	4	1				
R. W. Sillars	5	4					1 unknown
M. G. G. Garrett	1	1					
J. M. Tasker	5	4					1 unknown
POLICY COUNCIL – Strategic Land Planning Group							
B. M. Flouquet	4	3	1				
P. R. Sirett	4	3				1	
C. S. McNulty Bauer	4	3			1		
M. G. O'Hara	4	4					
M. H. Dorey	4	4					
POLICY COUNCIL – Fiscal and Economic Policy Steering Group							
L. S. Trott	11	11					
B. M. Flouquet	11	10	1				
A. H. Adam	11	9	2				
C. S. McNulty Bauer	11	10	1				
C. N. K. Parkinson	11	9				2	
J. Honeybill	1	1					
A. H. Langlois	1	1					
S. L. Langlois	1	1					
R. Domaille	1	1					
POLICY COUNCIL – Energy Policy Group							
C. N. K. Parkinson	4	4					
M. S. Lainé	4	3		1			
J. M. Le Sauvage	4	4					
G. Guille	4	4					
S. J. Ogier	4	2	1				1 unknown
POLICY COUNCIL – Environmental Policy Group							
P. R. Sirett	2	2					
B. M. Flouquet	2	1					1 unknown
M. G. O'Hara	2	1					1 unknown
C. A. Steere	2	2					
P. L. Gillson	2	2					

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
POLICY COUNCIL – External Relations Group							
L. S. Trott	8	8					
B. M. Flouquet	8	8					
C. S. McNulty Bauer	8	8					
D. B. Jones	8	8					
P. R. Sirett	8	5	1*		*	2	
POLICY COUNCIL – States Strategic Plan Team formerly the Government Business Plan Team							
L. S. Trott	3	2	1				
G. H. Mahy	3	3					
M. W. Collins	3	3					
A. H. Adam	3	2					1 unknown
R. W. Sillars	3	3					
M. H. Dorey	9	7	1				1 unknown
J. Kuttelwascher	3	2					1 unknown
C. N. K .Parkinson	6	6					
C. S. McNulty Bauer	6	5					1 unknown
M. J. Storey	6	6					
S. J. McManus	6	6					
S. L. Langlois	6	6					
R. G. Willmott	6	5					1 unknown
POLICY COUNCIL – Douzaine Liaison Team							
A. H. Adam	9	9					
M. P. J. Hadley	9	6				3	
R. Domaille	9	9					
POLICY COUNCIL – Parochial Legislation Working Party							
A. H. Adam	5	2	3				
S. L. Langlois	5	5					
R. Domaille	5	4	1				
COMMERCE AND EMPLOYMENT DEPARTMENT and TREASURY AND RESOURCES DEPARTMENT– Construction Sector Group							
C. S. McNulty Bauer	2	2					
P. L. Gillson	2	1				1	
J. Honeybill	2	2					
S. L. Langlois	2	2					
COMMERCE AND EMPLOYMENT DEPARTMENT – Dairy Management Board							
C. S. McNulty Bauer	5	5					
R. W. Sillars	5	4	1				
COMMERCE AND EMPLOYMENT DEPARTMENT – Business Guernsey Group							
R. W. Sillars	6	5				1	
M. S. Lainé	6	6					
M. J. Storey	6	6					

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
COMMERCE AND EMPLOYMENT DEPARTMENT and PUBLIC SERVICES DEPARTMENT – External Transport Group							
C. S. McNulty Bauer	2	2					
M. S. Lainé	2	1				1	
B. M. Flouquet	2	2					
S. J. Ogier	2	1				1	
COMMERCE AND EMPLOYMENT DEPARTMENT – Finance Sector Group							
C. S. McNulty Bauer	5	4			1		
P. L. Gillson	5	5					
L. S. Trott	5	3			2		
C. N. K. Parkinson	5	1		1	3		
COMMERCE AND EMPLOYMENT DEPARTMENT – Intellectual Property Office Steering Group							
M. J. Storey	5	5					
COMMERCE AND EMPLOYMENT DEPARTMENT and CULTURE AND LEISURE DEPARTMENT – Marketing Guernsey Group							
C. S. McNulty Bauer	2	2					
R. W. Sillars	2	2					
M. G. O'Hara	2	2					
CULTURE AND LEISURE DEPARTMENT – Liberation Celebrations Committee							
M. G. O'Hara	5	5					
G. P. Dudley-Owen	5	5					
CULTURE AND LEISURE DEPARTMENT – KGV Management Committee							
M. G. G. Garrett	6	3			2	1	
CULTURE AND LEISURE DEPARTMENT – Channel Islands Lottery Advisory Panel							
F. W. Quin	1	1					
CULTURE AND LEISURE DEPARTMENT – Guernsey Sports Commission							
F. W. Quin	6	4			1	1	
CULTURE AND LEISURE DEPARTMENT – Friends of St. James Association							
G. P. Dudley-Owen	4	1					3 – others attended instead
J. A. B. Gollop	4	2					2 – others attended instead
CULTURE AND LEISURE DEPARTMENT – Events Group							
M. G. O'Hara	0						
CULTURE AND LEISURE DEPARTMENT – Events Group – Chairmen of Specialist Interest Groups Sub-Meeting							
M. G. G. Garrett	1	1					

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
EDUCATION DEPARTMENT – Appointments Panel							
C. A. Steere	3	3					
D. de G. De Lisle	3	3					
M. W. Collins	4	4					
A. H. Langlois	1	1					
EDUCATION DEPARTMENT – Baubigny Schools Project Board							
M. W. Collins	1	1					
D. de G. De Lisle	1	1					
M. J. Fallaize	1				1		
J. Honeybill	1					1	
S. L. Langlois	1				1		
EDUCATION DEPARTMENT – Guille-Allès Library							
M. J. Fallaize	3	2			1		
EDUCATION DEPARTMENT – Blanchelande Girls' College Board							
C. A. Steere	2	2					
M. J. Fallaize	2	2					
EDUCATION DEPARTMENT – e-Learning							
M. W. Collins	0						
EDUCATION DEPARTMENT – College of Further Education Development Committee							
C. A. Steere	1	1					
M. W. Collins	1	1					
EDUCATION DEPARTMENT – Apprenticeship Sub-Committee							
C. A. Steere	1				1		
M. J. Fallaize	1					1	
EDUCATION DEPARTMENT – Higher Education Working Party							
C. A. Steere	1	1					
A. H. Langlois	1	1					
D. de G. De Lisle	1	1					
EDUCATION DEPARTMENT – Grammar School Committee							
C. A. Steere	1	1					
M. W. Collins	1	1					
EDUCATION DEPARTMENT – Joint Advisory Committee							
C. A. Steere	1	1					
M. J. Fallaize	1	1					
EDUCATION DEPARTMENT – Lifelong Learning Sub-Committee							
A. H. Langlois	2	2					
M. S. Lainé	2	2					
P. L. Gillson	2	1					1 unknown

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
EDUCATION DEPARTMENT – Guernsey Training Agency							
M. W. Collins	2	1		1			
EDUCATION DEPARTMENT – Youth Service							
A. H. Langlois	3	3					
EDUCATION DEPARTMENT – Standing Advisory Council for Religious Education							
C. A. Steere	1	1					
M. W. Collins	1	1					
D. de G. De Lisle	1	1					
EDUCATION DEPARTMENT – Amherst and Vauvert Primary Schools' Committee							
M. W. Collins	2	2					
EDUCATION DEPARTMENT – Forest Primary School Committee							
D. de G. De Lisle	2	2					
EDUCATION DEPARTMENT – La Mare de Carteret Primary School Committee							
D. de G. De Lisle	2	2					
EDUCATION DEPARTMENT – La Houguette Primary School Committee							
De. De G. De Lisle	2	1				1	
EDUCATION DEPARTMENT – St Andrew's Primary School Committee							
C. A. Steere	1	1					
EDUCATION DEPARTMENT – Castel Primary School Committee							
C. A. Steere	2	1			1		
EDUCATION DEPARTMENT – St Martins Primary School Committee							
C. A. Steere	1				1		
EDUCATION DEPARTMENT – St Mary and St Michael Roman Catholic Primary School Committee							
C. A. Steere	3	3					
M. W. Collins	3	2				1	
EDUCATION DEPARTMENT – Notre Dame du Rosaire Roman Catholic Primary School Committee							
C. A. Steere	3	3					
M. W. Collins	3	2				1	
EDUCATION DEPARTMENT – Hautes Capelles Primary School Committee							
M. J. Fallaize	1	1					
EDUCATION DEPARTMENT – Vale Infant and Junior and St Sampson's Infant Schools' Committee							
M. J. Fallaize	1	1					

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
EDUCATION DEPARTMENT – St. Peter Port School Committee							
A. H. Langlois	1					1	
EDUCATION DEPARTMENT – St Sampson's High School Committee							
M. J. Fallaize	2						1 unknown; 1 date changed
A. H. Langlois	2	2					
EDUCATION DEPARTMENT – Les Beaucamps High School Committee							
C. A. Steere	1	1					
EDUCATION DEPARTMENT - St Anne's School Committee							
A. H. Langlois	1						1 fog
EDUCATION DEPARTMENT – La Mare de Carteret High School Committee							
D. de G. De Lisle	1	1					
EDUCATION DEPARTMENT – ICT Project Board							
M. W. Collins	11	11					
R. Domaille	11	11					
HOME DEPARTMENT – Gambling Sub-Committee							
J. M. Tasker	0						
M. S. Lainé	0						
HOME DEPARTMENT – Law Enforcement Working Group							
G. R. Mahy	8	8					
HOME DEPARTMENT – Accommodation Sub-Committee							
M. S. Lainé	1	1					
PUBLIC SERVICES DEPARTMENT – Pilotage Board							
W. Walden	0						
A. Spruce	0						
PUBLIC SERVICES DEPARTMENT – Waste Disposal Authority							
B. M. Flouquet	5	5					
S. J. Ogier	5	5					
T. M. Le Pelley	5	5					
A. Spruce	5	4				1	
W. Walden	5	3	1			1	
PUBLIC SERVICES DEPARTMENT – Guernsey Recycling Advisory Forum							
S. J. Ogier	5	5					
PUBLIC SERVICES DEPARTMENT – Alderney Airport Working Party							
	0						

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
PUBLIC SERVICES DEPARTMENT – Waste Industry Forum							
B. M. Flouquet	1	1					
S. J. Ogier	1	1					
T. M. Le Pelley	1	1					
A. Spruce	1	1					
W. Walden	1					1	
TREASURY AND RESOURCES DEPARTMENT – Property Services Sub-Committee							
J. Honeybill	11	11					
R. Domaille	11	9				2	
S. L. Langlois	11	11					
TREASURY AND RESOURCES DEPARTMENT – Investments Sub-Committee							
C. N. K. Parkinson	6	5	1				
J. Honeybill	6	5				1	
S. L. Langlois	6	6					
TREASURY AND RESOURCES DEPARTMENT – ICT Sub-Committee							
R. Domaille	3	3					
A. H. Langlois	3	2				1	
TREASURY AND RESOURCES DEPARTMENT – Accountancy Sub-Committee							
C. N. K. Parkinson	1	1					
A. H. Langlois	1	1					
S. L. Langlois	1	1					
TREASURY AND RESOURCES DEPARTMENT – Land Registry Steering Group							
J. Honeybill	5	5					
S. L. Langlois	5	5					
PUBLIC ACCOUNTS COMMITTEE – Housing Association Group							
B. J. E. Paint	3	3					
M. G. G. Garrett	1	1					
PUBLIC ACCOUNTS COMMITTEE – Audit Sub-Committee							
L. R. Gallienne	1	1					
M. J. Storey	1	1					
PUBLIC ACCOUNTS COMMITTEE – New Jetty Group							
L. R. Gallienne	1	1					
M. J. Storey	1	1					
PUBLIC ACCOUNTS COMMITTEE – Auditor General Working Party							
L. E. Gallienne	4	4					
PUBLIC ACCOUNTS COMMITTEE – Corporate Governance Group							
T. J. Stephens	2	2					
L. R. Gallienne	1	1					

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
PUBLIC ACCOUNTS COMMITTEE – Contract Review Working Party							
T. J. Stephens	1	1					
M. G. G. Garrett	1				1		
L. R. Gallienne	1	1					
PUBLIC SECTOR REMUNERATION COMMITTEE – Public Service Employees Joint Council							
A. H. Brouard	3	3					
A. Spruce	3	3					
B. L. Brehaut	3	1		1	1		
M. W. Collins	3	3					
R. Domaille	3	1				2	
A. R. Le Lièvre	0						
PUBLIC SECTOR REMUNERATION COMMITTEE – Teachers and Lecturers Joint Council							
A. H. Brouard	0						
A. Spruce	0						
B. L. Brehaut	0						
M. W. Collins	0						
R. Domaille	0						
A. R. Le Lièvre	0						
PUBLIC SECTOR REMUNERATION COMMITTEE – Civil Service Joint Council							
A. H. Brouard	2	2					
A. Spruce	2	2					
B. L. Brehaut	2	1	1				
M. W. Collins	2	1				1	
R. Domaille	2						2 conflict of int
A. R. Le Lièvre	0						
PUBLIC SECTOR REMUNERATION COMMITTEE – Pensions Consultative Committee							
A. H. Brouard	1	1					
A. Spruce	1	1					
B. L. Brehaut	1	1					
M. W. Collins	1	1					
R. Domaille	1						1 conflict of int
A. R. Le Lièvre	0						

PART III - REPORT BY MEMBER/ELECTORAL DISTRICT

Summary of Attendances at Meetings of the Policy Council, Departments and Committees

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
ST PETER PORT SOUTH							
B. L. Brehaut	44	32	7	2	2	1	
C. S. McNulty Bauer	88	82	2		3		1 unknown
J. M. Tasker	34	30	1 + 1*		*	1	1 unknown
R. Domaille	89	72	1		2	10	4 conflict of int
A. H. Langlois	58	46	3			8	1 fog
J. Kuttelwascher	11	10					1 unknown
ST PETER PORT NORTH							
J. A. B. Gollop	22	16	4				2 replaced by other attendee
R. R. Matthews	12	12					
C. A. Steere	59	51	1		3	2	1 unknown 1 no notice
M. J. Storey	58	52	4			2	
J. Honeybill	66	55	4		1	6	
L. R. Gallienne	22	22					
M. W. Collins	85	71	5	3		6	
ST. SAMPSON							
P. L. Gillson	32	28	1			2	1 unknown
S. J. Maindonald	19	11	1	3		4	
S. J. Ogier	45	35	4			4	2 unknown
I. F. Rihoy	9	7	1	1			
L. S. Trott	45	41	2		2		
T. J. Stephens	31	30	1				
VALE							
M. J. Fallaize	44	35	3		3	1	1 unknown 1 date changed
G. H. Mahy	53	50		1	1	1	
A. Spruce	42	36	1			5	
M. M. Lowe	27	24	1		1	1	
G. Guille	25	24	1				
D. B. Jones	44	42		1		1	
A. R. Le Lièvre	32	26	3			3	
CASTEL							
M. H. Dorey	55	49	2		2	1	1 unknown
A. H. Adam	63	53	6		1	2	1 unknown
T. M. Le Pelley	28	24				3	1 no notice
S. J. McManus	28	27	1				
B. J. E. Paint	26	21	2			3	
B. M. Flouquet	68	61	4		1	1	1 unknown
M. G. G. Garrett	36	26	2		3	5	

NAME OF MEMBER	TOTAL NUMBER OF MEETINGS	MEMBER PRESENT		MEMBER ABSENT			
		Whole Meeting	Part of Meeting	Indisposed	States business	Personal/ business/ holiday	Other
WEST							
A. H. Brouard	38	33	4			1	
D. de G. De Lisle	28	27				1	
M. S. Lainé	51	47	2			2	
S. L. Langlois	74	70	1		1	1	1 no notice
P. R. Sirett	50	41	2 + 1*		*	6	
G. P. Dudley-Owen	29	25				1	3 replaced by other attendee
SOUTH-EAST							
C. N. K. Parkinson	82	67	6	1	3	3	2 unknown
F. W. Quin	29	25	1		2	1	
M. G. O'Hara	37	34				2	1 unknown
R. W. Sillars	47	41	1		1	3	1 unknown
J. M. Le Sauvage	17	17					
M. P. J. Hadley	16	10	1			5	
ALDERNEY REPRESENTATIVES							
R. G. Willmott	18	17					1 unknown
W. Walden	19	14	1			2	2 unknown

PART IV – REPORT OF ATTENDANCE IN THE STATES OF DELIBERATION

NAME OF MEMBER	TOTAL NUMBER OF DAYS (or part)	DAYS ATTENDED (or part)
ST PETER PORT SOUTH		
B. L. Brehaut	13	13
C. S. McNulty Bauer	13	13
J. M. Tasker	13	13
R. Domaille	13	13
A. H. Langlois	13	12
J. Kuttelwascher	13	13
ST PETER PORT NORTH		
J. A. B. Gollop	13	13
R. R. Matthews	13	13
C. A. Steere	13	13
M. J. Storey	13	13
J. Honeybill	13	13
L. R. Gallienne	13	13
M. W. Collins	13	12
ST SAMPSON		
P. L. Gillson	13	13
S. J. Maindonald	13	9
S. J. Ogier	13	13
I. F. Rihoy	13	12
L. S. Trott	13	12
T. J. Stephens	13	13
VALE		
M. J. Fallaize	13	13
G. H. Mahy	13	13
A. Spruce	13	13
M. M. Lowe	13	13
G. Guille	13	13
D. B. Jones	13	13
A. R. Le Lièvre	13	13
CASTEL		
M. H. Dorey	13	13
A. H. Adam	13	12
T. M. Le Pelley	13	12
S. J. McManus	13	13
B. J. E. Paint	13	13
B. M. Flouquet	13	13
M. G. G. Garrett	13	13

NAME OF MEMBER	TOTAL NUMBER OF DAYS (or part)	DAYS ATTENDED (or part)
WEST		
A. H. Brouard	13	13
D. de G. De Lisle	13	13
M. S. Lainé	13	12
S. L. Langlois	13	13
P. R. Sirett	13	13
G. P. Dudley-Owen	13	13
SOUTH-EAST		
C. N. K. Parkinson	13	13
F. W. Quin	13	13
M. G. O'Hara	13	13
R. W. Sillars	13	13
J. M. Le Sauvage	13	13
M. P. J. Hadley	13	12
ALDERNEY REPRESENTATIVES		
R. G. Willmott	13	13
W. Walden	13	13

Note:

The only inference which can be drawn from the statistics in this part of the report is that a Member was present for the roll call or was subsequently relévé(e).

Some Members recorded as absent will have been absent for acceptable reasons, e.g. illness or representing the States in some other forum such as the Commonwealth Parliamentary Association.

APPENDIX II

PUBLIC ACCOUNTS COMMITTEE

2009 ANNUAL REPORT

The Presiding Officer
The States of Guernsey
Royal Court House
St Peter Port

3rd June 2009

Dear Sir

In accordance with Resolution XII of Billet d'Etat XXIV of October 2003, I am pleased to present the Public Accounts Committee's fifth Annual Report and my fourth as Chairman, for the year ended 30 April 2009 to be appended to a Billet d'Etat.

1 Executive Summary

The work of the Public Accounts Committee continued into its second term with my re-election as Chairman and three of the four previous non-States members returning to the Committee in April 2008. The members' experience, added to the enthusiasm of five new members, meant that the firm foundation from the first term could be built upon.

During the year the Committee reviewed its processes, including how its reports are released, began researching the creation of a statutory post of Auditor General and raised a number of issues in response to States activities and reports.

The Committee completed work carried forward from the previous term under its contract with the National Audit Office, and, during the year ended 30 April 2009, produced:

- Its fourth annual report (Billet VII, May 2008);
- A States Report on Safeguarding Guernsey's Heritage Assets (Billet d'Etat II, January 2009);
- An appended States Report on Housing Associations in Guernsey (Billet d'Etat II, January 2009).

Last year the Committee set up a framework agreement for use with third parties tendering to supply independent reviews. The framework allows for the selection of reviewers to deliver specific projects such as the overview of Corporate Governance,

investigation into the New Jetty project and a review into Investments. This work will continue into the next year, added to which the Committee will be following up on the progress made on some past reviews and commencing some new reviews.

This report outlines the work carried out by the Committee since last May and the plans for the next year.

2. The Role of the Public Accounts Committee

Throughout the world recognition is given to the contribution of Public Accounts Committees in their work to promote the accountability of governments in ensuring that value for money is achieved in an open and transparent way. Guernsey's own Public Accounts Committee is no different, although it has fewer tools available to carry out its work.

The local Public Accounts Committee is always seeking to improve the way it operates, incorporating and developing new processes to provide the financial scrutiny needed and demanded by the tax payer. During the year the Committee commenced a review into the way in which its reports are released and also set up a Working Party to research, as resolved by the States in 2003 and 2004, the creation of the statutory post of Auditor General.

This latter research has involved meeting with the Auditor General for Wales, and plans are in hand to meet with representatives of the Commonwealth Parliamentary Association when in Guernsey for the 40th Annual Conference. Guernsey is not alone in having financial scrutiny and the opportunity to learn from other jurisdictions will be taken when delegates congregate in the Island in June 2009.

The Auditor General Working Party will continue its research and present its findings to the full Committee during the next calendar year.

3. Summary of States Financial Performance

Throughout the year the Public Accounts Committee monitors performance and will challenge financial issues arising from draft and published States Reports or other reports in the public domain.

During 2008/09 the Committee raised questions in relation to GuernseyFinance, Director of Aviation, Purchase of Tankships and Commercialisation of Business Activities; a full list of the correspondence of the Committee is found in Appendix V.

The Committee considered the 2009 budget and raised specific questions where appropriate.

Being responsible for the appointment of the States External Auditors the Public Accounts Committee will meet them twice a year, in order to discuss the work plan and then the audit findings. This contact is vital for the Committee to ensure that the States

has the highest standards in the management of its financial affairs.

During the past year the Treasury and Resources commissioned a fundamental spending review and issued the phase one report. The Committee was pleased to participate in the initial stages and looks forward to greater involvement following the completion of the second phase.

As the credit crunch bites and the world economic climate remains volatile, Guernsey needs the assurance that its finances are well looked after and the review of investments commissioned by the Committee is timely. Although the review has been set up during this reporting year, PricewaterhouseCoopers will not commence the review until next year.

The Committee awaits with interest the changes in the format and layout of the States Accounts and also initiatives to make the accounts compliant with International Financial Reporting Standards.

4. Value for Money Audits

When the membership of the Committee was re-elected in May 2008, there were two outstanding commissioned reports to progress and complete and also some suggestions for future reviews.

Following a short period of induction, members held their first hearing in August 2008 based on the UK National Audit Office report on "Safeguarding Guernsey's heritage assets". The Committee then formulated its own views and presented these, with the NAO report, to the States in January 2009. Although the States were supportive of the value for money review and its recommendations, and resolved that the Culture and Leisure Department return to the States with clear and costed proposals on the future direction and strategy for safeguarding, storing, displaying and accessibility of the heritage assets of the Island, the Committee noted that the project appears to have been given a priority 2 status in the recent Capital Prioritisation process.

This review showed a different side to the work of the Committee in that it can support areas where expenditure will be exerted but where Guernsey will achieve long term value for money and benefit as its heritage assets will be looked after for future generations.

The decision to append the second report relating to "Housing Associations in Guernsey" was reached by the former members of the Committee following the States support of housing associations within the Corporate Housing Programme[1]. Therefore, as an appended report, progress on completing this review was less timely. This subject will be re-visited at some time in the future but before the next term of office.

One of the main changes during 2008/09 was the finalisation of the work carried out by the National Audit Office under its three year contract and the setting up of a framework

[1] Billet d'Etat XVIII, December 2008, pages 1468 and 1470.

agreement for third party reviewers to complete future value for money reviews and investigations. After a tender process five ’reviewers were invited to be part of the framework agreement. Future reviews will involve selecting two from the list to quote and scope for the work, from which one is chosen. This approach was adopted following the recommendations from the Committee’s review on “Using Consultants Appropriately in the States of Guernsey”[2].

As part of the process in setting up the framework agreement presentations were given on a future review topic, that of corporate governance. This was important as it helped the Committee determine that an overview was required of corporate governance in the States of Guernsey rather than identifying specific areas for more in-depth investigation.

At the beginning of 2009 the Auditor General for Wales and the Wales Audit Office commenced its work on this important overview, the findings of which will not be available until the next reporting year.

The Committee also initiated a follow up of a past review into sickness absence, the original report being issued in November 2006.

As announced in previous annual reports, the Committee will be carrying out a value for money review at Health and Social Services Department, the topic to be determined. Other review work has not yet been determined.

5. Project Reviews

In the past the Committee has indicated that it has not been able to carry out investigations into a number of projects due to continuing legal proceedings. However, this last year the legal issues were resolved for the New Jetty and the Public Services Department notified the Committee that the investigations, as indicated in past States reports, could commence.

The Committee appointed FGS McClure Watters to carry out the investigation, which commenced in January 2009. It is anticipated that the findings from this investigation will be issued before the end of the calendar year. The Committee is grateful for the full co-operation of the Public Services Department in this review.

The Committee has been unable to commence its work on the Airport in respect of the Walters Requête and St Sampson’s Marina due to the outstanding legal issues.

For a number of years the Committee has been pursuing the completion of post implementation reviews for all major contracts. During 2008/09 the Contract Review Working Party has been in dialogue with the Property Services Sub-Committee of the Treasury and Resources Department in relation to its Code of Practice 4 specifically relating to post implementation reviews.

Post implementation reviews are important documents as they indicate the lessons

[2] Billet d’Etat II, February 2008, recommendation 11, pages 269-270.

learnt, both bad and good, from past projects, and inform future action.

During the year the Committee received copies of the Education Development Plan post implementation reviews for Sixth Form Centre, Le Rondin, Performing Arts Centre, the two Baubigny Schools as well as a lesson learnt document. It also ensured that Health and Social Services Department carried out post implementation reviews for John Henry House, Mignot Hospital, MIR Scanner and will put in place a review following completion of the Clinical Block.

2009/2010 will be spent reviewing all of these reports and building on comments from previous post implementation reviews received to help ensure that future projects are carried out more effectively and efficiently.

In June 2008 the Committee received notification that the Policy Council had considered the progress made on the implementation of the recommendations 1 to 9 of the Investigation into the Award of the Clinical Block Contract (February 2007), recommendation 10 to 14 already having been completed the previous year.

One year on, the development of the capital prioritisation process and codes of practice under the Corporate Property Plan by the Treasury and Resources Department will lead to the completion of the outstanding issues of the Clinical Block. The Committee will report back to the States on what has been done to implement the recommendations during the next year.

Although the Committee has focused mainly on construction projects it also ensured that similar changes were being carried out in relation to information technology projects.

6. Other scrutiny

As is expected in government and large businesses, the Committee is not alone in providing scrutiny of activities and finances.

The Committee is responsible for appointing the external auditors for the States of Guernsey and will meet them throughout the year, monitoring their performance and others and acting in its adopted role of an audit committee of the States of Guernsey.

In previous years the Committee has liaised with internal audit, but during the last year in the absence of an internal audit unit this has not been possible. The Committee is concerned that an organisation the size of the States does not have the support of thorough and robust internal audit unit, although it is pleased that some internal audit has been outsourced to target specific areas of internal control weaknesses and that the post of Head of Internal Audit has now been advertised.

The main work of the Committee is to provide value for money reviews and investigations, with the Scrutiny Committee concentrating on reviewing policies being made and also in place. Although dialogue between staff is frequent, the Chairmen and

Vice Chairmen of both Committees recently met formally in accordance with both Committees' mandates.

Added to regular scrutiny for 2008/09, is the Fundamental Spending Review, commissioned by the Treasury and Resources Department to help shape future budgets.

7. Committee Membership and staff

Following the general election in April 2008, the Chairman was pleased to be re-elected to the post, especially since his work had not been completed during the first term of office. Bringing a wealth of experience from the re-election of three of the non-States members, one of whom had served on the former Audit Commission, the Committee was pleased to welcome four new States deputies to the Committee and one new non-States member.

Having such a continuance of members has been positive to the work of the Committee as it had been able to progress with its program sooner than anticipated.

A list of members can be found in Appendix I.

During the year the Committee saw the Public Accounts Officer leave and a temporary appointment made to support its work, replacing and expanding the support received from the Graduate Officer Scheme in previous years. The Committee did not immediately replace the Public Accounts Officer and is currently in the process of advertising the post.

In early 2008 the Policy Council determined that the newly created Parliamentary Committees should have the support of a Chief Officer, partly to replace the Chief Scrutiny Officer, but providing guidance across the three Committees of Scrutiny, Assembly and Constitution and Public Accounts. Although the Committee unanimously opposed the creation of the post and questioned the independence of it in relation to the departmental Chief Officers, an appointment was made shortly after the general election and commenced in July.

Early this year the Policy Council, in searching for a senior member of staff to lead one of its strategies, identified the Chief Officer as being best suited to advance the strategy and the Parliamentary Committees least likely to miss its Chief Officer due to the shortness of the appointment.

Although the effects of the transfer of the Chief Officer are yet to be seen, the Committee believes that there will be little operational difference and that its work on the role of Auditor General may impact on the need of the Chief Officer post in future.

In line with the other Parliamentary Committees and following the appointment of a Chief Officer, Parliamentary Committees, the Chief Public Accounts Officer was renamed the Principal Public Accounts Officer.

8. Dialogue with Third Parties

The less visible work of the Committee is its monitoring work and ensuring that the whole financial scrutiny is carried out. Often the Committee will raise matters with other departments and confer with outside bodies on financial matters and the past year has been no different.

The Committee has continuing dialogue with four local firms of accountants namely Deloitte, KPMG, Ernest and Young and PricewaterhouseCoopers. This contact keeps the Committee abreast of developments in the accountancy world.

The Committee also has conversed with the two sets of consultants involved in the Fundamental Spending Review, Sector Projects who prepared and scope the project and then Tribal Helm charged with carrying out the work, the latter as any other States department/committee. Tribal Helm, along with four others, was also appointed to the Committee's framework agreement for the provision of value for money reviews and investigations for the next four years.

As would be expected in a financial environment, the Committee has much dialogue with the staff and members of the Treasury and Resources Department. The flow of information between the two is important and the Department is fully co-operative in ensuring that financial scrutiny benefits the Island.

During the past year the Committee and its working parties have met with the Treasury and Resources' property, treasury, corporate procurement and information technology units on a number of matters as part of its monitoring role.

Full details of the visitors to Committee meetings are found in Appendices II and III and correspondence in relation to its monitoring role in Appendix V.

9. The Year Ahead

The Committee anticipates a busy year ahead as it will be reporting on the New Jetty investigation, review on investments, the lessons learnt from past post implementation reviews, implementation of the Clinical Block recommendations[3], corporate governance and the role of the auditor general. It will also be commencing a further two reviews.

Already the previous Committee membership identified health as an area for future review and, once a topic has been determined, will be carried out towards the end of the year. Another review is also planned and may be influenced by the findings of the fundamental spending review.

In order to ensure that action is taken in respect of the recommendations from previous reports, the Committee is carrying out a follow up review of managing sickness absence[4], an appended States Report in November 2006 and industry support schemes

[3] Billet d'Etat V, February 2007
[4] Billet d'Etat XVIII, November 2006

from September 2006[5].

The Committee will also continue with its monitoring work, reacting to the general States business and also ensuring that the States operate to the highest standards in the management of their financial affairs.

10. Conclusion

The Committee is pleased that, as it completes its fifth year, it has become an established and accepted form of financial scrutiny for the States of Guernsey.

The impact and influence of the work of the Committee and the reports it has commissioned is leading to consideration and agreement of improved procedures and processes within the States of Guernsey in order to provide better value for money.

Although the output for the year did not reach its target of four reports this year, the continued promotion of better procedures has contributed to a better outcome for the tax payer.

Yours faithfully

Leon Gallienne
Chairman

[5] Billet d'Etat XVI, September 2006

Appendix I

PUBLIC ACCOUNTS COMMITTEE

MEMBERSHIP
From May 2008 -

Full Committee
Deputy Leon Gallienne (Chairman)
Deputy Barry Paint (Vice-Chairman)
Deputy Mike Garrett
Deputy Mrs Jane Stephens
Deputy Martin Storey
Mr Michael Best
Mr Chris Bradshaw
Advocate Mark Helyar
Mr Eifion Thomas

Audit Sub-Committee
Deputy Leon Gallienne (Chairman)
Deputy Martin Storey
Mr Eifion Thomas

Contract Review Working Party
Mr Michael Best (Chairman)
Deputy Mike Garrett
Deputy Mrs Jane Stephens
Advocate Mark Helyar

Auditor General Working Party
Deputy Leon Gallienne (Chairman)
Mr Chris Bradshaw
Mr Eifion Thomas

Subject Specific Groups

Housing Associations
Deputy Barry Paint
Mr Michael Best
Advocate Mark Helyar

Corporate Governance
Deputy Mrs Jane Stephens
Mr Michael Best
Advocate Mark Helyar

New Jetty
Deputy Leon Gallienne
Deputy Martin Storey
Advocate Mark Helyar

Investments
Deputy Martin Storey
Deputy Barry Paint
Mr Chris Bradshaw

Appendix II

Visitors to PAC Full Committee

Visitors have included:

- Deloitte x 2 – External Audit matters
    - Partner
    - Audit manager

  Accompanied by Chief Accountant, Treasury and Resources Department for both meetings and the Assistant Chief Accountant, Treasury and Resources Department for one meeting

- Sector Projects – Fundamental Spending Review
    - Executive Partner
    - Associate Partner

  Accompanied by Chief Accountant, Treasury and Resources Department

  Also present Chairman and Vice Chairman, Scrutiny Officer and Assistant Scrutiny Officer, Scrutiny Committee.

- Wales Audit Office – Corporate Governance Overview
    - Engagement Partner
    - Governance Manager
    - Compliance Manager
- HM Procureur and members of St James Chambers staff
- Chief Accountant and Assistant Chief Accountant – Finance matters update
- Deputy Matt Fallaize – Corporate Governance Overview

In addition a hearing was held on "Safeguarding Guernsey's Heritage Assets" involving:

- Chief Officer, Treasury and Resources Department;
- Director of States Property Services, Treasury and Resources Department;
- Head of Estates Management, Treasury and Resources Department;
- Chief Officer, Culture and Leisure Department;
- Museums Director, Culture and Leisure Department.

And the Committee met with those submitting tenders for the framework agreement.

The Committee met 19 times during the year to 30 April 2009.

Appendix III

Visitors to PAC Working Parties and Sub-Committees

Visitors to the Contract Review Working Party:

- Director of States Property Services, Treasury and Resources Department;
- Head of Project Services, Treasury and Resources Department;
- Strategy and Compliance Manager, Treasury and Resources Department;
- Director of Information Technology, Treasury and Resources Department;
- Corporate Procurement Director, Treasury and Resources Department;
- Law Officer, Contracts, St James' Chambers.

The Working Party met 3 times during the year and also visited Property Services Sub-Committee, Treasury and Resources Department twice.

Visitors to the Audit Sub-Committee:

- Chief Accountant, Treasury and Resources Department;
- Partner and Staff, Deloitte LLP;
- Partner and Staff, Ernst and Young

The Sub-Committee met 2 times during the year.

Visitors to the Auditor General Working Party

- Auditor General for Wales

The Working Party met 4 times during the year

Subject specific groups were set up during the year

Housing Association Group	6 meetings
New Jetty Group	1 meeting
Corporate Governance Group	2 meetings
Investments Group	not met

Appendix IV

Reports Issued by the Public Accounts Committee during its second term

2008

Fourth Annual Report	Billet VII, May

2009

Safeguarding Guernsey's heritage assets	Billet II, January
Housing Associations in Guernsey	Appended Billet II, January

Appendix V

Correspondence topics during the year 1 May 2008 to 30 April 2009
(excluding from general public, those related to reviews/investigations, green papers and other administrative matters)

Commerce and Employment Department	re GuernseyFinance re Director of Aviation
Education Department (x8)	re Completion of post implementation reviews
Health and Social Services (x4)	re Completion of post implementation reviews
Policy Council	re Implementation of Clinical Block investigation recommendations re Purchase of tankships
Public Services Department	re Residual Waste Treatment re Walters Requête and Airport overspend
Treasury and Resources Department	re Ports Holding Account re Cabernet Group re Audit of non-States bodies re Capital prioritisation re Clinical Block recommendations re Corporate Property plan re Internal audit
Data Protection Commissioner	re Security of States of Guernsey website
Office of Utility Regulation	re Commercialisation of Business Activities