

# **BILLET D'ÉTAT No. XVII, 2012**

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# PROJET DE LOI

ENTITLED

## **The Foundations (Guernsey) Law, 2012**

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# PROJET DE LOI

ENTITLED

## The Foundations (Guernsey) Law, 2012

**THE STATES**, in pursuance of their Resolutions of the 15<sup>th</sup> December, 2006<sup>a</sup> and 8<sup>th</sup> March, 2012<sup>b</sup>, have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the Island of Guernsey.

### PART I

#### CREATION AND CONSTITUTION

##### *Creation*

##### **Creation of foundation.**

1. Any one or more persons ("**the founder(s)**") may by -
  - (a) endowing the foundation with its initial capital (see section 2),
  - (b) subscribing his name, as the founder, to the Constitution of the foundation (see section 3(2)), and
  - (c) otherwise complying with the requirements of this Law

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<sup>a</sup> Article VIII of Billet d'État No. XXI of 2006.

<sup>b</sup> Article XV of Billet d'État No. V of 2012.

in respect of establishment and registration (see Schedule 1),

create a Guernsey foundation which, upon establishment, has legal personality separate and independent from its founder (see Schedule 1, paragraph 6(4)).

### **Capital endowment.**

2. (1) The "**initial capital**" of a foundation is the capital endowed upon the foundation in order that the requirements for the Charter may be met (see section 4(1)) and the foundation may be established (see section 1(a)).

(2) The initial capital may comprise any property.

(3) Following the endowment of the initial capital, further property may be endowed upon the foundation by any person if the Constitution (see section 3) so permits.

(4) A founder does not have any interest in a foundation by virtue only of endowing it with its initial capital or further property or otherwise by virtue of being the founder thereof.

(5) No person has any interest in a foundation, or is a founder of a foundation, by virtue only of endowing it with further property in accordance with subsection (3).

### **Constitution.**

3. (1) The Constitution of a foundation comprises -

(a) the Charter (see section 4), and



(b) subject to section 5(4), the Rules (see section 5).

(2) The founder must subscribe to the Constitution, by signing it in his own name, either personally or by his resident agent on his behalf (see section 12).

**Charter.**

**4.** (1) The Charter must -

- (a) state the name of the foundation (see Schedule 1, paragraph 1),
- (b) state the purpose of the foundation (see section 7),
- (c) contain a description of the initial capital of the foundation (see section 2),
- (d) state the duration of the foundation (if it is to subsist for a limited period only),
- (e) contain a declaration from the founder, or his resident agent, that the founder wishes the councillors to comply with the terms of the Charter.

(2) The Charter may contain any matter -

- (a) that is otherwise required or permitted to be in the Rules in accordance with section 5, or
- (b) that the founder thinks fit.

- (3) The Charter may be amended only if -
  - (a) the Charter so provides, or
  - (b) the Royal Court so orders, or the Registrar so permits, in accordance with Schedule 1, paragraphs 10(4) and (5).

**Rules.**

- 5. (1) The Rules must -
  - (a) prescribe the functions of the Council (and see section 9),
  - (b) detail the procedures for the appointment, resignation and removal of councillors and any guardian (see sections 14 to 18), and
  - (c) if the councillors or guardian are to be remunerated (see section 20), make such provision as the founder thinks fit in respect thereof.
- (2) The Rules may -
  - (a) prescribe the manner in which the property of the foundation may be distributed, accumulated or applied,
  - (b) detail whether, and if so how, further property may be

endowed upon the foundation,

- (c) provide for the addition or removal of a person or class of persons as beneficiary or for the exclusion from benefit of a person or class of persons, either revocably or irrevocably,
- (d) detail any person's powers in relation to the foundation (including, but not limited to, the power to appoint or remove a foundation official, to take investment decisions or to approve the use of the foundation's assets),
- (e) impose obligations upon beneficiaries as a condition of benefit,
- (f) make the interest of a beneficiary -
  - (i) liable to termination,
  - (ii) subject to a restriction on alienation or dealing, or
  - (iii) subject to diminution or termination in the event of the beneficiary becoming bankrupt,
- (g) detail the name and address of the default recipient (see section 6) failing which the default recipient shall, unless Her Majesty's Receiver-General directs otherwise, be the Crown, and

(h) contain any other matter that the founder thinks fit.

(3) The Rules may be amended only if -

(a) the Constitution so provides, or

(b) an application is made to the Royal Court by or on behalf of the founder or a foundation official whereupon the Court may, in its absolute discretion and on such terms and conditions as it thinks fit, by order authorise the rectification of any error, defect or omission therein.

(4) To the extent to which matters required or authorised to be in the Rules under subsection (1) are contained within the Charter, such matters need not also be in the Rules, and if all of the matters in subsection (1) and (2) are contained in the Charter, the foundation need not have any Rules.

**Default recipient.**

6. (1) The Constitution may identify a default recipient to whom all the foundation assets shall pass in the event of the termination of the foundation (see Part III of Schedule 2).

(2) Subject to the terms of the Constitution, the default recipient is not entitled to information about the foundation, has no interest in it, and is not a participant of the foundation.

(3) If -

- (a) no default recipient is named in the Constitution, or
- (b) any such default recipient no longer exists,

any property or assets of the foundation existing at the termination of the foundation shall, unless Her Majesty's Receiver-General directs otherwise, become *bona vacantia* belonging to the Crown.

**Purpose.**

7. A foundation must have a purpose and may be established for any purpose, save that it cannot carry out any commercial activities except those necessary for, and ancillary or incidental to, its purpose.

**Amendment of purpose.**

8. (1) The purpose of a foundation may be only amended -

- (a) where there is an express power so to amend in the Charter,
- (b) by order of the Royal Court in accordance with –
  - (i) subsection (2), or
  - (ii) Schedule 2, paragraph 21.

(2) If there is no express power to amend the purpose in the Charter then, subject to subsection (3), the purpose may be amended by order of the Royal Court where -

- (a) the purpose has been, as far as may be, fulfilled,

- (b) the purpose cannot be carried out, or not according to its spirit,
- (c) the purpose provides a use for part only of the property of the foundation,
- (d) the purpose was laid down by reference to a class of persons or to a matter which has for any reason since ceased to be -
  - (i) suitable, or
  - (ii) practicable in administering the foundation,
- (e) in the case of a charitable purpose, the purpose has ceased to be charitable (by being useless or harmful to the community or otherwise), or
- (f) the purpose has ceased in any other way to provide a suitable and effective method of using the property of the foundation,

and in these cases the property, or the remainder of the property, as the case may be, shall be held for such other charitable or non-charitable purpose as the Royal Court, on the application of -

- (i) Her Majesty's Procureur,
- (ii) the Council, or

(iii) the participants,

may declare to be consistent with the original intention of the founder or the spirit in which the foundation was established.

(3) An application to the Royal Court to amend the purpose under subsection (2) may only be made upon notice to the participants (see section 30).

**Council.**

9. (1) A foundation must have a Council.

(2) Subject to the terms of the Constitution, the Council shall comprise at least two councillors.

(3) For the avoidance of doubt the founder or a body corporate may be appointed as a councillor.

(4) A councillor -

(a) must be so named in the Register (in accordance with Schedule 1, paragraph 4)

(b) must ensure that the Council keeps accurate accounting records, and

(c) is a foundation official and must comply with the provisions of Part II (Foundation Officials).

(5) A person must not be appointed as a councillor, or be so

referred to in the Register, unless he has consented in writing to being a councillor of the foundation.

(6) The appointment of a person as a councillor has no effect if the person is a guardian of the foundation.

**Guardian.**

**10.** (1) If, in respect of a foundation, –

- (a) there is a purpose in respect of which there are no beneficiaries, or
- (b) there are disenfranchised beneficiaries (see section 33),

the foundation must have a guardian in relation to that purpose or those beneficiaries (see sections 16 and 18 for the appointment and removal of a guardian and section 14 for the role of foundation officials in the absence of a guardian).

(2) Without prejudice to subsection (1) the foundation may have a guardian if the Charter so provides.

(3) For the avoidance of doubt, the founder or a body corporate may be appointed as guardian.

(4) A guardian –

- (a) must be so named in the Register (in accordance with Schedule 1, paragraph 4),



- (b) must keep and retain accurate accounts and records of his guardianship for so long as his guardianship subsists and for 6 years thereafter, and
- (c) is a foundation official and must comply with the provisions of Part II (Foundation Officials).

(5) A person must not be appointed as a guardian, or be so referred to in the Register, unless he has consented in writing to being the guardian of the foundation.

(6) The appointment of a person as guardian has no effect if the person is a councillor of the foundation.

**Reservation to founder of powers to amend, revoke, vary or terminate.**

**11.** (1) Subject to the terms of the Constitution and to subsection (2), the founder may not reserve to himself any powers to amend, revoke or vary the Constitution or purpose or to terminate the foundation.

(2) The founder may reserve the following powers -

- (a) a power to amend, revoke or vary the terms of the Constitution, in whole or in part,
- (b) subject to section 8, a power to amend, revoke or vary the purpose of the foundation, in whole or in part,
- (c) a power to terminate the foundation,

provided that the power to amend, revoke, vary or terminate, as the case may be, is detailed in full in the Charter, and provided that these powers are only reserved -

- (i) for a period not exceeding the duration of the founder's life, if he is a natural person, or
- (ii) for a period not exceeding 50 years from the date of establishment of the foundation, if the founder is a legal person,

and thereafter any such powers so reserved shall lapse, notwithstanding the terms of the Constitution.

- (3) If, at any time in respect of a foundation, -
  - (a) any power has been reserved or granted under subsection (1) to more than one founder, and
  - (b) more than one founder is capable of exercising it at that time,

then such power must be exercised by those founders unanimously unless the Charter provides otherwise.

### **Resident agents.**

**12.** (1) If, at any time, no foundation officials of a foundation are Guernsey licensed fiduciaries or authorised persons, the foundation must have a resident agent.

- (2) A resident agent must be -

- (a) resident in Guernsey, and
  - (b) a Guernsey licensed fiduciary or authorised person.
- (3) A resident agent may request copies of–
- (a) the records of the foundation, and
  - (b) any other documents or information necessary for the resident agent to comply with his duties as a licensed fiduciary,

at any time, by making a request in writing to the Council (see Schedule 1, paragraph 23 and see also section 22).

(4) In this section "**authorised person**" means a person authorised to act as such in accordance with the provisions of section 4(2)(c) of the Regulation of Fiduciaries Law.

- (5) The Department may, by regulations, amend this section.

**Establishment, registration and ancillary matters (including disqualification).**

13. The provisions of Schedule 1 shall have effect.

PART II

FOUNDATION OFFICIALS

*Appointment, resignation and removal*

**Appointment of additional foundation officials where less than required number.**

14. (1) Subject to the terms of the Constitution, where –
- (a) the number of councillors falls below the number required by or by virtue of section 9(2), or
  - (b) there is no guardian of the foundation, and a guardian is required by virtue of section 10 or the terms of the Constitution,

the necessary additional foundation officials shall be appointed as soon as practicable in accordance with the Constitution or, where the Constitution is silent, in accordance with the provisions of this Law (see sections 15 and 16).

(2) Until the necessary appointments are made in accordance with subsection (1), and subject to the Constitution, the existing foundation officials shall act only to preserve the property of the foundation.

**Appointment of new or additional councillors in absence of express provision, etc.**

15. (1) Where –
- (a) notwithstanding section 5(1)(b), the Constitution of a foundation contains no provision for the appointment of a new or additional councillor,
  - (b) any such provision has lapsed or failed, or
  - (c) the person with power to make any such appointment

is not capable of exercising the power,

a new or additional councillor may be appointed by -

- (i) the Council,
- (ii) the last remaining councillor or his personal representative or liquidator,
- (iii) the Registrar, or
- (iv) the Royal Court, on the application of any person mentioned in section 42(2).

(2) A councillor appointed under this section has the same functions, and may act in all respects, as if he had been originally appointed a councillor.

(3) A councillor with power to appoint a new or additional councillor who fails to exercise the power may be removed from office by the Royal Court, on the application of any person mentioned in section 42(2).

**Appointment of new guardian in absence of express provision, etc.**

**16.** (1) Where the foundation requires a guardian in order to comply with section 10 or the terms of the Charter and -

- (a) notwithstanding section 5(1)(b), the Constitution of a foundation contains no provision for the appointment of a new guardian,

- (b) any such provision has lapsed or failed, or
- (c) the person with power to make any such appointment is not capable of exercising the power,

a new guardian may be appointed by -

- (i) the founder, his agent or personal representative,
- (ii) the Registrar, or
- (iii) the Royal Court, on the application of any person mentioned in section 42(2).

(2) A guardian appointed under this section has the same functions, and may act in all respects, as if he had been originally appointed a guardian.

**Resignation or removal of councillors.**

17. (1) Subject to the terms of the Constitution, a councillor may resign his office by delivering a written notice of resignation to the Council.

(2) A councillor is removed from office on the coming into effect of, or the exercise of a power under, a provision in the Constitution under or by which he is removed from or otherwise ceases to hold office.

(3) Subject to subsection (4) and to the terms of the Constitution, a resignation takes effect -

- (a) on delivery of the notice, or
  - (b) on such later date or on the happening of such later event as may be specified therein.
- (4) A resignation -
- (a) given to facilitate a breach of duty, or
  - (b) which would result in there being fewer councillors than the number required by or by virtue of section 9(2),

has no effect.

(5) Where the Council has reason to believe that a councillor of a foundation -

- (a) is unwilling or is refusing to act,
- (b) is bankrupt or otherwise unfit to act, or
- (c) is incapable of acting,

the Council shall apply to the Royal Court for the removal of the councillor and the appointment of a replacement; and his removal from office takes effect on the date specified by the order of the Court.

**Resignation or removal of guardian.**

18. (1) Subject to the terms of the Constitution, a guardian may

resign his office by delivering a written notice of resignation to the Council.

(2) A guardian is removed from office on the coming into effect of, or the exercise of a power under, a provision in the Constitution under or by which he is removed from or otherwise ceases to hold office.

(3) Subject to subsection (4) and to the terms of the Constitution, a resignation takes effect -

- (a) on delivery of the notice, or
- (b) on such later date or on the happening of such later event as may be specified therein.

(4) A resignation given to facilitate a breach of the guardian's duties has no effect.

(5) Where the Council has reason to believe that the guardian -

- (a) is unwilling or is refusing to act,
- (b) is bankrupt or otherwise unfit to act, or
- (c) is incapable of acting,

the Council shall apply to the Royal Court for the removal of the guardian and the appointment of a replacement; and his removal from office takes effect on the date specified by the order of the Court.

### *Duties*



**General duties.**

**19.** (1) The councillors have a duty to the foundation to act in good faith in the exercise of their functions.

(2) The guardian has a duty to the founder and the beneficiaries to act in good faith and en bon père de famille -

(a) to enforce the Constitution and the purpose, and

(b) in the exercise of his functions.

(3) For the avoidance of doubt, in the exercise of his duty under subsection (2), a guardian may bring an action against the Council unless the Constitution provides otherwise.

(4) A councillor must execute and administer the foundation and must exercise his functions under it -

(a) in accordance with the provisions of this Law, and

(b) subject to those provisions -

(i) in accordance with the terms of the Constitution, and

(ii) only in the advancement of the purpose.

**Duty not to profit from office.**

**20.** (1) Subject to subsection (2), foundation officials shall not -

- (a) derive, directly or indirectly, any profit from their appointment,
- (b) cause or permit any other person to so derive any such profit, or
- (c) on their own account enter into any transaction with the foundation, or relating to the property of the foundation, which may result in any such profit,

except -

- (i) as expressly authorised by the terms of the Constitution,
- (ii) as permitted by the provisions of this Law, or
- (iii) with the approval of the Royal Court.

(2) Subject to section 28, a guardian is entitled to be paid, and shall be reimbursed, by the Council from the property of the foundation for all expenses and liabilities properly incurred in connection with the guardianship of the foundation.

**Duty to give information.**

**21.** (1) The Council shall, at all reasonable times, at the written request of -

- (a) the guardian,

(b) any enfranchised beneficiary (see section 32) or

(c) subject to the terms of the Constitution, the founder,

provide full and accurate information as to the state and amount of the foundation property within 3 months' from the date of such request.

(2) Where by virtue of subsection (1)(c) the terms of the Constitution prohibit or restrict the provision of any information described in subsection (1), the founder may notwithstanding the prohibition or restriction apply to the Royal Court for an order authorising or requiring the provision of the information.

(3) When applying to the Royal Court for an order under subsection (2) the founder must show that the provision of the information is necessary or expedient -

(a) for the proper disposal of any matter before the Court,

(b) for the protection of the interests of any beneficiary or the purpose, or

(c) for the proper administration or enforcement of the foundation.

### **Duty to maintain records.**

**22.** (1) The Council shall ensure that a foundation shall keep the records of the foundation or a copy thereof at its registered office (and see Schedule 1, paragraph 2).

- (2) The accounting records, must be -
  - (a) sufficient to show and explain the foundation's transactions,
  - (b) such as to disclose with reasonable accuracy, at any time, the foundations' financial position at that time, and
  - (c) such as to enable the foundation officials to ensure that the foundation's accounts are prepared properly and in accordance with any relevant enactment for the time being in force,

and they shall in particular contain day to day entries of all sums of money received and expended by the foundation, the matters in respect of which the receipt and expenditure takes place and a record of the assets and liabilities of the foundation.

(3) The guardian and resident agent shall be entitled to inspect the documents referred to in subsection (1) upon 2 working days' notice in writing to the Council.

**Duty of councillors to act together.**

- 23.** (1) Subject to the terms of the Constitution –
- (a) all the councillors of a foundation shall, acting as the Council, join in the execution of the foundation, and
  - (b) no function conferred on the Council shall be

exercised unless all the councillors agree on its exercise.

(2) Where the terms of the Constitution empower the Council to act by majority, a councillor who dissents from a decision of the majority may require his dissent to be recorded in writing.

**Impartiality of councillors.**

**24.** (1) Subject to the terms of the Constitution and to subsection (2), where a foundation has more than one beneficiary or purpose, the Council shall be impartial and shall not execute the foundation for the advantage of one at the expense of another.

(2) Subsection (1) does not prejudice the exercise of a discretion conferred on the Council by the terms of the Constitution.

*General powers of the Council*

**Delegation by Council.**

**25.** (1) Subject to the terms of the Constitution, the Council shall not delegate its functions unless permitted to do so by the provisions of this Law.

(2) Except where the terms of the Constitution specifically provide to the contrary, the Council may -

- (a) delegate the management of foundation property to, and appoint, managers whom the Council reasonably considers to be competent and qualified to manage the foundation property or the investment thereof,

- (b) appoint professional persons to act in relation to the affairs of the foundation or to hold any foundation property, and
- (c) authorise any such manager or person to retain any commission or other payment usually payable for services of the description rendered.

(3) A councillor who, without any breach of duty, makes or permits the continuation of a delegation or appointment under subsection (2), is not liable for any loss to the foundation arising from the delegation or appointment.

#### **Corporate councillors.**

**26.** (1) A corporate councillor may –

- (a) act in connection with a foundation by resolution of the corporate councillor or of its board of directors or other governing body, or
- (b) by such resolution appoint an officer or employee, or a committee of officers or employees, or both, to act on its behalf in connection with the foundation.

(2) The rights in action of the corporate councillor against its officers and employees are not assets of the foundation.

#### **Non-disclosure of deliberations.**

**27.** (1) Notwithstanding sections 21 (duty to give information) and 32 (enfranchised beneficiaries), a councillor is not, subject to the terms of the Constitution and to any order of the Royal Court made pursuant to an application

under this section by a participant, obliged to disclose documents which reveal -

- (a) his deliberations as to how he should exercise his functions as councillor,
- (b) the reasons for any decision made in the exercise of those functions,
- (c) any material upon which such a decision was or might have been based.

(2) A participant applying to the Royal Court for an order under this section for the disclosure of any document must show that the disclosure is necessary or expedient -

- (a) for the proper disposal of any matter before the Court,
- (b) for the protection of the interests of any beneficiary or purpose, or
- (c) for the proper administration or enforcement of the foundation.

### *Liability*

#### **Liability for breach of duty.**

**28.** (1) Subject to the provisions of this Law and to the terms of the Constitution, a foundation official who commits or connives in a breach of his duty is liable for any loss or depreciation in value of the foundation property resulting from the breach.

(2) A foundation official is not liable for a breach of duty committed by another foundation official unless -

- (a) he becomes or ought to have become aware of the breach or of the intention to commit the breach, and
- (b) he actively conceals the breach or intention, or fails within a reasonable time to take proper steps to protect or restore the foundation property or to prevent the breach.

(3) The terms of a Constitution may not -

- (a) relieve a foundation official of liability for a breach of duty arising from his own fraud, wilful misconduct or gross negligence, or
- (b) grant him any indemnity against the foundation property in respect of any such liability.

(4) For the avoidance of doubt, and without prejudice to any other provision of this Law a term of a Constitution is invalid to the extent that it purports to -

- (a) relieve a foundation official of liability for a breach of duty arising from his own fraud, wilful misconduct or gross negligence, or
- (b) grant him any indemnity against the foundation



property in respect of any such liability.

**Power to relieve foundation officials from personal liability.**

**29.** The Royal Court may relieve a foundation official wholly or partly of liability for a breach of duty, where it appears to the Court that the official -

- (a) has acted honestly and reasonably, and
- (b) ought fairly to be excused -
  - (i) for the breach of duty,
  - (ii) for omitting to obtain the directions of the Court in the matter in which the breach arose.

**PART III**

**PARTICIPANTS**

*General*

**Participants.**

**30.** The participants of a foundation are -

- (a) the founder,
- (b) the enfranchised beneficiaries (see section 32)
- (c) in relation to any purpose or disenfranchised beneficiary (see section 33), the guardian, and

- (d) any other person so identified by the Constitution.

### *Beneficiaries*

#### **Beneficiaries.**

31. (1) A "**beneficiary**" is a person who may benefit from a foundation and who is -

- (a) so identified in the Constitution by name, or
- (b) whose identity is ascertainable from the terms of the Constitution by reference to –
  - (i) a class (see section 35), or
  - (ii) a relationship to another person, whether or not living at the time of the creation of the foundation or at the time by reference to which, under the terms of the Constitution, members of a class are to be determined.

(2) The Constitution may provide for the addition or removal of a person as beneficiary or for the exclusion from benefit of a beneficiary either revocably or irrevocably.

(3) The Constitution may impose an obligation on a beneficiary as a condition of benefit.

(4) A founder or foundation official of a foundation may also be a beneficiary thereof.

- (5) The Constitution may state –
  - (a) whether a beneficiary is entitled to the information about the foundation set out in section 32(1) ("**an enfranchised beneficiary**"), or
  - (b) whether a beneficiary is not entitled to that information ("**a disenfranchised beneficiary**": see section 33), and
  - (c) whether, and if so, in what manner a disenfranchised beneficiary may become an enfranchised beneficiary or vice versa.
- (6) Where in respect of any beneficiary the Constitution is silent or unclear as to –
  - (a) the matters in subsection (5)(a) and (b), then the beneficiary is an enfranchised beneficiary, and
  - (b) the matters in subsection (5)(c), the status of that beneficiary may not be altered save by order of the Royal Court.

**Enfranchised beneficiaries.**

- 32. (1) An enfranchised beneficiary is entitled to –
  - (a) copies of the Constitution,

- (b) disclosure of records and accounts of the foundation, on written request to the Council,
- (c) make an application to the Royal Court to request an order to prohibit –
  - (i) a change to the purpose under section 8 (amendment of purpose), or
  - (ii) the winding up of the foundation (see Schedule 2, paragraph 23).

(2) Subject to the terms of the Constitution, subsection (1) does not entitle a beneficiary to the information detailed in section 27 (non disclosure of deliberations).

**Disenfranchised beneficiaries.**

33. Subject to the terms of the Constitution, a disenfranchised beneficiary is not entitled to any information about the foundation.

**Disclaimer of beneficial interest.**

34. (1) Subject to the terms of the Constitution, a beneficiary may disclaim his interest in a foundation or any part of it, whether or not he has received any benefit from it.

(2) A disclaimer shall be in writing and, subject to the terms of the Constitution -

- (a) may be temporary, and

- (b) may, if the disclaimer so provides, be revoked in the manner and circumstances specified thereby.

(3) A disclaimer is not effective until it is delivered to the Council.

### **Class interests.**

**35.** Subject to the terms of the Constitution, where a foundation is made in favour of a class of persons then, -

- (a) the class closes when it is no longer possible for any other person to become a member of the class, and
- (b) where the interest of the class relates to income, and no member of the class exists, the income shall be accumulated and retained until a member of the class exists or the class closes.

## **PART IV**

### **PROVISIONS OF GENERAL APPLICATION**

#### *Jurisdiction and powers of Royal Court*

### **Jurisdiction of Royal Court.**

**36.** Without prejudice to the Royal Court's inherent jurisdiction, and for the avoidance of doubt, the Royal Court sitting as an Ordinary Court ("**the Royal Court**") has jurisdiction in respect of a Guernsey foundation and all matters relating thereto.

**Application of Guernsey law to questions of validity.**

37. (1) Subject to the terms of the Constitution, all questions arising in relation to a Guernsey foundation or any disposition of property to or upon such a foundation, including (without limitation) questions as to -

- (a) the capacity of the founder,
- (b) the validity, interpretation or effect of the Constitution or any variation or revocation thereof,
- (c) the validity of any endowment to the foundation,
- (d) the administration of the foundation, whether it is conducted in Guernsey or elsewhere, including (without limitation) questions as to the functions, appointment and removal of foundation officials,
- (e) the existence and extent of any functions in respect of the foundation, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such function,
- (f) the distribution of the foundation property,

are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction.

For these purposes "**the law of Guernsey**" does not include the Guernsey rules of private international law, except those set out in this section.

## (2) Subsection (1) -

- (a) does not validate any endowment of property to the foundation by the founder, which is neither owned by the founder nor the subject of a power of disposition vested in the founder,
- (b) does not affect the recognition of the law of any other jurisdiction in determining whether the foundation is the owner of any property,
- (c) is subject to any express provision to the contrary in the terms of the Constitution,
- (d) does not, in determining the capacity of a legal person, affect the recognition of the law of its place of establishment,
- (e) does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property, and
- (f) subject to subsection (3), does not validate –
  - (i) any disposition of real property situate in a jurisdiction other than Guernsey which is invalid under the law of that jurisdiction, or

- (ii) any testamentary disposition which is invalid under the law of the testator's domicile at the time of his death.

(3) No Guernsey foundation, and no endowment of property upon such a foundation, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any foundation official or participant to be questioned, nor is any foundation official, participant or third party to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that -

- (a) the laws of any other jurisdiction prohibit or do not recognise a Guernsey foundation, or

- (b) the foundation or endowment thereupon -

- (i) avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person -

- (A) by reason of a personal relationship to a founder or any beneficiary, or

- (B) by way of foreign heirship rights, or

- (ii) contravenes or potentially contravenes any rule of law, judgment, order or action of any other jurisdiction intended to recognise, protect,



enforce or give effect to any such rights, claims, interests, obligations or liabilities.

(4) Notwithstanding any legislation or other rule of law for the time being in force in relation to the recognition or enforcement of judgments, no judgment or order of a court of a jurisdiction outside Guernsey shall be recognised or enforced or give rise to any right, obligation or liability or raise any estoppel if and to the extent that -

- (a) it is inconsistent with this Law, or
- (b) the Royal Court, for the purposes of safeguarding the purpose of the foundation or the interests of the beneficiaries, or in the interests of the proper administration of the foundation, so orders.

(5) This section applies -

- (a) whenever the foundation or endowment thereto was created or made,
- (b) notwithstanding any other provision of this Law.

(6) In relation to a Guernsey foundation comprising personal property or any endowment of such property upon such a foundation, the law of Guernsey relating to *légitime* and the rights of a surviving spouse apply only where the founder is domiciled there at the time of his death.

#### **Approval of particular transactions.**

38. Where in the management or administration of a foundation a

transaction is, in the opinion of the Royal Court, expedient, but cannot be effected because the necessary power is not vested in the Council by the terms of the Constitution or by law, the Royal Court, on the application of any person mentioned in section 42(2) -

- (a) may confer on the Council, generally or in any particular circumstances, the necessary power, on such terms and conditions as the Court thinks fit, and
- (b) may direct the manner in which, and the property from which, any monies authorised to be expended, and the costs of any transaction, are to be paid or borne.

**Judgment against foundation official to be binding on participants or disenfranchised beneficiaries.**

**39.** (1) Any order, judgment or finding of law or fact of the Royal Court in an action against a foundation official founded on breach of duty is binding on the foundation and all participants and disenfranchised beneficiaries of the foundation, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

(2) Subsection (1) applies in respect of a participant or disenfranchised beneficiary only if -

- (a) he was represented in the proceedings (whether personally, or by the guardian of the foundation, or as the member of a class, or otherwise), or
- (b) if not so represented, he had notice of the proceedings

and a reasonable opportunity of being heard.

"**Notice**" in paragraph (b) means 14 days' notice or such other period as the Court may direct.

(3) This section is without prejudice to the powers of the Royal Court in respect of representative proceedings and class actions.

**Settlement of action against foundation official by alternative dispute resolution to be binding on participants or disenfranchised beneficiaries.**

**40.** (1) Where -

- (a) the terms of the Constitution direct or authorise, or the Royal Court so orders, that any claim against a foundation official founded on breach of duty may be referred to alternative dispute resolution ("**ADR**"),
- (b) such a claim arises and, in accordance with the terms of the Constitution or the Court's order, is referred to ADR, and
- (c) the ADR results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties,

the settlement is binding on all participants and disenfranchised beneficiaries of the foundation, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

(2) Subsection (1) applies in respect of a participant or

disenfranchised beneficiary only if -

- (a) he was represented in the ADR proceedings (whether personally, or by the guardian of the foundation, or as the member of a class, or otherwise), or
- (b) if not so represented, he had notice of the ADR proceedings and a reasonable opportunity of being heard,

and only if, in the case of a participant or disenfranchised beneficiary who is not yet ascertained or in existence, or who is a minor or person under legal disability, the person conducting the ADR proceedings certifies that he was independently represented by a person appointed for the purpose by a court of law.

"**Notice**" in paragraph (b) means 14 days' notice or such other period as the person conducting the ADR proceedings may direct.

(3) A person who represents a participant or disenfranchised beneficiary in the ADR proceedings for the purposes of subsection (2)(a) is under a duty of care to that person.

(4) For the avoidance of doubt, the ADR proceedings need not be conducted in Guernsey or in accordance with the procedural law of Guernsey.

(5) In this section -

"**ADR**" includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration, and

"proceedings" includes oral and written proceedings.

**Applications for directions.**

**41.** A foundation official may apply to the Royal Court for directions as to how he should or might act in any of the affairs of the foundation, and the Court may make such order as it thinks fit.

**General powers of Royal Court.**

**42.** (1) On the application of any person mentioned in subsection (2), the Royal Court may -

- (a) make an order in respect of -
  - (i) the execution, administration or enforcement of a foundation,
  - (ii) a foundation official, including an order as to the exercise of his functions, the removal of a foundation official (if, for example, he refuses or is unfit to act, or he is incapable of acting or is bankrupt, or his property becomes liable to arrest, saisie, or similar process of law), the appointment, remuneration or conduct of a foundation official, the keeping and submission of accounts, the making of payments, whether into court or otherwise, and the repayment to the foundation of any loss caused by a foundation official's breach of duty,
  - (iii) a participant, or any person connected with a

foundation,

(iv) any foundation property, including an order as to the vesting, preservation, application, distribution, surrender or recovery thereof,

(b) make a declaration as to the validity or enforceability of the terms of the Constitution,

(c) rescind or vary an order or declaration under this Law or make a new or further order or declaration.

(2) An application under subsection (1) may be made by -

(a) Her Majesty's Procureur,

(b) a foundation official,

(c) a participant,

(d) the Registrar,

(e) with leave of the Royal Court, any other person.

(3) Where the Royal Court appoints or removes a foundation official under this section it may impose such requirements and conditions as it thinks fit.

(4) Subject to the Royal Court's order, a foundation official appointed by the Court has the same functions, and may act in all respects, as a

foundation official appointed under the terms of the Constitution.

**Powers of Royal Court in event of default.**

43. If a person does not comply with an order of the Royal Court under this Law requiring him to do anything, the Royal Court may, on such terms and conditions as it thinks fit, order that the thing be done by another person, nominated for the purpose by the Court, at the expense of the person in default (or otherwise as the Court directs), and a thing so done has effect in all respects as if done by the person in default.

**Payment of costs.**

44. Without prejudice to its powers arising otherwise than under this Law, the Royal Court may order the costs and expenses of and incidental to an application to the Court under this Law to be paid by the foundation or by such persons, and in such manner and on such basis, as the Court thinks fit.

**Constitution of Royal Court.**

45. For the purposes of this Law the Royal Court is properly constituted by the Bailiff sitting unaccompanied by the Jurats.

*Offences*

**Offences by legal persons, etc.**

46. (1) Where an offence under this Law is committed by a legal person and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of -

- (a) any director, manager, secretary or other similar officer, or any foundation official, of the legal person,
- or

- (b) any person purporting to act in any such capacity,

he as well as the legal person is guilty of the offence and may be proceeded against and punished accordingly.

(2) Where the affairs of a legal person are managed by its members, subsection (1) applies to a member in connection with his functions of management as if he were a director.

(3) Where an offence under this Law is committed by an unincorporated body and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of -

- (a) in the case of a partnership, any partner,
- (b) in the case of any other unincorporated body, any officer of that body who is bound to fulfil any duty whereof the offence is a breach or, if there is no such officer, any member of the committee or other similar governing body, or
- (c) any person purporting to act in any capacity described in paragraph (a) or (b),

he as well as the unincorporated body is guilty of the offence and may be proceeded against and punished accordingly.

(4) Where an offence under this Law is alleged to have been committed by an unincorporated body, proceedings for the offence shall be brought



in the name of that body and not in the name of any of its members.

(5) A fine imposed on an unincorporated body on its conviction of an offence under this Law shall be paid from the funds of that body.

**False or misleading information.**

**47.** (1) A person who -

- (a) in connection with any application to, or otherwise in furnishing any information or document to, the Registrar in respect of a foundation under the provisions of this Law,
- (b) in purported compliance with a requirement imposed by or under the provisions of this Law, or
- (c) otherwise than as mentioned in paragraph (a) or (b) but in circumstances in which he intends, or could reasonably be expected to know, that the statement, information or document provided by him would or might be used by the Registrar for the purpose of exercising his functions conferred by or under this Law -
  - (i) makes a statement which he knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular,
  - (ii) dishonestly or otherwise, recklessly makes a

statement which is false, deceptive or misleading in a material particular,

- (iii) produces or furnishes or causes or permits to be produced or furnished any information or document which he knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular, or
- (iv) dishonestly or otherwise, recklessly produces or furnishes or recklessly causes or permits to be produced or furnished any information or document which is false, deceptive or misleading in a material particular,

is guilty of an offence.

(2) A foundation official who fails to provide the Registrar with any information in his possession knowing or having reasonable cause to believe -

- (a) that the information is relevant to the exercise by the Registrar of his functions under this Law; and
- (b) that the withholding of the information is likely to result in the Registrar being misled as to any matter which is relevant to and of material significance to the exercise of those functions in relation to the foundation or foundation official,

is guilty of an offence.

**Penalties.**

- 48.** (1) A person guilty of an offence under section 47(1) is liable -
- (a) on summary conviction, to imprisonment for a term not exceeding 3 months, to a fine not exceeding level 5 on the uniform scale, or to both,
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years, to a fine, or to both.
- (2) A person guilty of an offence under any other section or paragraph is liable -
- (a) on summary conviction, to a fine not exceeding level 5 on the uniform scale,
  - (b) on conviction on indictment, to a fine.

*Supplementary*

**Migration, revocation, winding up and termination.**

- 49.** The provisions of Schedule 2 have effect.

**Consequential amendments**

- 50.** (1) In the Regulation of Fiduciaries Law, after section 4(3)(b)(iii) insert -

"(iv) acting as foundation official for foundations within the meaning of section 2(1)(d), but only

where the individual is resident in Guernsey.",

(2) In the Companies Law -

(a) after section 428(3)(h) insert -

"(ha) his record of compliance with any provision contained in or made under the Foundations (Guernsey) Law, 2012 in acting as a foundation official or resident agent within the meaning of that Law.",

(b) in section 536(2) after "Office of the Registrar" insert "and in relation to the exercise of his functions".

**General provisions as to subordinate legislation.**

**51.** (1) The States may by Ordinance -

(a) amend Part II and Part IV of this Law,

(b) make such other provision as they think fit for the purposes of carrying this Law into effect, and

(c) make such amendments to any other enactment as they think fit where it is necessary to do so for the purpose of giving proper effect to that enactment and as are consequential upon the enactment of this Law.

(2) An Ordinance or regulation under this Law -

- (a) may be amended or repealed by a subsequent Ordinance or regulation, as the case may be, hereunder, and
- (b) may contain such consequential, incidental, supplementary and transitional provision as may appear to be necessary or expedient including, in the case of an Ordinance, provision making consequential amendments to this Law and any other enactment.

(3) Any power conferred by this Law to make an Ordinance or regulation may be exercised -

- (a) in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of cases,
- (b) so as to make, as respects the cases in relation to which it is exercised -
  - (i) the full provision to which the power extends, or any lesser provision (whether by way of exception or otherwise),
  - (ii) the same provision for all cases, or different provision for different cases or classes of cases, or different provision for the same class of case for different purposes,

- (iii) any such provision either unconditionally or subject to any prescribed conditions.

(4) Regulations under this Law shall be laid before a meeting of the States as soon as possible after being made; and, if at that or the next meeting the States resolve that the regulations be annulled, then they shall cease to have effect, but without prejudice to anything done under them or to the making of new regulations.

### **Interpretation.**

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

"**accounting records**" includes all underlying documentation, such as invoices, receipts and contracts, and details of property endowed upon the foundation (including the name and address of the person who endowed the property),

"**address**" in relation to any person means (unless the Registrar determines otherwise in any particular case) his physical address, telephone numbers and email address,

"**bankrupt**" means, -

- (a) that a declaration of insolvency has been made in respect of him by the Royal Court under the Loi ayant rapport aux Débiteurs et à la Renonciation, 1929<sup>c</sup>,
- (b) that a Commissioner or Committee of Creditors has

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<sup>c</sup> Ordres en Conseil Vol. VIII, p. 310.

been appointed by the Royal Court under that Law to supervise or secure his estate,

- (c) that his affairs have been declared to be in a state of "désastre" at a meeting of his arresting creditors held before a Commissioner of the Royal Court,
- (d) that an interim vesting order has been made against him in respect of any of his real property in the Bailiwick,
- (e) in the case of a company, and otherwise than for the sole purpose of solvent amalgamation, solvent reconstruction or solvent winding up, that -
  - (i) a liquidator (provisional or otherwise) has been appointed to act, or
  - (ii) the company has passed a special resolution requiring that it be voluntarily wound up,
- (f) in the case of a company, that an administration order is in force in respect of the company or, if the company is a protected cell company, in respect of any of its cells,
- (g) in the case of a protected cell company, that a receivership order is in force in respect of any of its cells,

- (h) in the case of a foundation, that a winding up order has been made by the Royal Court in respect of the foundation pursuant to paragraph 25(1)(f) of Schedule 2,
- (i) that a composition, compromise or arrangement with creditors has been entered into in respect of him whereby his creditors will receive less than 100 pence in the pound,
- (j) that possession or control has been taken of any of his property or affairs by or on behalf of creditors or, in the case of a company, the holders of debentures issued by it,
- (k) that an event, measure or procedure has occurred outside Guernsey in relation to him which corresponds as nearly as may be to any event described in the above paragraphs,

and "**bankruptcy**" shall be construed accordingly,

"**beneficiary**" has the meaning given in section 31,

"**breach of duty**" means a breach of any duty imposed on a foundation official by this Law, including the duties imposed under section 19, or by the terms of the Constitution, and cognate expressions shall be construed accordingly,

"**Charter**" has the meaning given in section 4,



"**Companies Law**" means the Companies (Guernsey) Law, 2008<sup>d</sup>, as amended,

"**Constitution**" means the Charter and Rules of a foundation,

"**corporate councillor**" means a councillor which is a body corporate (wherever incorporated),

"**Council**" has the meaning given in section 9,

"**default recipient**" has the meaning given in section 6,

"**Department**" means the States of Guernsey Commerce and Employment Department,

"**department**" means any department, council or committee (however called) of the States of Guernsey,

"**disenfranchised beneficiary**" has the meaning given in section 31(5),

"**disposition**" includes any means by which property or any interest therein is created, transferred, dealt with, extinguished or charged, and related expressions shall be construed accordingly,

"**endowment**" means the dedicating of property to a foundation,

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<sup>d</sup> No. VIII of 2008 amended by Ordinance Nos. XXV of 2008; LIV of 2008; VII of 2009; XIV of 2009; Regulations, 2009 (No. 34 of 2009); and (No. 34 of 2010) (No. XI of 2010).

**"enfranchised beneficiary"** has the meaning given in section 31(5),

**"establishment"** shall be construed in accordance with paragraph 6 of Schedule 1,

**"foreign heirship right"** means any right, claim or interest arising under the law of a jurisdiction other than Guernsey in, against or to the property of any person arising, accruing or existing in consequence of, or in anticipation of, that person's death, other than a right, claim or interest created by will or expressed in any other voluntary disposition by that person or resulting from an express limitation in the disposition of the property to that person,

**"formalities"**, in relation to a disposition of property, means the documentary and other actions required generally by the law of the jurisdiction in question for any such disposition of any such property, and includes any special formalities required by reason of the party effecting the disposition being a minor, a person under legal disability or a corporation,

**"foundation official"** includes the councillors and guardian,

**"founder"** has the meaning given in section 1,

**"functions"** includes rights, powers, discretions, privileges, obligations, liabilities and duties,

**"Guernsey licensed fiduciary"** means a person who is a licensed fiduciary under the Regulation of Fiduciaries Law,

**"Her Majesty's Procureur"** includes Her Majesty's Comptroller,

**"initial capital"** has the meaning given in section 2(1),

**"interest"**, in relation to a beneficiary, means his interest under a foundation,

**"minor"** means a person who has not attained the age of 18 years,

**"Part A of the Register"** has the meaning given in Schedule 1, paragraph 4(2)(a),

**"Part B of the Register"** has the meaning given in Schedule 1, paragraph 4(2)(b),

**"participants"** has the meaning given in section 30,

**"personal relationship"** includes every form of relationship by blood, adoption, marriage or cohabitation regardless of whether the law of any jurisdiction recognises the validity, legitimacy or existence of the relationship, and includes a former personal relationship which has in law or in fact terminated.

A personal relationship also exists between two persons if a personal relationship exists between each of them and a third person,

**"personal representative"** means the executor or administrator of the estate of a deceased person or the guardian of a person,

**"profit"** includes gain or advantage,

**"property" -**

- (a) means immeubles and meubles of any description, wherever situated, and any share, right or interest therein, and includes tangible or intangible property and any debt or thing in action,
- (b) in relation to rights and interests, includes rights and interests whether vested, contingent, defeasible or future,

**"provisions of this Law"** includes the provisions of any Ordinance or regulations hereunder,

**"purpose"** means any purpose whatsoever, whether or not involving the conferral of any benefit on any person, and includes, without limitation, the holding or ownership of property and the exercise of functions,

**"records of the foundation"** includes all documents filed with the Registrar, the Constitution, the accounting records, and all documents required to be kept by the foundation in accordance with any enactment,

**"Register"** has the meaning given in Schedule 1, paragraph 4((1),

**"Registrar"** has the meaning given in Schedule 1, paragraph 3(1),

**"Regulation of Fiduciaries Law"** means the Regulation of Fiduciaries Administration Businesses and Company Directors, etc

(Bailiwick of Guernsey) Law, 2000<sup>e</sup>, as amended,

**"Royal Court"** means the Royal Court sitting as an Ordinary Court, constituted in accordance with section 45,

**"Rules"** has the meaning given in section 5, and

**"States"** means the States of Guernsey.

(2) Any reference in this Law to an enactment is a reference thereto as from time to time amended, re-enacted (with or without modification), extended or applied.

**Savings.**

**53.** (1) Nothing in this Law -

- (a) affects the functions under any provision of law of Her Majesty's Sheriff or of any guardian or attorney,
- (b) subject to section 37, validates an otherwise invalid endowment,
- (c) derogates from any right of a minor to repudiate a transaction on attaining full age,

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<sup>e</sup> Order in Council No. I of 2001 amended by No. XIV of 2003; No. XVI of 2007; No. VIII of 2008; No. XXV of 2008; Ordinance No. XXXIII of 2003 (the Machinery of Government (Transfer of Functions) (Guernsey) Ordinance, 2003) and Guernsey Statutory Instrument No. 3 of 2008 (the Regulation of Fiduciaries, Administration Businesses and Company Directors, etc (Bailiwick of Guernsey) (Amendment) Regulations, 2008).

- (d) disappplies or derogates from any rule of law or custom relating to the formalities required for the disposition of immeubles in Guernsey.

(2) Nothing in this Law derogates from the powers of the Royal Court which exist independently of this Law -

- (a) to set aside, vary or reduce any transfer or other disposition of property, testamentary or otherwise,
- (b) to make an order relating to matrimonial proceedings,
- (c) to make an order relating to the avoidance of fraud on creditors.

(3) Nothing in this Law derogates from the provisions of -

- (a) article 29 of the Law entitled "Loi sur les Successions, 1840"<sup>f</sup>,
- (b) the Law entitled "Loi supplémentaire à la Loi des Successions, 1890"<sup>g</sup>.

(4) Nothing in this Law affects a personal representative acting as such.

(5) No endowment upon a foundation is invalidated by

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<sup>f</sup> Ordres en Conseil Vol. I, p. 51, Vol. II p. 59

<sup>g</sup> Ordres en Conseil Vol. II, p. 323.

application of the principle of "donner et retenir ne vaut".

**Citation.**

**54.** This Law may be cited as the Foundations (Guernsey) Law, 2012.

**Commencement.**

**55.** This Law shall come into operation on the date appointed by regulations of the Department.

## SCHEDULE 1

ESTABLISHMENT, REGISTRATION AND ANCILLARY MATTERS  
(INCLUDING DISQUALIFICATION)*Establishment and registration***Name of foundation.**

1. (1) The name of a foundation -
  - (a) shall be stated in its certificate of establishment (see paragraph 8),
  - (b) shall contain the word "Foundation" or the abbreviation "Fdn.",
  - (c) shall not be the same as a name already appearing in the Register,
  - (d) shall not be such as to constitute a criminal offence or, in the opinion of the Registrar, be offensive, misleading or inappropriate,
  - (e) shall not include any word such as "Imperial", Royal", "Queen" or "Crown" which implies or might be taken to imply royal or government connection, support or patronage, unless Her Majesty's Procureur has given written permission for the use of that word, or



- (f) shall not be such as to induce the public to confuse the foundation with some other person or body previously established in Guernsey or elsewhere.

(2) The Royal Court, if satisfied that any provision of subparagraph (1) has not been complied with, may order that, within such time and subject to such terms, conditions and penalty as the Court thinks fit, the name of the foundation shall be changed.

(3) If an order of the Royal Court under subparagraph (2) is not complied with in any respect the foundation shall be liable to be wound up by order of the Royal Court under Schedule 2, paragraph 24(1) (winding up by the Royal Court).

**Registered office of foundation.**

2. (1) Every foundation shall at all times have a registered office in Guernsey, at which all records of the foundation (or copies thereof) must be kept (and see section 22).

(2) The Registrar shall be notified of any change in the registered office in accordance with paragraph 10 (change in registered particulars).

(3) The name and address of the registered office shall be included in all correspondence sent by foundation officials on behalf of the foundation, together with the registration number (see paragraph 7(4)).

**Registrar of Foundations.**

3. (1) There is established the office of the Registrar of Foundations ("the Registrar"), which shall be held by the Registrar of Companies whose office

was created under section 495 of the Companies Law.

(2) For the avoidance of doubt, the functions of the Registrar conferred by or under this Law are, for the purposes of sections 495(5) and 499(1)(f) of the Companies Law, functions assigned or transferred to him by or under an enactment, and the provisions of that Law relating to the Registrar's functions (whether conferred by or under that Law or otherwise), together with the associated penalties and offences, and other ancillary, incidental and supplementary provisions, apply *mutatis mutandis* to the Registrar's functions conferred by or under this Law.

#### **Register of Foundations.**

**4.** (1) The Registrar shall establish and thereafter maintain a Register of Foundations ("**the Register**").

(2) The Register shall contain -

(a) a record of all foundations registered under paragraph 7 containing -

(i) the name and registered number of the foundation,

(ii) the name and address of the councillors appointed in accordance with or by virtue of section 9(2),

(iii) the name and address of the guardian, appointed in accordance with or by virtue of section 10, if applicable, and

(iv) the details of the registered office,

("Part A of the Register"),

(b) a statement of the purpose of the foundation, and all declarations and other documents filed with the Registrar under or for the purposes of this Law ("**Part B of the Register**").

(3) Part A of the Register only shall be part of the public records of the Island of Guernsey.

**Use of Part B of the Register.**

5. (1) Subject to the provisions of subparagraph (2), no person who under or for the purposes of this Law receives information comprised or intended to be comprised within Part B of the Register, shall disclose the information without the consent of the person to whom it relates and (if different) the person from whom it was so obtained.

(2) Subparagraph (1) does not preclude –

(a) the disclosure of –

(i) information which at the time of disclosure is or has already been made available to the public from other sources, or

(ii) information in the form of a summary or collection of information so framed as not to

enable information relating to any particular person to be ascertained from it,

- (b) the disclosure of information for the purpose of enabling or assisting the Registrar to discharge his functions,
- (c) where, in order to enable or assist him to discharge his functions conferred by or under this Law, the Registrar considers it necessary to seek advice from a qualified person on any matter of law, accountancy or valuation or any other matter requiring the exercise of professional skill, the disclosure by the Registrar to that person of such information as appears to the Registrar to be necessary to ensure that that person is properly informed as to the matters on which his advice is sought,
- (d) the disclosure of information for the purpose of enabling or assisting an authority exercising, in a place outside the Bailiwick, functions equivalent to those of the Registrar under this Law to exercise its functions,
- (e) the disclosure of information for the purposes of the investigation, prevention or detection of crime or with a view to the instigation of, or otherwise for the purposes of, any criminal proceedings in the Bailiwick or elsewhere,
- (f) the disclosure of information for the purposes of

enabling or assisting Her Majesty's Procureur to discharge his functions,

- (g) the disclosure of information for the purposes of enabling or assisting the Guernsey Financial Services Commission to discharge its functions,
- (h) the disclosure of information in connection with any proceedings arising out of this Law,
- (i) the disclosure of information to comply with an order of a court,
- (j) the disclosure of information which is authorised or required by or under this Law or any other enactment.

(3) A person who discloses or causes or permits the disclosure of any information in contravention of this paragraph is guilty of an offence.

**Establishment of foundation.**

6. (1) A foundation shall only be established if the requirements of this Law are satisfied.

(2) A foundation may not be established if its purpose or Constitution is contrary to the law of Guernsey.

(3) A foundation is established -

- (a) by the Registrar registering it on the Register and allocating it a registration number (see paragraph 7),

- (b) with effect from the date of registration as stated in the certificate of registration (see paragraph 8).

(4) Upon establishment under the name set out in the Register and for the purposes set out in the Register -

- (a) a foundation has legal personality, separate from its founder, foundation officials and beneficiaries with a continuous existence until its removal from the Register,
- (b) the persons named in the application as foundation officials are deemed to have been appointed to their respective offices.

(5) When established, a foundation -

- (a) may sue and be sued in its name and may exercise all the functions of a legal person, including the power to hold land, and
- (b) may have a common seal (see paragraph 15).

**Registration of foundation.**

7. (1) Every foundation shall be registered and shall continue to be registered in accordance with this paragraph.

(2) Only a Guernsey licensed fiduciary may apply to register a foundation.

(3) A person wishing to effect the registration of a foundation shall file with the Registrar -

- (a) the Charter (see section 4),
- (b) a declaration signed by the founder or the resident agent that the details contained within the Charter are correct and an accurate reflection of the purposes of the foundation,
- (c) a declaration as to whether there are, or there are intended to be, any disenfranchised beneficiaries,
- (d) the names and addresses of the proposed councillors, together with their written consent so to act,
- (e) the name and address of the proposed guardian (if appropriate) together with his written consent so to act,
- (f) the name and address of the resident agent, if any, (see section 12),
- (g) the address of the registered office in Guernsey,
- (g) any applicable fee, and
- (h) such other documents or information as the Registrar may require.

(4) Upon receipt of the fee, documents and information specified in subparagraph (3), and provided that the Registrar is satisfied that the requirements of the provisions of this Law are satisfied, the Registrar shall -

- (a) register the foundation in the Register by inscribing its name therein, and
- (b) allocate a registration number to the foundation,

and thereupon the foundation shall be established for the purposes of this Law.

(5) The Registrar -

- (a) when registering a foundation in the Register under this paragraph, and
- (b) when issuing a certificate of registration in relation to the foundation under paragraph 8 or paragraph 10,

may rely upon the documents filed with him in all respects and shall not be bound to enquire further as to whether, in relation to the foundation, the formalities prescribed by this Law have been complied with.

(6) The Department may by regulations prescribe the fees to be charged by the Registrar on receipt of any application to him or on the exercise of any function by him under the provisions of this Law, which fees may be set at such level that the Department considers appropriate.

(7) The Department may, in its discretion, determine that all



registrations be subject to an annual renewal procedure; and if it does so, it must specify by regulations -

- (a) what information and fee (if any) are to be provided and in what form,
- (b) what procedure shall be followed (including an appeals procedure if it thinks fit), and
- (c) without prejudice to any other provision of this Law, what, if any, financial penalties shall be payable by such persons as may be prescribed by the regulations for failure to comply with the renewal procedure.

**Issue of certificate of registration.**

8. (1) On registration of a foundation, the Registrar shall issue a certificate of registration to the foundation at its registered office.

(2) The certificate must-

- (a) state -
  - (i) the name and registered number of the foundation,
  - (ii) the registered office of the foundation,
  - (iii) the date of its establishment,
  - (iv) the duration of the foundation (if applicable),

and

(b) be signed by the Registrar.

(3) The certificate is, unless it has ceased to be valid, conclusive evidence of compliance with the requirements of this Law as to registration and of all matters stated in it.

(4) A certificate of registration shall cease to be valid in the circumstances described in paragraph 10 of this Schedule (change in and rectification of registered particulars) or paragraphs 13 and 28 of Schedule 2 (removal from Register).

(5) A certificate of registration, or a copy thereof issued and sealed by the Registrar, shall be received in evidence in all legal proceedings.

**Pre-establishment contracts and obligations.**

9. A contract or obligation that purports to be made by or on behalf of a foundation at a time when the foundation has not been established has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the foundation or as agent for it, and he is personally liable on the contract accordingly until such time that the contract is ratified by the Council on behalf of the foundation.

**Change in and rectification of registered particulars.**

10. (1) If during the continuance of a foundation -

(a) there is a change in any particular of the foundation referred to in paragraph 7(3) or

- (b) a person becomes or ceases to be a foundation official,

notice of the change signed by any one or more of the foundation officials shall, within a period of 21 days from the date of the change, be filed with the Registrar, and, where the change is to the foundation's name or registered office, the change shall not be effective until the Registrar has issued a new certificate of registration, upon the issue of which the existing certificate shall cease to be valid.

- (2) In default of compliance with subparagraph (1) -

- (a) the foundation and foundation official shall each be guilty of an offence,
- (b) the Registrar may impose such financial penalty to be paid by such persons as the Department may, by regulations under this paragraph, prescribe, and
- (c) the change may not be relied on by the foundation or by any foundation official or former foundation official thereof so as to affect adversely the rights of any third person.

- (3) Upon receipt of notice under subparagraph (1) or as soon as is reasonably practicable thereafter, the Registrar shall make the appropriate entry in the Register.

- (4) The Registrar may, in his absolute discretion and on such terms and conditions as he thinks fit, on an application by or on behalf of the founder or a foundation official, by order authorise the rectification of any typographical error or formal defect or formal omission -

- (a) in the entries relating to the foundation in the Register,  
or
- (b) in any declaration or other document filed with the Registrar in relation to the foundation under or for the purposes of this Law.

(5) The Royal Court may, in its absolute discretion and on such terms and conditions as it thinks fit, on an application by or on behalf of the founder or a foundation official, by order authorise the rectification of any error, defect or omission -

- (a) in the entries relating to the foundation in the Register,  
or
- (b) in any declaration or other document filed with the Registrar in relation to the foundation under or for the purposes of this Law.

*Ancillary matters (including disqualification)*

**Power of councillors to bind the foundation.**

**11.** (1) In favour of a person dealing with a foundation in good faith, the power of the councillors to bind the foundation, or authorise others to do so, is deemed to be free of any limitation under the Constitution.

(2) For this purpose--

- (a) a person "**deals with**" a foundation if he is a party to any transaction or other act to which the foundation is a party,
- (b) a person dealing with a foundation –
  - (i) is not bound to enquire as to any limitation on the powers of the councillors to bind the foundation or authorise others to do so,
  - (ii) is presumed to have acted in good faith unless the contrary is proved, and
  - (iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the councillors under the Constitution.

(3) This paragraph does not affect any right of any participant of the foundation to bring proceedings to restrain the doing of an action that is beyond the powers of the councillors.

(4) This paragraph does not affect any liability incurred by the councillors or any other person by reason of the councillors or that other person exceeding their powers.

(5) This paragraph has effect subject to paragraph 12 (transactions with councillors).

**Constitutional limitations: transactions involving councillors.**

12. (1) This paragraph applies to a transaction if or to the extent that its validity depends on paragraph 11 (power of councillors to bind the foundation).

Nothing in this paragraph excludes the operation of any other enactment or rule of law by virtue of which the transaction may be called in question or any liability to the foundation may arise.

(2) Where -

- (a) a foundation enters into such a transaction, and
- (b) the parties to the transaction include -
  - (i) a councillor of the foundation, or
  - (ii) a person connected with any such councillor,

the transaction is voidable at the instance of the foundation.

(3) Whether or not it is avoided, any such party to the transaction as is mentioned in subparagraph (2)(b), and any councillor who authorised the transaction, is liable -

- (a) to account to the foundation for any gain he has made directly or indirectly by the transaction, and
- (b) to indemnify the foundation for any loss or damage resulting from the transaction.

- (4) The transaction ceases to be voidable if –
- (a) restitution of any money or other asset which was the subject matter of the transaction is no longer possible,
  - (b) the foundation is indemnified for any loss or damage resulting from the transaction,
  - (c) rights acquired bona fide for value and without actual notice of the councillors exceeding their powers by a person who is not party to the transaction would be affected by the avoidance,
  - (d) the transaction is affirmed by the foundation, or
  - (e) it is disclosed by the councillor mentioned in subparagraph (2)(b) to the other foundation officials and not avoided by the foundation within a period of 3 months after the date of disclosure.

(5) A person other than a councillor is not liable under subparagraph (3) if he shows that at the time the transaction was entered into he did not know that the councillors were exceeding their powers.

(6) Nothing in the preceding provisions of this paragraph affects the rights of any party to the transaction not within subparagraph (2)(b)(i) or (ii). But the Royal Court may, on the application of the foundation or any such party, make an order affirming, severing or setting aside the transaction on such terms as appear to the Court to be just.

- (7) In this paragraph "**transaction**" includes any act.

**Formal execution of documents.**

13. (1) A document is formally executed by a foundation –

- (a) by the affixing under writing of its common seal,
- (b) if it is signed on behalf of the foundation –
  - (i) by two authorised signatories, or
  - (ii) by a councillor in the presence of a witness who attests the signature,
- (c) if it is signed by a person authorised by power of attorney under paragraph (3), or
- (d) by any other means specifically authorised by the Constitution.

(2) References in this paragraph to a document being signed by a councillor are to be read, where that office is held by a corporate councillor, as references to its being signed by an individual authorised by the corporate councillor to sign on its behalf.

(3) A foundation may, by power of attorney executed by the Council, authorise a person, either generally or in respect of specified matters, as its attorney to execute documents on its behalf.



(4) A document executed in accordance with subparagraph (1)(c), whether in Guernsey or elsewhere, has effect as if executed by the foundation.

**Common seal.**

**14.** (1) A foundation may but need not have a common seal.

(2) A foundation's name shall be engraved in legible characters on the seal.

(3) If there is a failure to comply with subparagraph (2) the foundation is guilty of an offence.

(4) A foundation official, or a person acting on behalf of a foundation, commits an offence if he uses, or authorises the use of, a seal purporting to be a seal of the foundation on which its name is not engraved as required by subparagraph (2).

**Disqualification orders.**

**15.** (1) Where the Royal Court considers that, by reason of a person's conduct in relation to any foundation or otherwise, that person is unfit to be concerned in the management of a foundation, the Court may, if satisfied that it is desirable in the public interest to do so, make and subsequently renew (on one or more occasions) an order against him (a "**disqualification order**") prohibiting him, without the leave of the Court -

(a) from being a foundation official of any foundation or any specified foundation,

(b) from participating in, or being in any way concerned in, directly or indirectly, the management, formation

or promotion of any foundation or any specified foundation.

(2) A disqualification order and any renewal thereof shall have effect for such period not exceeding 15 years as shall be specified therein.

(3) A disqualification order and any renewal thereof may contain such incidental and ancillary terms and conditions as the Royal Court thinks fit.

(4) The Court must provide the Registrar with a copy of any disqualification order.

(5) An application for a disqualification order or for a renewal thereof may be made by the Registrar, by Her Majesty's Procureur, by any foundation of which the person in question is, or has been, an official, by any liquidator, participant or official of such a foundation or, with the leave of the Court, by any other interested party.

(6) A person who contravenes any provision of a disqualification order or a renewal thereof -

(a) shall be guilty of an offence, and

(b) shall be personally liable for any debts and liabilities of the foundation in relation to which the contravention was committed which were incurred at any time when he was acting in contravention of the disqualification order or the renewal thereof.

(7) A person's liability pursuant to subparagraph (6)(b) is joint

and several with that of the foundation and of any other person so liable in relation to the foundation.

(8) In determining whether or not a person is unfit to be concerned in the management of a foundation, the Court shall have regard to the provisions of paragraph 17.

(9) A disqualification order may be renewed at any time before, or within a period of one month immediately succeeding, the date of the expiration of the order.

(10) For the removal of doubt, a disqualification order or renewal thereof may, with the agreement of the parties, and in the Court's absolute discretion, be granted by consent.

**Revocation of disqualification order.**

**16.** (1) A person subject to a disqualification order or renewal thereof may apply to the Royal Court for a revocation of the order or renewal on the ground that he is no longer unfit to be concerned in the management of a foundation; and the Court may grant the application if satisfied that -

- (a) it would not be contrary to the public interest to do so, and
- (b) the applicant is no longer unfit to be concerned in the management of a foundation.

(2) An application under subparagraph (1) for the revocation of a disqualification order or renewal shall not be heard unless the person upon whose application the disqualification order or (as the case may be) the renewal was made

has been served with notice of the application to revoke not less than 28 days (or such other period as the Court may in its absolute discretion direct) before the date of the hearing; and, without prejudice to the foregoing, the Court may -

- (a) direct that notice of the application to revoke shall also be served on such other persons as the Court thinks fit, and
- (b) for that purpose adjourn the hearing of the application.

(3) For the removal of doubt, an application under subparagraph (1) for the revocation of a disqualification order or renewal, may, with the agreement of the parties, and in the Court's absolute discretion, be granted by consent.

**Fit and proper person.**

17. (1) Every person who is, or is to be, a foundation official of the foundation shall be a fit and proper person to hold that position.

(2) In determining whether a person is a fit and proper person to hold a particular position, regard shall be had to -

- (a) his probity, competence, solvency and soundness of judgement for fulfilling the responsibilities of that position,
- (b) the diligence with which he is fulfilling or likely to fulfil those responsibilities,
- (c) whether the interests of participants or disenfranchised

beneficiaries of the foundation are, or are likely to be, in any way threatened by his holding that position,

- (d) the rules, standards and guidelines of any relevant professional, governing, regulatory or supervisory authority,
- (e) his record of compliance with the provisions of this Law in acting as a foundation official or resident agent, and
- (f) his record of compliance with any provision contained in or made under the Companies Law in acting as a corporate services provider or resident agent within the meaning of that Law.

(3) Without prejudice to the generality of the foregoing provisions, regard may be had to the previous conduct and activities in business or financial matters of the person in question.

**Registrar to keep register of disqualification orders.**

**18.** The Registrar shall keep a register of all disqualification orders, and all renewals and revocations thereof, made by the Royal Court under paragraphs 15 and 16, and the register shall form part of the public records of the Island.

**Service of documents.**

**19.** (1) Any document to be served on a foundation may be served -

- (a) by being left at, or sent by post or transmitted to, the foundation's registered office, or

- (b) by being delivered to any councillor thereof or by being left at, or sent by post or transmitted to, his address shown in the Register.

(2) Any document to be served under or for the purposes of the provisions of this Law may be served on -

- (a) an individual, by being delivered to him, or by being left at, or sent by post or transmitted to, his usual or last known place of abode,
- (b) a legal person with a registered office in Guernsey, by being left at, or sent by post or transmitted to, that office,
- (c) a legal person without a registered office in Guernsey, by being left at, or sent by post or transmitted to, its principal or last known principal place of business in Guernsey or, if there is no such place, its registered office or principal or last known principal place of business elsewhere,
- (d) an unincorporated body -
  - (i) by being served on any partner, member of the committee or other similar governing body, manager, director or other similar officer thereof in accordance with paragraph (a), or

- (ii) by being left at, or sent by post or transmitted to, the body's principal or last known principal place of business in Guernsey or, if there is no such place, its principal or last known principal place of business elsewhere,
- (e) a department of the States, by being left at, or sent by post or transmitted to, the principal offices of that department in Guernsey,
- (f) on the Registrar, by being left at, or sent by post or transmitted to, the principal offices of the Registrar in Guernsey.

(3) If a person notifies the Registrar of an address for service within Guernsey for the purposes of the provisions of this Law, any document to be served on that person under those provisions may be served by being left at, or sent by post to or transmitted to, that address.

(4) Where the provisions of this Law authorise or require a document to be served on a person who is -

- (a) a minor, or
- (b) a person under legal disability,

the document may be served on his guardian; and if there is no guardian, the party wishing to effect service may apply to the Royal Court for the appointment of a person to act as guardian for the purposes of those provisions.

(5) If service of a document cannot, after reasonable enquiry, be effected in accordance with this paragraph, the document may be served by being published on two occasions in La Gazette Officielle.

(6) Subparagraphs (2) to (5) are without prejudice to subparagraph (1); and subparagraphs (1) to (5) are without prejudice to any other lawful method of service and to the provisions of paragraph 20.

(7) Where a document is sent by post it shall, unless the contrary is shown, be deemed for the purposes of the provisions of this Law to have been received -

- (a) in the case of a document sent to an address in the United Kingdom, the Channel Islands or the Isle of Man, on the third day after the day of posting,
- (b) in the case of a document sent elsewhere, on the seventh day after the day of posting,

excluding in each case any non-business day.

(8) For the purposes of the provisions of this Law, service of any document sent by post shall be proved by showing the date of posting, the address thereon and the fact of prepayment.

(9) Notwithstanding the provisions of this paragraph and of any other rule of law in relation to the service of documents, no document to be served on the Registrar under or for the purposes of the provisions of this Law shall be deemed to have been served until it is received.



(10) In this paragraph and in paragraph 20 -

**"by post"** means by registered post, recorded delivery service or ordinary letter post,

**"document"** does not include a summons,

**"non-business day"** means -

(a) a Saturday, a Sunday, Christmas Day and Good Friday, and

(b) any day appointed as a public holiday by Ordinance of the States under section 1(1) of the Bills of Exchange (Guernsey) Law, 1958<sup>h</sup>,

**"served"** includes given and submitted,

**"summons"** includes any document compelling a person's attendance before a court, and

**"transmitted"** means transmitted by electronic communication, facsimile transmission or other similar means which produce or enable the production of a document containing the text of the communication (in which event the document shall be regarded as served when it is received).

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<sup>h</sup> Ordres en Conseil Vol. XVII, p. 384; Vol. XXIV, p. 84; Orders in Council No. XI of 1993; No. XIV of 1994 and No. IX of 2001.

**Documents to be submitted, etc, in electronic form.**

20. (1) Any document to be served on the Registrar under or for the purposes of the provisions of this Law shall or, as the case may be, may be in such electronic form and served by such electronic means as the Registrar may require or, as the case may be, permit, whether in any particular case or class of cases or generally; and, without limitation, this paragraph applies to any, and to anything accompanying any, application, statement, consent, declaration or signature.

(2) Accordingly, where under the provisions of this Law any information or document is required to be in such form or to be served by such means, or anything is required to be done in such manner, as (in whatever words) the Registrar may require, the Registrar may, without limitation, require the information or document to be in or, as the case may be, to be served, or the thing to be done, by electronic means.

(3) This paragraph is without prejudice to -

- (a) paragraph 19(9),
- (b) the Electronic Transactions (Guernsey) Law, 2000<sup>i</sup>,  
and
- (c) any regulations of the Registrar in relation to the  
practice and procedure of the Office of Registrar.

**Recovery of fees and financial penalties.**

21. A fee or financial penalty which may be imposed under the provisions of this Law shall be recoverable from the person on whom they are

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<sup>i</sup> Order in Council No. VIII of 2000.

imposed as a civil debt.

**Resident agent requests.**

**22.** If a resident agent requests information under section 12 and, on receipt of such request, the Council refuses to provide the resident agent with the information requested then -

- (a) the agent may apply to Registrar to be removed as resident agent, and
- (b) the Registrar on receipt of such application must, if satisfied that it is properly made -
  - (i) grant the application, on one month's notice to the Council, and
  - (ii) if no other resident agent is appointed -
    - (a) the Registrar may impose such financial penalty as may be prescribed for these purposes by regulations of the Department,
    - (b) an application may be made to the Royal Court under paragraph 24(1)(i) of Schedule 2, by any person mentioned in section 42(2), and
    - (c) if regulations made by the Department under paragraph 30 of Schedule 2 so

provide, the foundation may be struck off the Register.

**Power to make regulations.**

23. Without prejudice to paragraphs 7(6), 7(7) and 10(2), 22, the Department may, after consultation with the Registrar, make regulations amending the provisions of this Schedule.

## SCHEDULE 2

## MIGRATION, REVOCATION, WINDING UP AND TERMINATION

## PART I

## MIGRATION

*Registration of overseas foundation as a Guernsey foundation***Overseas foundation may be registered as Guernsey foundation.**

1. (1) An overseas foundation may apply to the Registrar to be registered as a Guernsey foundation in accordance with the provisions of this Part.

(2) In this Part -

"**overseas foundation**" means a foundation with legal personality currently established under the law of any place outside Guernsey,

"**place**" includes a district or territory,

"**registered as a Guernsey foundation**" means -

- (a) ceasing to be registered as a foundation in the place in which it was established or where it is now registered, and
- (b) becoming registered as a foundation in the Register,

and "**registration**" as a Guernsey foundation shall be construed accordingly.

**Registration must be authorised by foreign law.**

**2.** An overseas foundation cannot be registered as a Guernsey foundation unless -

- (a) the foundation is able under the law of place in which it is currently established to be registered as a Guernsey foundation, and
- (b) the foundation has complied with the requirements of that law in relation to its registration as a Guernsey foundation.

**Foundation cannot be bankrupt, etc.**

**3.** An overseas foundation cannot be registered as a Guernsey foundation if -

- (a) the foundation is bankrupt or is otherwise being wound up,
- (b) a liquidator, receiver or administrator has been appointed, in relation to any property of the foundation,
- (c) an application has been made to a court, whether in Guernsey or elsewhere -

- (i) to put the foundation into bankruptcy or to have it declared bankrupt,
- (ii) to have the foundation wound up,
- (iii) for the approval of a composition, compromise or arrangement with creditors has been entered into in respect of it whereby its creditors will receive less than 100 pence in the pound, or
- (iv) for the appointment of a liquidator, receiver or administrator in relation to any property of the foundation,

and (in each case) the application has not been finally disposed of.

**Application for registration as a Guernsey foundation.**

4. (1) An application for registration as a Guernsey foundation shall be made to the Registrar.

(2) The application shall be in a form specified by the Registrar and shall include or be accompanied by -

- (a) the migration details (see paragraph 5),
- (b) such other information and documents, verified in such manner, as the Registrar may require,
- (c) a declaration of compliance (see paragraph 16), and

(d) such fee as may be specified by the Registrar.

(3) The application may propose the date on which registration as a Guernsey foundation shall take effect, provided that that date is not later than 3 months after the date of the application.

(4) An application for registration as a Guernsey foundation may only be made by a Guernsey licensed fiduciary.

**Migration details.**

5. (1) In this Part "**migration details**" means -

- (a) a copy of the foundation's certificate of establishment (if any) in the place in which it is currently established,
- (b) a copy of the Charter which is to be binding on the foundation immediately after its registration in Guernsey, which must comply with the requirements of section 4 of this Law, together with, if different, a copy of the foundation's current Charter or equivalent document,
- (c) a statement of the foundation's current foundation officials (see subparagraph (2)),
- (d) a statement of the address of the foundation's registered office in the place in which it is currently established and as proposed in Guernsey,



- (e) the proposed name under which the foundation is to be registered in Guernsey, which name shall comply with Schedule 1, paragraph 1,
- (f) all other information and documents -
  - (i) that would be required to be filed under paragraph 7(3) of Schedule 1 from a person wishing to effect the registration of a foundation, and
  - (ii) as the Registrar may require,
- (g) evidence acceptable to the Registrar that –
  - (i) the foundation is not prohibited from being registered in Guernsey by paragraph 2 (registration must be authorised by foreign law) or 3 (foundation cannot be bankrupt),
  - (ii) on the date of registration, the foundation will cease to be established and registered under the law of any place outside Guernsey, and
  - (iii) the foundation has legal personality in the place in which it is established or registered.

(2) The statement of the foundation's current foundation officials shall comprise the full name of every foundation official and his address (being, in

the case of a body corporate or a partnership, the address of its registered office or, if none, its principal office).

**Effect of registration.**

6. (1) Upon receipt of the application for registration as a Guernsey foundation under this Part -

- (a) the Registrar shall register the foundation in the Register by -
  - (i) inscribing its name therein, and
  - (ii) allocating a registration number to the foundation,
- (b) subject to the provisions of this Part, the foundation shall be treated in all respects as a foundation established under this Law,
- (c) the Registrar shall issue a certificate of registration in respect of the foundation which shall -
  - (i) contain the matters detailed in Schedule 1, paragraph 8,
  - (ii) state the date on which the foundation was first established (in addition to the date on which it was established in Guernsey),

- (iii) detail the place(s) in which the foundation was previously registered,
- (iv) detail the name(s) with which the foundation was previously registered, and
- (v) be conclusive evidence that the foundation is duly registered.

(2) If the application proposed a date on which registration as a Guernsey foundation was to have effect which date postdates the date of issue of the certificate of registration, then the foundation shall be established and registered as a Guernsey foundation on (and the date stated on the certificate shall be) the proposed date.

#### **Cancellation of registration.**

7. (1) Where an overseas foundation is registered as a Guernsey foundation under this Part, the foundation shall, as soon as possible, file with the Registrar any certificate or other document issued under the law of the place in which the foundation has ceased to be established and registered evidencing the fact that the foundation has ceased to be established and registered under that law.

(2) If the Royal Court is satisfied that -

- (a) an overseas foundation has been registered as a Guernsey foundation pursuant to the provisions of this Part, and
- (b) the foundation continues to be established or registered under the law of any place outside Guernsey,

the Court may, in its absolute discretion on the application of -

(i) the foundation or any of its participants or creditors, or

(iii) the Registrar,

make an order for the removal of the foundation's name from the Register.

(3) An order under subparagraph (2) may be made subject to such terms and conditions and such penalty as the Royal Court thinks fit.

(4) On the making of an order under subparagraph (2) the foundation's registration in Guernsey shall (unless the Court orders otherwise) be void *ab initio*.

*Transfer of registration of foundations to overseas*

**Foundations may transfer registration.**

8. (1) A foundation may apply to the Registrar to be removed from the Register in accordance with the provisions of this Part.

(2) In this Part "**removed from the Register**" means removed from the Register for the purposes of becoming established as a foundation with legal personality under the law of a place outside Guernsey.

**Foundations cannot transfer registration without power to do so.**

9. A foundation cannot be removed from the Register unless the Constitution permits such removal.

**Foundations cannot transfer registration if in bankruptcy, etc.**

**10.** A foundation cannot be removed from the Register if -

- (a) the foundation is bankrupt or is otherwise being wound up,
- (b) a liquidator, receiver or administrator has been appointed, in relation to any property of the foundation,
- (c) an application has been made to a court, whether in Guernsey or elsewhere -
  - (i) to put the foundation into bankruptcy or to have it declared bankrupt,
  - (ii) to have the foundation wound up,
  - (iii) for the approval of a composition, compromise or arrangement with creditors has been entered into in respect of it whereby its creditors will receive less than 100 pence in the pound, or
  - (iv) for the appointment of a liquidator, receiver or administrator in relation to any property of the foundation,

and (in each case) the application has not been finally disposed of.

**Foundations cannot transfer registration without giving notice to creditors and participants.**

**11.** A foundation cannot be removed from the Register unless, before it applies to the Registrar under paragraph 12 for removal, it gives written notice to all its creditors and participants stating that it intends to so apply.

**Application for transfer of registration.**

**12.** (1) An application for removal from the Register shall be made to the Registrar.

(2) The application shall be in a form prescribed by the Registrar and shall include or be accompanied by -

(a) confirmation from Her Majesty's Procureur and the Director of Income Tax that they have no objection to the removal of the foundation from the Register,

(b) evidence acceptable to the Registrar that -

(i) the removal of the foundation from the Register is not prohibited by paragraphs 9 (cannot transfer registration without power to do so), 10 (cannot transfer registration if in bankruptcy) or 11 (cannot transfer registration without giving notice to creditors and participants),

(ii) on the date of the removal of the foundation's name from the Register the foundation will be

established under the law of the place in question, and

(iii) the foundation will continue to have legal personality in accordance with the law of the place in question.

(c) such other information and documents, verified in such manner, as the Registrar may require,

(d) a declaration of compliance (see paragraph 16), and

(e) such fee as may be specified by the Registrar.

(3) Upon receipt of the documents specified in subparagraph (2), the Registrar shall give notice of the proposed transfer in such manner and for such period as he thinks fit.

(4) An application for removal from the Register may only be made by a Guernsey licensed fiduciary.

**Effect of transfer.**

**13.** Not less than 28 days after the day on which the Registrar gave notice under paragraph 12(3) -

(a) any statement in the foundation's Constitution that its registered office is situated in Guernsey shall be deleted,

- (b) the foundation's name shall be removed from the Register,
- (c) the foundation shall thereupon cease to be a Guernsey foundation,
- (d) the Registrar shall file in the Register a notice stating that the foundation's name has, pursuant to the provisions of this paragraph, been removed from the Register for the purpose of the foundation becoming established under the law of the place specified in the notice, and
- (e) the Registrar shall publish the fact that the foundation has been removed from the Register in such manner and for such period as he thinks fit.

**Cancellation of transfer.**

**14.** (1) Where a foundation is removed from the Register under this Part, the foundation shall, as soon as possible, file with the Registrar any certificate or other document issued under the law of the place in which the foundation has become established evidencing the fact that the foundation has become established under the law thereof.

(2) If the Royal Court is satisfied that -

- (a) a foundation's name has been removed from the Register pursuant to the provisions of this Part, and



- (b) the foundation has not become established under the law of any place outside Guernsey,

the Court may, in its absolute discretion on the application of -

- (i) the foundation or any of its participants or creditors, or
- (ii) the Registrar,

make an order for the restoration of the foundation's name to the Register.

(3) An order under subparagraph (2) may be made subject to such terms and conditions and such penalty as the Court thinks fit.

(4) On the making of an order under subparagraph (2) the removal of the foundation's name from the Register shall (unless the Court otherwise orders) be void *ab initio*.

**Power of Royal Court to make orders as to transfer of registration.**

**15.** (1) If the Royal Court is satisfied that the removal of a foundation from the Register under paragraph 13 (effect of transfer) would unfairly prejudice a participant or creditor of the foundation or any other person to whom the foundation is under any obligation or liability, the Court may, on the application of that person made at any time before the date on which the removal of the foundation takes place, or within such further time as the Court may in any particular case allow, make such order as it thinks fit in relation to the removal, including, without prejudice to the generality of the foregoing, an order -

- (a) directing that the removal of the foundation shall not take place, or shall only take place subject to such terms and conditions as the Court thinks fit,
- (b) modifying the proposal for the removal of the foundation in such manner as may be specified in the order,
- (c) directing the foundation or its councillors to reconsider the proposal for the removal of the foundation or any part of the proposal.

(2) An order under subparagraph (1) may be made subject to such terms and conditions and such penalty as the Court thinks fit.

### *General*

#### **Declaration of compliance.**

16. (1) A "**declaration of compliance**" is a declaration, signed by the person making the application under paragraph 4 or 12, as the case may be, that all the requirements of this Part in respect of registration as a Guernsey foundation, or the removal of a foundation from the Register, as the case may be, have been fulfilled.

(2) The Registrar, when performing his functions under this Part, may rely upon a declaration of compliance in all respects and accordingly is not bound to enquire further as to whether, in relation to an application for registration as a Guernsey foundation, or an application for the removal of a foundation from the Register, as the case may be, the provisions of this Part have been complied with.

**Documents in a language other than English.**

17. Where a document provided to the Registrar under this Part is not in English, a translation of it in English verified or certified in such manner as the Registrar may require must also be provided, unless the Registrar waives this requirement.

**Registration or transfer not to prejudice continuity of foundation's existence.**

18. (1) Registration as a Guernsey foundation under this Part or removal of a foundation from the Register under this Part does not prejudice or affect the identity or continuity of the foundation's legal personality which shall be uninterrupted by the process of transfer.

(2) For the avoidance of doubt, upon registration as a Guernsey foundation or removal from the Register –

- (a) all property and rights to which the foundation was entitled immediately before registration or removal remain its property and rights,
- (b) the foundation remains subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which it was subject immediately before registration or removal,
- (c) all actions and other legal proceedings which immediately before registration or removal could have been instituted or continued by or against the foundation may be instituted or continued by or against it after registration or removal, and

- (d) a conviction, ruling, order or judgment in favour of or against the foundation before registration or removal may be enforced by or against it after registration or removal.

**Terminology used in other jurisdictions.**

19. References in this Part to foundations, foundation officials, participants, certificates of establishment, liquidations or any other matter concerning a foundation include references to their equivalents in the law of the place outside Guernsey from which or to which a foundation is migrating.

*Part II*

*Revocation and variation*

**Revocation or variation of powers.**

20. (1) Subject to section 11, the terms of the Constitution may provide that any power or exercise of a power under the Constitution may be capable of -

- (a) revocation, in whole or in part, or
- (b) variation.

(2) No revocation or variation prejudices anything lawfully done by a foundation official in relation to the foundation before he receives notice of the revocation or variation.

**Variation of terms of Constitution on application to Royal Court.**

21. (1) The Royal Court, on the application of the foundation

officials, may approve any arrangement which varies or revokes the terms of the Constitution or enlarges or modifies the powers of management or administration of the Council, if it is satisfied that the arrangement -

- (a) is now suitable or expedient, and
- (b) is consistent with the original intention of the founder and the spirit in which the foundation was established.

(2) The Royal Court may dispense with the consideration set out in subparagraph (1)(b) if satisfied that the original intention of the founder cannot be ascertained.

(3) An application to the Royal Court under subparagraph (1) may only be made upon notice to the participants (see section 30).

### *Part III*

#### *Winding up and termination*

#### **Winding up and termination.**

**22.** (1) A foundation is terminated, and accordingly no longer exists or has legal personality, only if -

- (a) a winding up event has occurred (see paragraph 23),
- (b) after which, the winding up has been completed and the assets distributed (see paragraphs 25 and 27),
- (c) after which, an application has been submitted to the Registrar for removal from the Register (see paragraph

28), and

- (d) as a result of which, the Registrar has removed the foundation from the Register.

(2) For the avoidance of doubt, a foundation is only terminated on the date of its removal from the Register in accordance with this Part.

**Winding up events.**

**23.** (1) A foundation shall be wound up by the Council on the occurrence of any of the following events ("**winding up events**") -

- (a) the expiry of its duration (if it is limited in duration),
- (b) the happening of any event or the exercise of any power specified in that behalf in the Constitution (including a power exercised under section 11),
- (c) the foundation no longer having any property or assets,
- (d) the bankruptcy of the foundation,
- (e) the completion, failure or lapse of its purpose –
  - (i) by order of the Royal Court, on the application of the councillors or participants, or
  - (ii) with the consent of the participants.

- (f) upon the making by the Royal Court of an order under paragraph 24(1) (winding up by Royal Court) for the winding up of the foundation.

(2) Subject to the order of the Royal Court, immediately following a winding up event the foundation property shall, be distributed by the Council within a reasonable time in accordance with the provisions of paragraph 27.

**Winding up of foundation by Royal Court.**

**24.** (1) The Royal Court may order the winding up of a foundation on the application of any person mentioned in section 42(2) or any creditor thereof if in its opinion -

- (a) it is not reasonably practicable to carry on the foundation in conformity with the Constitution,
- (b) it was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty,
- (c) it is, or is being conducted in a way that is, immoral or contrary to public policy,
- (d) its terms are so uncertain that its performance is rendered impossible.
- (e) the foundation is bankrupt,
- (f) without prejudice to the generality of paragraph (e), the following conditions are satisfied -

- (i) the foundation is indebted to a creditor in a sum exceeding £750 or such other sum as may be prescribed by regulations of the Department,
  - (ii) the creditor has, by Her Majesty's Sergeant, served a signification on the foundation demanding payment of the debt, and
  - (iii) the foundation does not, within a period of 21 days immediately following the date of service of that demand, pay the debt or give security for it to the creditor's satisfaction,
- (g) there has been, in relation to the foundation, a failure to comply with any provision of an order of the Royal Court under paragraph 1 of Schedule 1 (name of a foundation),
- (h) the guardian or registered agent has been denied access to the documents to which he is entitled under section 22,
- (i) the resident agent has been refused information requested under paragraph 22 of Schedule 1, or there is no resident agent where one is required by section 12,
- (j) the affairs of the foundation are being conducted in



such a way as to defraud creditors (whether of the foundation or of any other person) or in an unlawful manner,

- (k) there has been persistent default by the foundation in complying with the requirements or conditions imposed by or under the provisions of this Law,
- (l) the founder or councillors have, in connection with the formation or management of the foundation, been guilty of fraud, misfeasance, breach of duty or other misconduct in relation to the foundation, or
- (m) it is just and equitable to do so.

(2) Upon the making of an order under subparagraph (1) for the winding up of a foundation or at any time thereafter, the Royal Court may make such other orders in relation to the winding up as it thinks fit, including one for the appointment of one or more liquidators to wind up the foundation's affairs and distribute its assets, and to apply to the Registrar for removal of the foundation from the Register.

(3) Where an appeal is instituted under against a decision of the Court's order for the winding up of a foundation, the foundation shall not, by reason of the institution of the appeal, be wound up pending the final disposal or withdrawal of the appeal unless the Court before which the appeal is instituted, on the application of the person concerned, orders otherwise; and an order under this subparagraph may be made on such terms and conditions as the Court may direct.

(4) Where an application is made pursuant to subparagraph 1(i),

the Court may order that the foundation be struck off the Register instead of being wound up, if it thinks just and equitable to do so in all the circumstances.

**General provisions as to winding up of foundations.**

**25.** (1) When a foundation is required to be wound up its affairs shall, unless a liquidator has been appointed by the Royal Court under paragraph 24(2) or under subparagraph (5), be wound up by the Council, or by a liquidator appointed by the Council.

(2) Within two weeks after the date of the winding up event the Council, liquidator or resident agent, shall -

- (a) give notice to the participants of the winding up, and
- (b) publish notice that the foundation is being wound up in La Gazette Officielle or in such other manner and for such period as the Registrar thinks fit.

(3) From the commencement of the winding up of a foundation no foundation official may, except in accordance with the provisions of paragraph 27 (distribution of assets), claim as a creditor of the foundation.

(4) For the purposes of this Law, the winding up of a foundation is deemed to commence on the earlier of the following -

- (a) the date of the occurrence of the winding up event, or
- (b) the date of the order of the Royal Court under paragraph 24(1) for its winding up.

(5) Upon the commencement of the winding up of a foundation or at any time thereafter, the Royal Court may, on the application of any foundation official, participant, assignee or creditor thereof, make such orders in relation to the winding up as it thinks fit, including one for the appointment of one or more liquidators to wind up the foundation's affairs and distribute its assets.

(6) On the appointment of a liquidator (whether under this paragraph or under paragraph 24) all powers of the foundation officials cease, and a person who purports to exercise any power of a foundation official at a time when, pursuant to this subparagraph, those powers have ceased shall be guilty of an offence.

(7) From the commencement of the winding up of a foundation the foundation shall cease to carry any activities except to the extent necessary for its beneficial winding up, and where in relation to a foundation there is a contravention of this subparagraph, the foundation and each councillor thereof shall be guilty of an offence.

(8) All expenses properly incurred in the winding up of a foundation, including the liquidator's remuneration, are payable from the foundation's assets in priority to all other debts.

(9) From the commencement of the winding up of a foundation, the persons winding up the foundation's affairs, in the name of and for and on behalf of the foundation -

- (a) may, to the extent necessary for the beneficial winding up of the foundation, prosecute, defend or settle any civil or criminal action,

- (b) shall dispose of the foundation's property and realise its assets, and
  - (c) shall, in accordance with the provisions of paragraph 27 (distribution of assets) -
    - (i) discharge the foundation's debts, and
    - (ii) distribute any remaining assets of the foundation in accordance with the terms of the Constitution.
- (10) As soon as a foundation's affairs are fully wound up -
- (a) the persons who conducted the winding up shall -
    - (i) prepare an account of the winding up, giving details of the conduct thereof and the disposal of the foundation's property, and stating whether or not any state of affairs described in paragraph 26 (personal liability for certain defaults) has come to their attention,
    - (ii) provide all foundation officials with a copy of the said account, and
    - (iii) within a period of seven days beginning on the date of completion of the winding up, file with the Registrar, and publish in La Gazette Officielle or in such other manner and for such

period as may be specified by the Registrar,  
notice of completion of the winding up,

- (b) the Registrar shall, as soon as is reasonably practicable after such filing, delete the inscription relating to the foundation from the Register, and
- (c) the foundation's certificate of registration shall thereupon cease to be valid and the foundation shall thereupon be dissolved.

(11) Where there is a contravention of any provision of subparagraph (10)(a) in relation to a foundation, the persons who conducted the winding up shall each be guilty of an offence.

(12) The persons conducting the winding up of a foundation may seek the Royal Court's directions as to any matter arising in relation to the winding up, and upon such an application the Royal Court may make such order as it thinks fit.

**Personal liability for certain defaults in event of bankruptcy.**

26. (1) In any case where -

- (a) a foundation has been wound up and is unable to pay its debts, and
- (b) there has been in relation to the foundation a contravention of any relevant provision which -
  - (i) has contributed to the inability of the

foundation to pay its debts,

- (ii) has materially misled or deceived any foundation official, participant or creditor as to, or has resulted in substantial uncertainty as to, the assets, liabilities or investment instruments of the foundation, or
- (iii) has substantially impeded the orderly winding up of the foundation's affairs,

any foundation official who is responsible for the contravention shall (without prejudice to any civil liability or order under subparagraph (3)) be guilty of an offence.

(2) In a prosecution for an offence under this paragraph, it shall be a defence for the person charged to show that -

- (a) he took all reasonable steps to secure compliance by the foundation with the relevant provisions, or
- (b) he had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of or appointed by the foundation officials -
  - (i) was charged with the duty of ensuring that those provisions were complied with, and
  - (ii) was in a position to discharge that duty.

(3) In any case where the circumstances set out in subparagraph (1)(a) and (b) exist, the Royal Court may, on the application of any creditor, foundation official, participant or person conducting the winding up of the foundation, declare that the foundation official who is responsible for the contravention detailed in subparagraph (1) (b) shall be personally liable, without limitation of liability, for the debts of the foundation or such part thereof as may be specified by the Royal Court.

(4) Where the Royal Court makes a declaration under subparagraph (3) in relation to any person, it may -

- (a) give such directions as it thinks fit for the purpose of giving effect to the declaration, and
- (b) direct that the liability of that person under the declaration shall be a charge on -
  - (i) any debt due from the foundation to him, to any person on his behalf, to any person claiming as assignee from or through him or to any person acting on behalf of such an assignee, or
  - (ii) any charge on any foundation assets or any interest in any such charge held by or vested in him or any such person,

and the Court may also from time to time make such further orders as it thinks fit for the purpose of giving effect to any charge imposed under this subparagraph.

(5) In subparagraph (4) the expression "**assignee**" includes any person to whom or in whose favour, by the directions of the person liable, the debt, charge or interest was created, issued or transferred but does not include an assignee for valuable consideration given in good faith and without notice of any of the grounds upon which the declaration might have been made.

(6) The Royal Court shall not make a declaration under subparagraph (3) in respect of a person if it considers that -

- (a) he took all reasonable steps to secure compliance by the foundation with the relevant provisions, or
- (b) he had reasonable grounds for believing and did believe that a competent and reliable person, acting under the supervision or control of or appointed by the councillors -
  - (i) was charged with the duty of ensuring that those provisions were complied with, and
  - (ii) was in a position to discharge that duty.

(7) Subparagraphs (3), (4), (5) and (6) are without prejudice to any other penalty, remedy or proceedings, whether civil or criminal, in respect of the contravention.

(8) For the purposes of this paragraph -

- (a) the expression "**relevant provision**" means any



provision of section 22 and any other provision for the time being prescribed by regulations of the Department, and

- (b) a person shall be considered to be responsible for a contravention of a relevant provision if the contravention -
  - (i) was committed with his consent or connivance, or
  - (ii) was attributable to or facilitated by any neglect on his part.

**Distribution of assets upon winding up.**

**27.** Upon the winding up of a foundation, the assets shall be distributed in the following order -

- (a) firstly, to creditors other than foundation officials, participants or disenfranchised beneficiaries, to the extent otherwise permitted by law, in satisfaction of the foundation's debts,
- (b) secondly, to foundation officials, participants or disenfranchised beneficiaries who are creditors, to the extent otherwise permitted by law, in satisfaction of the foundation's debts,
- (c) finally, subject to the provisions of the Constitution, to the default recipient (see section 6).

**Removal from Register.**

**28.** (1) Following the winding up of a foundation and distribution of the assets in accordance with this Part an application for removal from the Register shall be submitted to the Registrar.

(2) An application for removal from the Register must –

- (a) state the winding up event that led to the winding up of the foundation,
- (b) confirm that the winding up process had been completed in accordance with this Part,
- (c) be provided by the Council, liquidator or resident agent, or such other person as the Registrar may allow and,
- (d) contain any further information that the Registrar may require.

(3) If the conditions of subparagraph (2) are satisfied then –

- (a) the foundation's name shall be removed from the Register,
- (b) the foundation shall cease to exist and to have legal personality,

- (c) the Registrar shall file in the Register a notice stating that the foundation's name has, pursuant to the provisions of this paragraph, been removed from the Register by virtue of its termination, and
- (d) the Registrar shall publish the fact that the foundation has been terminated and removed from the Register in such manner and for such period as he thinks fit.

**Reinstatement of foundations following order for winding up of foundation.**

29. (1) Where a foundation has been removed from the Register under paragraph 28 as a result of an administrative error, the Registrar may reinstate it to the Register, on the application of any foundation official, participant or creditor thereof if –

- (a) the application is made within 6 months of the date of removal, or
- (b) within such greater time as the Registrar may allow, if he is satisfied that it was not possible for the application to be brought within time.

(2) Where the Register refuses, or is unable, to reinstate a foundation to the Register the Royal Court may, in its absolute discretion and on such terms and conditions as it thinks fit, on an application by or on behalf of the any person mentioned in section 42(2), by order authorise the reinstatement of a foundation to the Register, if

- (a) the application is made within 6 months of the removal, or

- (b) within such greater time as the Court may allow, if it is satisfied that it was not possible for the application to be brought within time, and
- (c) if it thinks it just and equitable to do so in all the circumstances.

(3) An order under subparagraph (2) may contain such directions and make such provision as the Court thinks fit for placing the foundation and all other persons in the same position as nearly as may be as if the foundation had not been terminated, and, without prejudice to the generality of the foregoing, including provision for the return of the foundation's property, which may include any property (or the value thereof) which vested in the Crown upon termination.

(4) The reinstatement of a foundation's name pursuant to an order under subparagraph (2) shall, unless the Court otherwise directs, and without prejudice to any other term of the order, be conditional upon the payment by the applicant to the Registrar of -

- (a) all sums which would have been payable by the foundation if it had not been dissolved, and
- (b) any costs incurred by Registrar, if appropriate.

(5) Upon the restoration of a foundation's name in accordance with this paragraph, the foundation shall be deemed to have continued in existence.

**Power to make regulations.**

30. The Department may, after consultation with the Registrar, make

regulations -

- (a) amending the provisions of Parts II and III of this Schedule, and
- (b) making such provision for the striking off from the Register of foundations as the Department thinks fit, including (without limitation) provision as to -
  - (i) the circumstances in which, and grounds upon which, a foundation may be struck off, whether on the application of the foundation or any other person or body or of the Registrar's own motion,
  - (ii) the circumstances in which -
    - (A) a foundation may not be struck off, or
    - (B) an application for striking off may not be made,
  - (iii) the procedure to be followed by the Registrar and any other person or body in respect of striking off, including procedure preliminary to and consequential upon striking off,
  - (iv) the consequences of striking off,
  - (v) the giving and publication of notice of striking

off and other prescribed matters,

- (vi) the making of representations in respect of striking off,
- (vii) the information, documents and evidence to be provided in support of striking off or applications therefor,
- (viii) the payment and recovery of costs in respect of striking off,
- (ix) the payment and recovery of fees, penalties, other sums, and interest thereon in respect of striking off or prior defaults,
- (x) the devolution of the foundation's property, rights, assets, debts, obligations and liabilities on striking off,
- (xi) the respective functions of the Court and the Registrar in respect of striking off,
- (xii) restoration to the Register and matters corresponding to those set out in subparagraphs (i) to (xi) in respect of striking off, and
- (xiii) ancillary matters.

## **The Competition (Guernsey) Ordinance, 2012**

### **ARRANGEMENT OF SECTIONS**

#### **PART I ABUSE OF A DOMINANT POSITION**

1. Prohibition of abuse of a dominant position.
2. Exclusion of mergers and acquisitions.
3. Exemption by Department on grounds of public policy.
4. Exemption for land agreements.

#### **PART II ANTI-COMPETITIVE PRACTICES**

5. Prohibition on preventing competition.
6. Authority may grant exemptions.
7. Block exemptions.
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## **The Competition (Guernsey) Ordinance, 2012**

**THE STATES**, in pursuance of their Resolutions of the 27<sup>th</sup> July, 2006<sup>a</sup>, the 29<sup>th</sup> September, 2009<sup>b</sup> and the 30<sup>th</sup> May, 2012<sup>c</sup>, and in exercise of the powers conferred on them by sections 1, 5 and 6 of the Competition (Enabling Provisions) (Guernsey) Law, 2009<sup>d</sup> and all other powers enabling them, hereby order:-

### **PART I**

#### **ABUSE OF A DOMINANT POSITION**

##### **Prohibition of abuse of a dominant position.**

1. (1) Subject to the provisions of this Part of this Ordinance, any conduct on the part of one or more undertakings which constitutes the abuse of a dominant position within any market in Guernsey for goods or services is prohibited.

(2) Conduct may, in particular, constitute such an abuse if it consists of -

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,
- (b) limiting production, markets or technical development to the prejudice of consumers or any class or

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<sup>a</sup> Article XVIII of Billet d'État No. XIII of 2006.

<sup>b</sup> Article IX of Billet d'État No. XXI of 2009.

<sup>c</sup> Article XIV of Billet d'État No. XI of 2012.

<sup>d</sup> Order in Council No. XV of 2009; amended by the Guernsey Competition and Regulatory Authority Ordinance, 2012.

description thereof,

- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
- (d) making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) For the purposes of this Ordinance an undertaking is considered to be in "**contravention**" of subsection (1) if it engages in conduct which is prohibited thereunder.

**Exclusion of mergers and acquisitions.**

2. Conduct, either on its own or when taken together with other conduct, does not constitute an abuse of a dominant position for the purposes of section 1 to the extent that -

- (a) it results in a merger or acquisition, or
- (b) it is directly related to and necessary for the execution of a merger or acquisition.

**Exemption by Department on grounds of public policy.**

3. (1) The Commerce and Employment Department ("**the Department**") may, after consulting the Guernsey Competition and Regulatory Authority ("**the Authority**") as to the terms and conditions of the exemption when it

considers it necessary or expedient to do so, exempt -

- (a) an undertaking,
- (b) any class or description of undertaking, or
- (c) any undertaking of a class or description,

specified by Resolution of the States for the purposes of this subsection from the prohibition set out in section 1(1).

(2) The States shall not by Resolution specify an undertaking or class or description of undertaking for the purposes of subsection (1) unless satisfied that there are exceptional and compelling reasons of public policy making it desirable to do so.

(3) When, in accordance with subsection (1), the Department consults the Authority on a proposed exemption -

- (a) the Authority must publish the advice it gives to the Department in such manner and for such period as it considers appropriate, and
- (b) the Department must publish its reasons for granting or refusing to grant the exemption, as the case may be, in such manner and for such period as it considers appropriate.

#### **Exemption for land agreements.**

4. The Authority may exempt an undertaking or any class or description

of undertaking from the prohibition set out in section 1(1) in respect of a land agreement or any class or description of land agreement.

## PART II

### ANTI-COMPETITIVE PRACTICES

#### **Prohibition on preventing competition.**

**5.** (1) Subject to the provisions of this Part of this Ordinance, agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services are prohibited.

(2) Subsection (1) applies, in particular, to agreements between undertakings which -

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions,
- (b) limit or control production, markets, technical development or investment,
- (c) share markets or sources of supply,
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
- (e) make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject

of the contracts.

(3) Subsection (1) applies only if the agreement is, or is intended to be, implemented in Guernsey.

(4) An agreement is void to the extent that it comprises or includes an agreement prohibited by subsection (1).

(5) An agreement is subject to the prohibition set out in subsection (1) whether or not every party to it is an undertaking, provided that at least two parties are undertakings.

(6) Agreements described in subsection (1) are referred to in this Ordinance as "**anti-competitive practices**".

(7) For the purposes of this Ordinance an undertaking is considered to be in "**contravention**" of subsection (1) if it is a party to an agreement which is prohibited thereunder.

**Authority may grant exemptions.**

6. (1) The Authority may exempt an agreement or proposed agreement between undertakings or any class or description of agreements or proposed agreements between undertakings from the prohibition set out in section 5(1).

(2) Without prejudice to the generality of section 17(1)(b) (power to refuse applications for exemptions), the Authority shall not grant an exemption under this section unless satisfied that, having regard to any relevant circumstances, the agreement in question -

- (a) contributes to improving the production or distribution of goods or services or promoting technical or economic progress in the production or distribution of goods or services,
- (b) allows consumers of those goods or services a fair share of any resulting benefit,
- (c) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives mentioned in paragraphs (a) and (b), and
- (d) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the market in Guernsey for the goods or services in question.

**Block exemptions.**

7. (1) The Department may, after consulting the Authority, by regulation -

- (a) exempt any class or description of agreements between undertakings from the prohibition set out in section 5(1), and
- (b) vary or revoke any such exemption.

(2) When advising the Department, the Authority shall, in particular, advise it whether in the Authority's opinion the class or description of

agreement concerned -

- (a) contributes to improving the production or distribution of goods or services or promoting technical or economic progress in the production or distribution of goods or services,
  - (b) allows consumers of those goods or services a fair share of any resulting benefit,
  - (c) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives mentioned in paragraphs (a) and (b), and
  - (d) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the market in Guernsey for the goods or services in question.
- (3) Before advising the Department the Authority must -
- (a) publish a draft of the advice it intends to give in such manner and for such period as it considers appropriate,
  - (b) at the same time specify a reasonable period within which representations may be made in relation to the draft advice, and



- (c) consider any representations submitted to it within that period.

(4) The Authority must publish the advice it gives to the Department in such manner and for such period as it considers appropriate.

(5) Regulations under this section may, without prejudice to section 63 (general provisions as to subordinate legislation) -

- (a) impose conditions or obligations subject to which an exemption granted by the regulations is to have effect,
- (b) provide that a contravention of a condition imposed by the regulations has the effect of cancelling the exemption in respect of an agreement,
- (c) provide that if there is a contravention of an obligation imposed by the regulations, the Authority may revoke the exemption in respect of the agreement,
- (d) provide that if the Authority considers that a particular agreement is not one which falls within paragraphs (a) to (d) of subsection (2), or is one to which paragraph (b) of this subsection applies, it may declare that the exemption does not apply in respect of the agreement,
- (e) provide for the manner in which the Authority may revoke an exemption under paragraph (c) or issue a declaration under paragraph (d) and the manner in which the notice of revocation or the declaration is to

be published,

- (f) provide for an exemption to have effect from a date earlier than the date on which the regulations came into force,
- (g) provide that the regulations or any of their provisions will cease to have effect on a date or at the end of a period specified in the regulations.

**Exemption for small undertakings.**

8. (1) The Department may by regulation, after consulting the Authority, prescribe a small undertaking or any class or description of small undertaking for the purposes of this section.

(2) Where a small undertaking is prescribed or is of a class or description prescribed under subsection (1), then any agreement between undertakings to which that undertaking is a party is, provided that all other parties to the agreement are so prescribed or are of a class or description so prescribed, and subject to the provisions of this section and of any regulations under it, exempt from the prohibition set out in section 5(1).

(3) The expression "**small undertaking**" has the meaning assigned by regulations under this section, and regulations may define what constitutes a small undertaking by reference to (by way of example, and without limitation) -

- (a) turnover, earnings, market share or similar measures,
- or

(b) the number of employees.

(4) Regulations made under this section may, without prejudice to section 63 (general provisions as to subordinate legislation) -

(a) impose conditions or obligations subject to which an exemption granted by the regulations is to have effect,

(b) provide that a contravention of a condition imposed by the regulations has the effect of cancelling the exemption in respect of the relevant undertaking,

(c) provide that if there is a contravention of an obligation imposed by the regulations, the Authority may revoke the exemption in respect of the relevant undertaking,

(d) provide that if the Authority considers that a particular undertaking is not one to which the regulations apply, or is one to which paragraph (b) applies, it may with the approval of the Department declare that the exemption does not apply in respect of the undertaking,

(e) provide for the manner in which the Authority may revoke an exemption under paragraph (c) or issue a declaration under paragraph (d) and the manner in which the notice of revocation or the declaration is to be published,

(f) provide for an exemption to have effect from a date

earlier than the date on which the regulations came into force,

- (g) provide that the regulations or any of their provisions will cease to have effect on a date or at the end of a period specified in the regulations.

(5) This section and regulations under it do not have the effect of exempting an agreement between undertakings from the prohibition set out in section 5(1) if the object or effect of the agreement is to -

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions,
- (b) limit or control production, markets, technical development or investment, or
- (c) share markets or sources of supply.

(6) When in accordance with subsection (1) the Department consults the Authority, the Authority must publish the advice it gives to the Department in such manner and for such period as the Authority considers appropriate.

**Exemption by Department on grounds of public policy.**

9. (1) The Department may, after consulting the Authority as to the terms and conditions of the exemption when it considers it necessary or expedient to do so, exempt -

- (a) an agreement,

(b) any class or description of agreement, or

(c) any agreement of a class or description,

specified by Resolution of the States for the purposes of this subsection from the prohibition set out in section 5(1).

(2) The States shall not by Resolution specify an agreement or class or description of agreement for the purposes of subsection (1) unless satisfied that there are exceptional and compelling reasons of public policy making it desirable to do so.

(3) When, in accordance with subsection (1), the Department consults the Authority on a proposed exemption -

(a) the Authority must publish the advice it gives to the Department in such manner and for such period as the Authority considers appropriate, and

(b) the Department must publish its reasons for granting or refusing to grant the exemption, as the case may be, in such manner and for such period as it considers appropriate.

**Exemption for land agreements.**

**10.** The Authority may exempt a land agreement or any class or description of land agreement from the prohibition set out in section 5(1).

**Exclusion of groups.**

11. Section 5(1) does not apply to an agreement if all the parties to it are, directly or indirectly, under the control of the same undertaking.

**Exclusion of mergers and acquisitions.**

12. (1) An agreement between undertakings, either on its own or when taken together with another such agreement, is not prohibited by section 5(1) to the extent that it results, or if carried out would result, in a merger or acquisition.

(2) The exclusion provided by subsection (1) extends to any provision directly related to and necessary for the execution of the merger or acquisition.

## PART III

## MERGERS AND ACQUISITIONS

**Certain mergers or acquisitions not to be executed without approval.**

13. (1) Subject to the provisions of this Part of this Ordinance, a merger or acquisition of a class or description prescribed by regulations of the Department under subsection (3) is prohibited except with, and in accordance with the conditions of, the approval of the Authority.

(2) Without prejudice to the generality of section 17(1)(b) (power to refuse applications for approvals), the Authority shall not grant an approval under this section unless satisfied that, having regard to any relevant circumstances, the merger or acquisition -

- (a) would not substantially lessen competition within any market in Guernsey for goods or services, and

(b) would not be to the prejudice of -

(i) consumers or any class or description thereof,

(ii) the economic development and well-being of the Bailiwick, and

(iii) the public interest.

(3) The Department may, subject to the provisions of sections 14(1) and 56, and after consulting the Authority, by regulation prescribe the classes and descriptions of mergers and acquisitions to which the prohibition set out in subsection (1) applies.

(4) When in accordance with subsection (3) the Department consults the Authority -

(a) the Authority must publish the advice it gives to the Department in such manner and for such period as the Authority considers appropriate, and

(b) the Department must publish its reasons for prescribing the particular classes and descriptions of mergers and acquisitions to which the prohibition set out in subsection (1) is to apply in such manner and for such period as it considers appropriate.

(5) For the purposes of this Ordinance an undertaking or person is considered to be in "**contravention**" of subsection (1) if it executes a merger or

acquisition which is prohibited thereunder other than with, and in accordance with the conditions of, the approval of the Authority.

(6) If there is a merger or acquisition in contravention of subsection (1) -

- (a) where any party to the merger or acquisition is a company registered in Guernsey, no right, title or interest in any shares in the company shall pass, vest or be transferred, charged or otherwise dealt with in accordance with the terms of the merger or acquisition, and
- (b) no right, title or interest in any property in Guernsey or governed, according to the Guernsey rules of private international law, by the law of Guernsey shall pass, vest or be transferred, charged or otherwise dealt with in accordance with the terms of the merger or acquisition,

unless and until the approval of the Authority to the merger or acquisition is granted under this section, and unless the dealing in the shares or property in question is authorised by, or is not in contravention of or inconsistent with, the terms and conditions of the approval.

**Exemption by Department on grounds of public policy.**

**14.** (1) The Department may, after consulting the Authority as to the terms and conditions of the exemption when it considers it necessary or expedient to do so, exempt -



- (a) a merger or acquisition,
- (b) any class or description of merger or acquisition, or
- (c) any merger or acquisition of a class or description,

specified by Resolution of the States for the purposes of this subsection from the prohibition set out in section 13(1).

(2) The States shall not by Resolution specify a merger or acquisition or class or description of merger or acquisition for the purposes of subsection (1) unless satisfied that there are exceptional and compelling reasons of public policy making it desirable to do so.

(3) When, in accordance with subsection (1), the Department consults the Authority on a proposed exemption -

- (a) the Authority must publish the advice it gives to the Department in such manner and for such period as the Authority considers appropriate, and
- (b) the Department must publish its reasons for granting or refusing to grant the exemption, as the case may be, in such manner and for such period as it considers appropriate.

**Exemption for land agreements.**

**15.** The Authority may exempt a merger or acquisition of a class or description prescribed by regulations of the Department under section 13(3) from the prohibition set out in section 13(1) where the merger or acquisition is in respect

of a land agreement or any class or description of land agreement.

PART IV  
APPLICATIONS FOR EXEMPTION  
OR APPROVAL OF MERGER OR ACQUISITION

**Application for exemption or approval.**

- 16.** (1) A person wishing to obtain -
- (a) an exemption under section 3, 4, 6, 9, 10, 14 or 15 (an "**exemption**"), or
  - (b) an approval under section 13(1) for a merger or acquisition (an "**approval**"),

must make an application to the relevant authority in such form and manner and at such time (whether specified by reference to the time of the conduct, agreement, merger or acquisition in respect of which the exemption or approval is sought or otherwise) as the relevant authority may determine.

The "**relevant authority**" means -

- (a) the Department, in relation to an exemption under section 3, 9 or 14, or
  - (b) the Authority, in any other case.
- (2) An application under this section shall be accompanied by -
- (a) a statement of the conduct, agreement, merger or

acquisition in respect of which the exemption or approval is sought,

- (b) the names and business addresses of all parties to that conduct, agreement, merger or acquisition and of all other undertakings or persons with any proprietary, financial or business interest therein,
- (c) such other information and documents as the relevant authority may reasonably require for the purpose of determining the application,
- (d) the appropriate fee prescribed by regulations of the Department under this section or (if the regulations so provide) an agreement, secured in such manner as the relevant authority thinks fit, to pay the relevant authority's reasonable costs, fees and expenses in connection with the determination of the application, whether or not it is successful, and
- (e) anything else prescribed by regulations of the Department under this section.

(3) Upon receipt of an application under this section and at any time thereafter the relevant authority may by notice in writing require the applicant and any person who is or is to be a director, controller, partner or manager of the applicant to provide such additional information and documents as the relevant authority may reasonably require for the purpose of determining the application, including (without limitation) information in relation to undertakings and persons who will, if the exemption or approval is granted, have any proprietary, financial,

business or other interest -

(a) in the conduct, agreement, merger or acquisition in respect of which the exemption or approval is sought, or

(b) in or in connection with the applicant.

(4) Any information or document to be provided to the relevant authority under this section shall be in such form and shall be verified in such manner as the relevant authority may require; and the relevant authority may by notice in writing require the applicant or any person mentioned in subsection (3) -

(a) to provide a report, in such form as may be specified in the notice, by a person who has relevant professional or other skills and who is nominated or approved by the relevant authority, on such aspects of the application or any information or document provided in connection with it as the relevant authority may specify,

(b) to attend at such time and place as may be specified in the notice in order to give an explanation of and to answer questions relating to the application or any such information, document or report or anything in them.

(5) The relevant authority's requirements under subsections (2), (3) and (4) may differ as between different applications.

(6) The relevant authority must -

- (a) publish details of any application received under this section in such manner and for such period as it considers appropriate,
- (b) at the same time specify a reasonable period within which representations may be made in relation to the application, and
- (c) consider any representations submitted to it within that period.

(7) An application under this section may be withdrawn by the applicant by notice in writing to the relevant authority at any time before the application is determined, but any fee paid is not refundable and any undertaking as to costs, fees and expenses remains enforceable.

(8) If there is any change to any of the information supplied to the relevant authority by or on behalf of an applicant for the purposes of an application under this section, whether by virtue of the information becoming out of date, or otherwise, or if any such information is found to be incomplete or inaccurate, the applicant shall inform the relevant authority thereof as soon as is reasonably practicable and in any case within a period of 28 days after the date on which he learns of the change, omission or inaccuracy.

A failure to do so is, without prejudice to any other provision of this Ordinance, a ground for the refusal or revocation of an exemption or approval.

(9) Where an undertaking or person has agreed to pay the

relevant authority's reasonable costs, fees and expenses in connection with the determination of an application under this section -

- (a) those costs, fees and expenses may, subject to paragraph (b), be recovered by the relevant authority from that undertaking or person as a civil debt,
- (b) no sum in respect of those costs, fees and expenses may be recovered by the relevant authority where the court is satisfied that -
  - (i) the sum is not reasonable in amount or was not reasonably incurred, or
  - (ii) the relevant authority acted unreasonably, frivolously or vexatiously in incurring that sum.

**Grant or refusal of exemption or approval.**

**17.** (1) The relevant authority may, upon receipt of an application under section 16 for an exemption or approval -

- (a) grant the application, with or without conditions, or
- (b) refuse the application.

(2) The relevant authority shall not consider an application for an exemption or approval -

- (a) if the application is not accompanied by -

- (i) the appropriate fee prescribed by regulations under section 16 or, as the case may be,
  - (ii) an agreement, secured in such manner as the relevant authority thinks fit, to pay the relevant authority's reasonable costs, fees and expenses in connection with the determination of the application,
- (b) if the applicant or any person who is or is to be a director, controller, partner or manager of the applicant has not provided any information or document reasonably required by the relevant authority for the purpose of determining the application, or
- (c) if the application is otherwise not made in accordance with the provisions of this Ordinance.

(3) In considering whether or not to grant an application for an exemption or approval the relevant authority may, without prejudice to any other matter which it must or may take into account, have regard to whether the benefit to consumers or any class or description thereof of granting the exemption or approval would outweigh the lessening of competition within the relevant market in Guernsey for goods and services and any adverse effects of that lessening of competition.

(4) The relevant authority must publish notice of any decision under this section to grant or refuse an application for an exemption or approval in

such manner and for such period as it considers appropriate.

**Period of validity of exemption or approval.**

18. (1) An exemption or approval granted by the relevant authority -
  - (a) shall (unless any condition of the exemption or approval provides for any other period of duration) continue to be valid until it is revoked, and
  - (b) may be expressed to have effect from a date before that on which it is granted.
- (2) The relevant authority may, on the application of -
  - (a) an undertaking or person granted an exemption or approval, or
  - (b) any party to the conduct, agreement, merger or acquisition in respect of which the exemption or approval was granted,

extend the period of validity of the exemption or approval, subject to such conditions as it thinks fit.

(3) The relevant authority must publish notice of any decision under this section to extend the period of validity of an exemption or approval in such manner and for such period as it considers appropriate.

**Conditions of exemption or approval.**

19. (1) The relevant authority may, when granting an exemption or



approval or at any time thereafter, impose such conditions in respect of the exemption or approval as it thinks fit.

(2) Such conditions may apply to exemptions or approvals generally, to exemptions or approvals of any class or description, or to any particular exemption or approval.

(3) The relevant authority may vary or rescind any condition in respect of an exemption or approval.

(4) Conditions in respect of an exemption or approval may be of a continuing nature and, if expressed to be so, shall be binding on and enforceable against not only the applicant for the exemption or approval but also against any other undertaking or person (whether or not in existence at the time of the granting of the exemption or approval) specified by the relevant authority by name or by description, which may include, without limitation -

- (a) any party to the conduct, agreement, merger or acquisition in respect of which the exemption or approval was granted,
- (b) any undertaking or person with any proprietary, financial or business interest in that conduct, agreement, merger or acquisition,
- (c) any undertaking or legal person formed as a result of that conduct, agreement, merger or acquisition,
- (d) any undertaking or person to which any business or assets of any such party, undertaking or person are

transferred or which directly or indirectly acquires or establishes control of any such business or assets, or

- (e) any director, controller, partner or manager of a party, undertaking or person mentioned in paragraph (a), (b), (c) or (d).

(5) Without prejudice to the generality of subsection (1), the conditions which may be imposed in respect of an exemption or approval may make provision as to the duration of the exemption or approval and of the conditions thereof and as to the protection of consumers or any class or description thereof, the economic development and well-being of the Bailiwick and the public interest; and conditions may (without limitation) -

- (a) require an undertaking to take certain steps, to refrain from adopting or pursuing a particular course of action or to conduct, or to restrict the scope of, its business in a particular way,
- (b) impose requirements, restrictions or prohibitions on the acceptance, carrying on or soliciting of business (whether at all or in any specified manner), either generally or in respect of particular undertakings or persons or particular classes or descriptions thereof,
- (c) impose requirements, restrictions or prohibitions on the entering into of any transactions or class or description thereof,
- (d) impose requirements, restrictions or prohibitions to be

complied with or fulfilled otherwise than by action taken by the applicant for the exemption or approval,

- (e) require the furnishing to the relevant authority, at such times, intervals and places as may be specified by the relevant authority, of such information and documents, and of accounts of such description, in such form and containing such information and particulars, as may be so specified,
- (f) require an undertaking or person to provide evidence of compliance with any condition or direction issued by the relevant authority in whatever form and manner and at whatever time the relevant authority may reasonably determine.

(6) An undertaking or person who contravenes any condition of an exemption or approval is guilty of an offence and liable -

- (a) on conviction on indictment, to a fine,
- (b) on summary conviction, to a fine not exceeding level 5 on the uniform scale.

(7) The contravention of a condition of an exemption or approval, whether or not constituting an offence under subsection (6), is a ground for the revocation of the exemption or approval but does not of itself invalidate any contract entered into or transaction completed before the date of revocation.

(8) An undertaking or person whose exemption or approval is

subject to conditions, whether as to its duration or otherwise, may apply under section 16 for a new exemption or approval and, if the new exemption or approval is granted, the first-mentioned exemption or approval shall cease to have effect.

(9) In considering whether or not to impose, vary or rescind any condition in respect of an exemption or approval the relevant authority may, without prejudice to the generality of the foregoing provisions of this section, have regard to any matter to which it may have regard under section 17 when considering whether or not to grant an application for an exemption or approval.

(10) The relevant authority may give public notice of the imposition, variation or rescission of a condition in respect of an exemption or approval and the date from which any such condition, variation or rescission is effective; and, in deciding whether or not to do so, the relevant authority shall have regard to the interests of consumers or any class or description thereof, the economic development and well-being of the Bailiwick and the public interest.

**Revocation of exemption or approval.**

20. (1) The relevant authority may revoke an exemption or approval granted by it where it has reasonable grounds to believe that -

- (a) there has been a material change of circumstances since the exemption or approval was granted,
- (b) the information on which it based its decision to grant the exemption or approval was, in a material particular, false, deceptive, misleading or incomplete, or
- (c) there has been a contravention of a condition of the

exemption or approval.

(2) In considering whether or not to revoke an exemption or approval the relevant authority may, without prejudice to the generality of subsection (1), have regard to any matter to which it may have regard under section 17 when considering whether or not to grant an application for an exemption or approval.

(3) The relevant authority must publish notice of any decision under this section to revoke an exemption or approval in such manner and for such period as it considers appropriate.

(4) The relevant authority may take action under subsection (1) on a complaint made by any undertaking or person or of its own motion.

(5) A decision of the relevant authority to revoke an exemption or approval shall not, subject to the provisions of subsection (6), have effect until the end of the period within which, under section 46, an appeal can be brought against the revocation or, if an appeal is brought within that period, until the appeal is finally disposed of or withdrawn.

(6) Where the relevant authority is of the view that it is necessary or desirable to do so for the protection of -

- (a) consumers or any class or description thereof,
- (b) the economic development and well-being of the Bailiwick, or
- (c) the public interest,

the relevant authority may apply to the Royal Court for an order under this subsection directing that its decision to revoke the exemption or approval should, without prejudice to any appeal in respect of the decision under section 46, have immediate effect; and the Royal Court may make an order under this subsection on such terms and conditions as it thinks just.

(7) An application by the relevant authority for an order under subsection (6) may, with the approval of the Royal Court, and on such terms and conditions as the Royal Court may direct, be made *ex parte*.

(8) The Authority may not revoke its approval under section 13(1) of a merger or acquisition if the merger or acquisition has been executed.

**Directions consequential upon revocation of exemption or approval.**

**21.** (1) The relevant authority may -

- (a) when serving notice on an undertaking or person under section 44 that the relevant authority has decided to revoke their exemption or approval,
- (b) at any time after such a notice has been served (whether before or after the exemption or approval is revoked), or
- (c) in the case of an undertaking or person whose exemption or approval is subject to a condition as to its duration, upon the expiry of the exemption or approval or at any time thereafter,

give the undertaking or person such directions as appear to the relevant authority to be desirable for the protection of -

- (i) consumers or any class or description thereof,
- (ii) the economic development and well-being of the Bailiwick, or
- (iii) the public interest.

(2) Without prejudice to the generality of subsection (1), directions thereunder may impose any condition, requirement, restriction or prohibition that may be imposed by conditions under section 19(5) or by directions under section 31, 32, 33 or 35.

(3) No direction shall be given by virtue of paragraph (a) or (b) of subsection (1), and any direction given by virtue of either of those paragraphs shall cease to have effect, if -

- (a) the relevant authority serves on the undertaking or person concerned notice in writing that it no longer proposes to revoke its exemption or approval, or
- (b) the relevant authority's decision to revoke the exemption or approval is reversed on appeal under section 46.

(4) An undertaking or person who contravenes any provision of a direction under subsection (1) is guilty of an offence and liable -

- (a) on conviction on indictment, to a fine,
- (b) on summary conviction, to a fine not exceeding level 5 on the uniform scale.

(5) A contravention by an undertaking or person of a direction under subsection (1) does not of itself invalidate any contract entered into or any transaction completed under the authority of the exemption or approval concerned.

(6) A direction under subsection (1) -

- (a) must be in writing, and
- (b) may be varied or rescinded by a subsequent direction thereunder.

(7) The relevant authority may give public notice of the imposition, variation or rescission of a direction under subsection (1) and the date from which the direction is effective.

## PART V

### INVESTIGATIONS BY AUTHORITY

#### **Power of Authority to investigate anti-competitive practices, etc.**

**22.** Where the Authority has reasonable grounds for suspecting that an undertaking -

- (a) has contravened -
  - (i) section 1(1), 5(1) or 13(1),



- (ii) any condition of an exemption or approval, or
  - (iii) a direction of the Authority under section 21, 31, 32, 33 or 35, or
- (b) intends to contravene section 13(1),

it may conduct an investigation into the suspected contravention or intended contravention and exercise the powers conferred by this Part of this Ordinance.

**Power to request and obtain information and documents.**

**23.** (1) The Authority may, by notice in writing served on an undertaking suspected of a contravention described in section 22, require it to furnish the Authority at such times or intervals, at such place and in respect of such periods as may be specified in the notice, with such information as the Authority may reasonably require for the purposes of investigating the suspected contravention.

(2) The Authority may, by notice in writing served on an undertaking suspected of a contravention described in section 22 -

- (a) require it to produce, within such time and at such place as may be specified in the notice, such documents or documents of such description as may be so specified,
- (b) require it to furnish forthwith, to the Authority or any of its officers, servants or agents authorised for the purposes of this paragraph, on production if so

required of evidence of their authority, such information and documents as the Authority or the officer, servant or agent may specify,

being information or documents reasonably required by the Authority for the purposes of investigating the suspected contravention.

(3) Where under this section the Authority or any officer, servant or agent thereof has power to require the furnishing or production of any information or document from an undertaking, the Authority or that officer, servant or agent has the like power to require the furnishing or production of the information or document from any person who appears to be in possession or control of it or able to obtain access to it.

(4) An undertaking or person on whom a notice is served under subsection (1), (2) or (3) must -

- (a) attend at such place and time as may be specified in the notice and answer such questions as the Authority may reasonably put to them for the purposes of investigating the suspected contravention, and
- (b) otherwise give the Authority all assistance in connection with the investigation which they are reasonably able to give.

(5) The power conferred by this section to require an undertaking or person to produce any documents includes power -

- (a) if the documents are produced, to take and retain

copies of them or extracts from them and to require -

- (i) that undertaking or person, or
- (ii) any person who is a present or past director, controller, partner, manager or employee of that undertaking or person,

to provide an explanation of them, and

- (b) if the documents are not produced, to require the undertaking or person required to produce them to state, to the best of their knowledge and belief, the whereabouts of the documents.

(6) If it appears to the Authority to be desirable to do so in the interests of consumers or any class or description thereof, or for the protection or enhancement of the economic development and well-being of the Bailiwick, or in the public interest, it may also exercise the powers conferred by this section in relation to -

- (a) any person who is a present or past director, controller, partner, manager, employee, agent, banker, auditor or advocate or other legal adviser of the undertaking suspected of the contravention,
- (b) any person who is or has at any relevant time been an associated party of the undertaking, and
- (c) where the undertaking is a company, any person who

is or has at any relevant time been a significant shareholder of the undertaking.

(7) A person who without reasonable excuse -

- (a) fails to comply with a requirement imposed on him by or under this section, or
- (b) obstructs or fails to give all reasonable assistance to any person exercising or purporting to exercise any power conferred by this section,

is guilty of an offence and liable -

- (i) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both,
- (ii) on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the uniform scale or to both.

(8) A statement made by a person in response to a requirement imposed by or under this section -

- (a) may be used in evidence against him in proceedings other than criminal proceedings, and
- (b) may not be used in evidence against him in criminal

proceedings except -

(i) where evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person, or

(ii) in proceedings for -

(A) an offence under subsection (7) or section 48(1),

(B) some other offence where, in giving evidence, he makes a statement inconsistent with it, but the statement is only admissible to the extent necessary to establish the inconsistency,

(C) perjury, or

(D) perverting the course of justice.

(9) A notice under subsection (1), (2) or (3) shall give particulars of the right of appeal conferred by section 46.

**Power of Bailiff to grant warrant.**

**24.** If the Bailiff is satisfied by information on oath -

(a) that a notice has been served under section 23 on any undertaking or person and that there are reasonable grounds for suspecting -

- (i) that there has been a failure to comply with any requirement imposed by or under the notice,
  - (ii) that there has been a failure by that undertaking or person to comply with any other requirement imposed by or under section 23, or
  - (iii) that any information or document furnished pursuant to any requirement mentioned in subparagraph (i) or (ii) is false, misleading, inaccurate or incomplete,
- (b) that it is not reasonably practicable to serve a notice under section 23, or
- (c) that there are reasonable grounds for suspecting that if such a notice were served -
- (i) it would not be complied with,
  - (ii) any documents to which it would relate would be concealed, falsified, tampered with or destroyed, or
  - (iii) the service of the notice might seriously prejudice the investigation of the suspected contravention or the performance by the Authority of its functions,

he may grant a warrant conferring the powers set out in section 25.

**Powers conferred by Bailiff's warrant.**

**25.** (1) A warrant granted under section 24 authorises any officer of police, together with any other person named in, or of a class or description specified in, the warrant (including, without limitation, any officer, servant or agent of the Authority) -

(a) to enter any premises specified in the warrant, being premises -

(i) which are occupied by the undertaking or person upon whom the notice under section 23 was or could be served,

(ii) upon which the documents to which the notice under section 23 relates are reasonably believed to be or from which they are reasonably believed to be accessible, or

(iii) where no notice under section 23 has been served, upon which the documents to which the notice would relate are reasonably believed to be or from which they are reasonably believed to be accessible,

using such force as is reasonably necessary for the purpose,

(b) to search the premises and, in relation to any documents-

(i) which were required by the notice under section 23, or

(ii) where no notice under section 23 has been served, which are of a class or description specified in the warrant and which could have been required by a notice under section 23,

to take possession of them or to take any other steps which may appear to be necessary for preserving them or preventing interference with them,

(c) to take and retain copies of or extracts from any such documents,

(d) to require any person named in, or of a class or description specified in, the warrant -

(i) to answer any questions which could have been put to him under section 23,

(ii) to state to the best of his knowledge and belief the whereabouts of any documents described in paragraph (b),

(iii) to make an explanation of any such documents.



(2) A warrant granted under section 24 shall cease to be valid on the expiration of 28 days immediately following the day on which it was issued.

(3) Any documents of which possession is taken under the powers conferred by a warrant granted under section 24 may be retained -

(a) for a period of three months or such longer period as the Bailiff may, when issuing the warrant or at any time thereafter, direct, or

(b) if within that period proceedings to which the documents are relevant are commenced against any undertaking or person, until the conclusion of those proceedings.

(4) The provisions of section 18 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003<sup>e</sup> ("additional powers of seizure") apply to a person acting under the authority of a warrant under this section as they apply to a police officer.

(5) A person who without reasonable excuse obstructs or fails to comply with any requirement of a person exercising or purporting to exercise any power conferred by a warrant granted under section 24 is guilty of an offence and liable -

(a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both,

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<sup>e</sup> Order in Council No. XXIII of 2003 to which there are amendments not relevant to this Ordinance.

- (b) on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the uniform scale or to both.

(6) A statement made by a person in response to a requirement imposed under a warrant granted under section 24 –

- (a) may be used in evidence against him in proceedings other than criminal proceedings, and

- (b) may not be used in evidence against him in criminal proceedings except –

- (i) where evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person, or

- (ii) in proceedings for –

- (A) an offence under subsection (5) or section 48(1),

- (B) some other offence where, in giving evidence, he makes a statement inconsistent with it, but the statement is only admissible to the extent necessary to establish the inconsistency,

- (C) perjury, or

(D) perverting the course of justice.

**Supplementary provisions as to production of documents.**

26. (1) To comply with a notice under section 23, copies of documents may, with the consent of the Authority and subject to the terms and conditions of that consent, be delivered instead of originals, but -

- (a) the copies must be in such form and verified in such manner as the Authority may specify, and
- (b) if so required by the Authority, the originals of the documents must be made available for inspection, removal and use by it in accordance with the requirement (for example, but without limitation, if they are required for use as evidence in any criminal or civil proceedings or for the purpose of investigating a suspected offence or a suspected contravention of this Ordinance),

and a failure to comply with a requirement under paragraph (b) is an offence punishable in the same manner as a failure to comply with a requirement of the notice under section 23.

(2) If possession is taken of documents under the powers conferred by this Part of this Ordinance a record (which shall comprise a list or, if a list is impracticable, a description) of the documents must upon request be supplied to the person from whom they were obtained.

(3) The record shall be provided within a reasonable time from

the making of the request for it.

(4) Where the Authority proposes to give notice to an undertaking or person under section 23, the Authority may by notice require them -

- (a) to tell the Authority what documents they have in their possession or power which are or may be relevant to the investigation, and
- (b) to take any steps which appear to be necessary for preserving them or preventing interference with them,

and a failure to comply with a requirement of a notice under this subsection is punishable in the same manner as a failure to comply with a notice under section 23.

**Non-notification to other persons of service of notices.**

27. (1) The Authority may direct an undertaking or person to whom a notice is given under section 23 that they must not -

- (a) inform, or cause or permit to be informed, the undertaking suspected of the contravention described in section 22 that the notice has been given, or
- (b) disclose or cause or permit to be disclosed to any undertaking or person (including the undertaking suspected of the contravention) information or any other matter likely to prejudice the investigation to which the notice relates or the performance by the Authority of its functions.

(2) A person who fails to comply with a direction under subsection (1) is guilty of an offence and liable on summary conviction to fine not exceeding twice level 5 on the uniform scale, unless he can show -

- (a) that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself and by any person under his control, or
- (b) in the case of an offence under paragraph (b), that he did not know or suspect that the disclosure was likely to be prejudicial to the investigation or to the performance by the Authority of its functions,

and, for the avoidance of doubt, the institution and prosecution of an appeal under section 46 against the decision of the Authority to give the notice under section 23 does not of itself constitute a failure to comply with a direction under subsection (1).

(3) A direction under subsection (1)(b) does not prevent a professional legal adviser from disclosing any information or other matter -

- (a) to, or to a representative of, a client of his in connection with the giving by the adviser of legal advice to the client, or
- (b) to any person -
  - (i) in contemplation of, or in connection with,

legal proceedings, and

(ii) for the purpose of those proceedings.

(4) Subsection (3) does not apply in relation to any information or other matter which is disclosed with a view to furthering a criminal purpose.

**Access to documents which have been removed.**

**28.** (1) This section applies to any document -

(a) which has been removed by or on behalf of the Authority under the powers conferred by this Part of this Ordinance, and

(b) which is being retained for the purposes of -

(i) an investigation into a contravention described in section 22,

(ii) the investigation of an offence, or

(iii) any civil or criminal proceedings brought as a result of an investigation mentioned in paragraph (a) or (b).

(2) Subject to the provisions of subsection (5), if a request for access to a document or for a copy of a document is made to the Authority by a person who had possession or control of the document immediately before it was removed or by someone acting on his behalf, and the Authority is satisfied that the person reasonably requires the document for the purposes of his business or

otherwise, the Authority may, subject to such terms and conditions as it reasonably thinks fit -

- (a) allow the person who made the request access to the document under the supervision of the Authority,
- (b) allow that person to copy it,
- (c) itself copy it or cause it to be copied at the expense, if the Authority so determines, of that person.

(3) Where anything is copied under subsection (2)(c) the copy shall be supplied to the person who made the request.

(4) The copy shall be supplied within a reasonable time from the making of the request.

(5) There is no duty under this section to give access to, or a copy of, a document or to allow a person to copy a document if the Authority has reasonable grounds to believe that to do so would prejudice -

- (a) an investigation into a contravention described in section 22,
- (b) the investigation of an offence,
- (c) any civil or criminal proceedings brought as a result of an investigation mentioned in paragraph (a) or (b), or
- (d) the performance by the Authority of its functions.

**Legal professional privilege, liens and duties of confidentiality.**

**29.** (1) Nothing in -

(a) this Part of this Ordinance, or

(b) a warrant granted under section 24,

compels the production or divulgence by an advocate or other legal adviser of an item subject to legal professional privilege within the meaning of section 24 of the Police Powers and Criminal Evidence (Bailiwick of Guernsey) Law, 2003, but an advocate or other legal adviser may be required to give the name and address of any client.

(2) Where a person claims a lien on a document, its production under -

(a) this Part of this Ordinance, or

(b) a warrant granted under section 24,

is without prejudice to his lien.

(3) A requirement imposed by or under -

(a) this Part of this Ordinance, or

(b) a warrant granted under section 24,

has effect notwithstanding any obligation as to confidentiality or other restriction on



the disclosure of information imposed by statute, contract or otherwise; and accordingly the obligation or restriction is not contravened by the making of a disclosure pursuant to such a requirement.

**Co-operation with overseas competition authorities.**

30. (1) Any relevant power conferred on the Authority by a provision of this Ordinance or any other enactment may, at the request of an overseas competition authority (the "**requesting authority**"), be exercised for the purpose of enabling or assisting, in the interests of consumers or otherwise, the requesting authority to carry out any of its functions; and the provision conferring the power shall have effect accordingly.

(2) In deciding whether or not to exercise a power by virtue of subsection (1), the Authority may take into account, in particular -

- (a) whether corresponding assistance would be given to the Authority,
- (b) whether the case concerns the breach of a law or other requirement which has no close parallel in Guernsey or involves the assertion of a jurisdiction not recognised by Guernsey,
- (c) the seriousness of the case and its importance to persons in Guernsey,
- (d) whether the assistance sought could be obtained by other means,
- (e) whether the assistance sought would, in the

Authority's view, lead to disproportionate injury, loss, damage or harm to the undertakings or persons in respect of whom the relevant powers would be exercised,

- (f) whether the assistance sought is required by the requesting authority solely to enable it to exercise its competition functions,
- (g) whether the requesting authority will comply with any conditions (whether as to confidentiality, use, safekeeping or otherwise) subject to which any document or information would be disclosed, and
- (h) whether it is otherwise appropriate in the public interest to give the assistance sought.

(3) The Authority may require the requesting authority to provide it with an undertaking to pay its costs, fees and expenses in connection with the provision of the assistance before it exercises any relevant power by virtue of subsection (1).

(4) Where the Authority decides to exercise any relevant power by virtue of subsection (1), it may authorise a representative of the requesting authority to attend, and take part in, any interview conducted in the course of the exercise of the power.

(5) An authorisation shall not be given under subsection (4) unless the Authority is satisfied that any information obtained by the requesting authority as a result of the interview will be subject to such obligations of

confidentiality as it may think fit to impose.

(6) In this section -

**"relevant power"** means -

- (a) any power conferred by this Part of this Ordinance for or in respect of the investigation of a suspected contravention described in section 22, and
- (b) any other power of the Authority the exercise of which is ancillary or incidental to the exercise of a power described in paragraph (a),

**"requesting authority"** has the meaning given by subsection (1).

(7) The provisions of this section are without prejudice to the power of the Authority to enter into such understandings, agreements and other arrangements as it thinks fit with overseas competition authorities for the provision by the parties to the arrangement of mutual assistance and co-operation in respect of the performance of their respective functions, including (without limitation) functions described in subsection (6) or corresponding to them.

## PART VI

### ENFORCEMENT

#### **Directions in relation to abuse of dominant position.**

**31.** (1) If the Authority decides that conduct by an undertaking is in contravention of -

(a) section 1(1), or

(b) any condition of an exemption under section 3 or 4,

it may give the undertaking such directions as it considers appropriate to bring the contravention to an end.

(2) A direction under this section may, in particular, require the undertaking to cease or modify the conduct in question.

(3) A direction under this section -

(a) must be in writing, and

(b) may be varied or rescinded by a subsequent direction hereunder.

(4) The Authority may, in addition to or instead of giving a direction under this section, by order impose a financial penalty on the undertaking.

**Directions in relation to anti-competitive practices.**

**32.** (1) If the Authority decides that an undertaking is in contravention of -

(a) section 5(1), or

(b) any condition of an exemption under section 6, 9 or 10,

it may give the undertaking such directions as it considers appropriate to bring the contravention to an end.

(2) A direction under this section may, in particular, require the undertaking to terminate, modify or withdraw from the agreement in question.

(3) A direction under this section -

(a) must be in writing, and

(b) may be varied or rescinded by a subsequent direction hereunder.

(4) The Authority may, in addition to or instead of giving a direction under this section, by order impose a financial penalty on the undertaking.

**Directions in relation to mergers and acquisitions.**

33. (1) If the Authority decides that an undertaking is in contravention of -

(a) section 13(1), or

(b) any condition of an exemption under section 14 or 15,

it may give the undertaking such directions as it considers appropriate to bring the contravention to an end.

(2) If the Authority decides that an undertaking or person is in contravention of a condition of the Authority's approval of a merger or acquisition

under section 13(1), it may give the undertaking or person such directions as it considers appropriate to bring the contravention to an end.

(3) A direction under subsection (1) or (2) may, without limitation -

- (a) require the undertaking or person to take all such action as it may be possible to take to nullify, suspend or modify the merger or acquisition or to withdraw therefrom,
- (b) impose on the undertaking or person a condition as to the manner in which they conduct business,
- (c) require the undertaking or person to sell or otherwise dispose of such part of their assets or business as may be directed by the Authority, and
- (d) impose any other requirement, restriction, restraint or prohibition that may be imposed by conditions under section 19(5).

(4) A condition, requirement, restriction, restraint or prohibition imposed by virtue of subsection (3)(b), (c) or (d) has effect as if it had been a condition of the Authority's approval of the merger or acquisition in question.

(5) If the Authority decides that an undertaking or person intends to contravene section 13(1) by executing a merger or acquisition which is prohibited thereunder other than with, and in accordance with the conditions of, the approval of the Authority, it may give the undertaking or person such directions as it

considers appropriate to ensure that the merger or acquisition is not executed or is not executed except with, and in accordance with the conditions of, the approval of the Authority.

(6) A direction under this section -

- (a) must be in writing, and
- (b) may be varied or rescinded by a subsequent direction hereunder.

(7) The Authority may, in addition to or instead of giving a direction under this section, by order impose a financial penalty on the undertaking or person.

**Financial penalties.**

**34.** (1) In deciding whether or not to impose a financial penalty under section 31(4), 32(4) or 33(7) and, if so, the amount thereof, the Authority must take into consideration the following factors -

- (a) whether the contravention was brought to the attention of the Authority by the undertaking or person concerned,
- (b) the seriousness of the contravention,
- (c) whether or not the contravention was intentional, negligent or reckless,
- (d) what efforts, if any, have been made to rectify the

contravention and to prevent a recurrence,

- (e) the potential financial consequences to the undertaking or person concerned, and to third parties including customers and creditors of that undertaking or person, of imposing a penalty, and
- (f) the penalties imposed by the Authority in other cases.

(2) Where a financial penalty is imposed on an undertaking or person, the Authority may publish their name and the amount of the penalty in such manner and for such period as it considers appropriate.

(3) The amount of the penalty must not exceed 10% of the turnover of the undertaking or person during the period of the contravention of the prohibition in question, up to a maximum period of 3 years.

(4) The Department may by regulation prescribe the manner in which the turnover is to be calculated for the purposes of subsection (3).

(5) An order imposing a financial penalty must be in writing and must specify the date by which the penalty is required to be paid.

(6) The order may provide for the penalty to be paid by instalments of such number and amounts and at such times as may be specified in the order.

(7) A financial penalty is, without prejudice to any other remedy in respect of a default in payment, recoverable as a civil debt due to the Authority.



(8) The Authority may, of its own motion or on the application of the undertaking or person concerned, vary -

- (a) the amount of a financial penalty, or
- (b) the number, amounts and times of the instalments by which the financial penalty is to be paid.

(9) The Authority shall pay any money received by it in payment of a financial penalty to the Department for the General Revenue Account of the States.

(10) Subsection (9) does not apply if and to the extent that, in accordance with agreed financial procedures, the Department directs otherwise.

**Interim measures.**

**35.** (1) This section applies if the Authority has not completed an investigation under section 22 into the matter but has reasonable grounds for suspecting that an undertaking or person -

- (a) has contravened -
  - (i) section 1(1), 5(1) or 13(1),
  - (ii) any condition of an exemption or approval, or
  - (iii) a direction of the Authority under section 21, 31, 32 or 33, or
- (b) intends to contravene section 13(1).

(2) The Authority may give such directions as it considers appropriate if it considers it necessary to do so as a matter of urgency -

- (a) to prevent serious and irreparable damage to a particular undertaking or person or class or description thereof,
- (b) to protect the public interest, or
- (c) for the protection or enhancement of the economic development and well-being of the Bailiwick.

(3) A direction given under this section has effect while subsection (1) applies, but may be replaced, if the circumstances permit, by a direction under section 21, 31, 32 or 33 (as appropriate).

(4) A direction under this section -

- (a) must be in writing, and
- (b) may be varied or rescinded by a subsequent direction hereunder.

(5) In the case of a suspected contravention of section 1(1), a direction under this section may, in particular, require the undertaking to cease or modify the conduct considered to constitute -

- (a) the abuse of a dominant position, or

- (b) the contravention of the condition in question.

(6) In the case of a suspected contravention of section 5(1), a direction under this section may, in particular, require the undertaking -

- (a) not to enter into an agreement except insofar as it does not have the object or effect of preventing competition within any market in Guernsey for goods or services, or
- (b) to terminate, modify or withdraw from -
  - (i) the agreement considered to be an anti-competitive practice, or
  - (ii) the undertaking's implementation of or participation in it.

(7) In the case of a suspected contravention of section 13(1), a direction given under this section may, in particular -

- (a) require the undertaking or person to take all such action as it may be possible to take to nullify, suspend or modify the effect of the merger or acquisition,
- (b) impose on the undertaking or person a condition as to the manner in which they conduct business, and

- (c) impose any other requirement, restriction, restraint or prohibition that may be imposed by conditions under section 19(5).

(8) Where the Authority suspects that an undertaking or person intends to contravene section 13(1) by executing a merger or acquisition which is prohibited thereunder other than with, and in accordance with the conditions of, the approval of the Authority, a direction given under this section may, in particular -

- (a) prohibit the execution of the merger or acquisition or prohibit its execution except with, and in accordance with the conditions of, the approval of the Authority, and
- (b) impose such requirements, restrictions, restraints and prohibitions as the Authority considers appropriate to ensure that the merger or acquisition is not executed or is not executed except with, and in accordance with the conditions of, the approval of the Authority.

**Enforcement of directions.**

36. (1) If the Authority decides that an undertaking or person has, without reasonable excuse, contravened a direction under section 21, 31, 32, 33 or 35, the Authority may apply to the Royal Court for an order -

- (a) requiring the undertaking or person to take such steps as may be necessary to make good the contravention within such time as may be specified in the order, or

- (b) requiring, where the direction related to anything to be done in the management or administration of the undertaking or person, any person who is a present or past director, controller, partner, manager or employee of that undertaking or person to take any such steps within such time as may be specified in the order.

(2) An order of the Royal Court under this section may be made subject to such penalty and on such terms and conditions (including incidental, supplementary and ancillary terms and conditions) as the Royal Court thinks fit.

(3) The powers conferred by this section are in addition to and not in derogation from any other power, penalty, sanction, remedy or liability (criminal, civil or administrative) provided for by or under any enactment or otherwise arising in respect of the contravention.

**Requests for Authority's opinion as to compliance.**

37. (1) This section applies where an undertaking wishes to seek the opinion of the Authority on whether a proposed course of action would constitute a contravention of -

- (a) section 1(1) or 5(1), or
- (b) any condition of an exemption under section 3, 4, 6, 9 or 10.

(2) The Authority's opinion cannot be sought under this section as to whether a course of action would constitute a contravention of section 13(1), and an opinion of the Authority that a course of action is unlikely to constitute a

contravention of -

- (a) section 1(1) or 5(1), or
- (b) any condition of an exemption under section 3, 4, 6, 9 or 10,

does not imply that the same course of action would not constitute a contravention of section 13(1) or any condition of an exemption or approval under Part III of this Ordinance.

(3) An application for an opinion must -

- (a) be made in such form as the Authority may determine,
- (b) contain or be accompanied by such information and documents as the Authority may require relating to the proposed course of action, and
- (c) be accompanied by such fee as may be prescribed by the Department or (if the regulations so provide) an undertaking, in such form as may be approved by the Authority, to pay its reasonable costs, fees and expenses in connection with the determination of the application, whatever the outcome.

(4) At any time after receiving an application and before giving his opinion the Authority may request the applicant to provide such additional information or documents as the Authority may reasonably require to enable it to determine the application including (without limitation) information in relation to

undertakings and persons who, if the proposed course of action were to proceed, would have any proprietary, financial, business or other interest in the conduct or agreement in respect of which the opinion is sought or in connection with the applicant.

(5) The Authority shall not consider an application for an opinion under this section -

- (a) if the application is not accompanied by the prescribed fee or the undertaking as to costs, fees and expenses described in subsection (3)(c),
- (b) if the applicant has not provided any information or document reasonably required by the Authority for the purpose of determining the application, or
- (c) if the application is otherwise not made in accordance with the provisions of this Ordinance.

(6) The Department may, after consultation with the Authority, by regulation prescribe the manner in which an application for an opinion shall be dealt with by the Authority.

(7) The regulations may, in particular, but without limitation, require the Authority -

- (a) to publish in a prescribed form and manner details of applications received by it,

- (b) to invite representations in respect of applications received by it and to take them into account when preparing its opinion, and
- (c) to publish in a prescribed form and manner any opinion it gives and its reasoning for his decision.

(8) If regulations are not made under subsection (6) the Authority shall deal with applications for an opinion under this section in such manner as it thinks fit.

(9) If the Authority delivers an opinion under this section that a proposed course of action is unlikely to constitute a contravention of section 1(1) or 5(1) or of a condition of an exemption under section 3, 4, 6, 9 or 10, as the case may be, it shall not exercise its powers under Part V (investigations by Authority) or this Part of this Ordinance in respect of that course of action unless -

- (a) it has reasonable cause to suspect that -
  - (i) there has been a material change of circumstance since it gave its opinion,
  - (ii) any information or document on which it based its opinion was incomplete, false, deceptive or misleading in a material particular, or
  - (iii) the course of action constitutes a contravention of section 13(1), or
- (b) a complaint about the course of action taken by the



relevant undertaking or person is made to it.

## PART VII SUPPLEMENTARY MATTERS

### *Disclosure of information*

#### **Restrictions on disclosure of information.**

**38.** (1) Subject to the provisions of section 39 -

- (a) no person who under or for the purposes of this Ordinance receives information relating to the business or other affairs of any person,
- (b) no person who obtains any such information directly or indirectly from a person who has so received it,

shall disclose the information without the consent of the person to whom it relates and (if different) the person from whom it was so obtained.

(2) A person who discloses information in contravention of this section is guilty of an offence and liable -

- (a) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both,
- (b) on summary conviction, to imprisonment for a term not exceeding three months or to a fine not exceeding level 5 on the uniform scale or to both.

**Cases where disclosure is permitted.**

39. Section 38 does not preclude -

- (a) the disclosure of -
  - (i) information which at the time of disclosure is or has already been made available to the public from other sources, or
  - (ii) information in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it,
- (b) the disclosure of information for the purpose of enabling or assisting the Authority to discharge its functions conferred by or under this Ordinance,
- (c) where, in order to enable or assist it to discharge its functions conferred by or under this Ordinance, the Authority considers it necessary to seek advice from a qualified person on any matter of law or accountancy or any other matter requiring the exercise of professional skill, the disclosure by the Authority to that person of such information as appears to it to be necessary to ensure that that person is properly informed as to the matters on which his advice is sought,
- (d) the disclosure by the Authority of information in the

interests of consumers or any class or description thereof or in the public interest,

(e) the disclosure of information for the purpose of enabling or assisting, in the interests of the public or otherwise, an overseas competition authority in a place outside the Bailiwick to exercise its functions,

(f) the disclosure of information in compliance with, or for the purposes of enabling or assisting a person to comply with, any requirement imposed by or under this Ordinance or any regulation made under it,

(g) the disclosure of information -

(i) for the purposes of the investigation, prevention or detection of crime, or

(ii) with a view to the instigation of or otherwise for the purposes of any criminal proceedings,

whether under this Ordinance or otherwise,

(h) the disclosure of information in connection with any other proceedings arising out of this Ordinance,

(i) the disclosure of information with a view to the instigation of, or otherwise for the purposes of, any disciplinary proceedings relating to the exercise of his professional duties by a lawyer, accountant, auditor or

other professional representative of a person under investigation under this Ordinance,

- (j) the disclosure by the Authority to Her Majesty's Procureur or an officer of police of information obtained under Part V of this Ordinance or information in the possession of the Authority as to any suspected offence or contravention in relation to which the powers conferred by Part V are exercisable,
- (k) where information is disclosed to an officer of police under paragraph (j), the disclosure of that information by an officer of police for the purposes of an investigation or prosecution either in the Bailiwick or, with the prior consent of Her Majesty's Procureur to such disclosure, elsewhere,
- (l) the disclosure of information to comply with the directions of any division of the Royal Court.

**Information supplied to Authority by overseas competition authority.**

**40.** (1) Sections 38 and 39 apply, subject to subsection (2), in relation to information supplied to the Authority for the purposes of its functions conferred by or under this Ordinance by an overseas competition authority in a place outside the Bailiwick as they apply in relation to information described in section 38(1)(a).

(2) Information so supplied to the Authority may be disclosed only -

- (a) with the consent of the persons whose consent is

referred to in section 38(1),

- (b) for the purposes or in the circumstances described in section 39(a), (b), (g) or (h), or
- (c) with the consent of and subject to any conditions imposed by the authority by which the information was supplied, for the purposes or in the circumstances described in any other paragraph of section 39.

**Power to impose conditions in respect of disclosed information.**

**41.** The Authority shall, when disclosing any information to any person pursuant to the provisions of this Ordinance -

- (a) impose such conditions in relation to the use, disclosure, safekeeping and return of that information by that person or by any other person who may obtain the information from him,
- (b) require any such person to enter into such undertakings in relation to such use, disclosure, safekeeping and return, and
- (c) take such other steps to ensure that the confidentiality of the information is protected,

as the Authority thinks fit.

*Civil actions*

**Civil actions for contravention of Ordinance.**

**42.** (1) A person has a duty not to contravene -

- (a) section 1(1), 5(1) or 13(1),
- (b) any condition of an exemption or approval, or
- (c) a direction under section 21, 31, 32, 33 or 35.

(2) A breach of that duty is actionable by an aggrieved person as a tort in the same manner and by means of the same remedies as in the case of a breach of statutory duty.

(3) The court may accordingly grant such orders, reliefs and remedies as it considers appropriate and as the court has power to grant in the case of a breach of statutory duty, including, in the case of the Royal Court, without limitation and for the avoidance of doubt -

- (a) an award of punitive or exemplary damages in respect of a breach of the duty mentioned in subsection (1),
- (b) an injunction or interim injunction to restrain any actual or apprehended breach of that duty, or
- (c) a declaration that a person has contravened or that a particular act, omission or course of conduct on the part of a person would contravene -
  - (i) section 1(1), 5(1) or 13(1),

(ii) any condition of an exemption or approval, or

(iii) a direction under section 21, 31, 32, 33 or 35.

(4) An application for -

(a) an injunction described in subsection (3)(b), or

(b) a declaration described in subsection (3)(c),

may be made by the Authority or by an aggrieved person against -

(i) the undertaking suspected of the actual or apprehended breach of the duty mentioned in subsection (1), and

(ii) any officer of the undertaking suspected, by virtue of subsection (5), of having incurred personal liability in respect of the breach or (in the case of an apprehended breach) whose acts, omissions or conduct could result in his incurring personal liability in respect of the breach.

(5) Where a breach of the duty mentioned in subsection (1) is committed by an undertaking and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, an officer of the undertaking, he as well as the body corporate is personally liable in the same manner and to the same extent as the undertaking for the breach of duty and may be actioned and proceeded against accordingly.

A person's liability by virtue of this subsection is joint and several with that of the undertaking and of any other person so liable in relation to that undertaking.

(6) If in proceedings for breach of the duty mentioned in subsection (1) against an officer of an undertaking it appears to the court that the officer is or may be liable but that -

- (a) he acted honestly and reasonably,
- (b) he was not aware of the breach of duty or of the intention to commit it and, in being not so aware, was neither reckless nor negligent, or
- (c) he expressly objected, and exercised such rights as he had by way of voting power or otherwise as an officer of the undertaking, so as to try to prevent the breach of duty,

and, having regard to all the circumstances of the case, the court is satisfied that he ought fairly to be excused -

- (i) for the breach of duty, and
- (ii) for omitting to obtain the directions of the court in the matter in which the breach arose,

the court may relieve him, either wholly or in part, from his personal liability for breach of the duty on such terms and conditions as it thinks fit.



(7) If any such officer has reason to apprehend that a claim may be made against him in respect of a breach of the duty mentioned in subsection (1), he may apply to the Royal Court for relief, and the Royal Court has the same power to grant him relief as it has under subsection (6).

(8) An "**officer**" of an undertaking includes -

- (a) in the case of a body corporate, any director, manager, secretary or other similar officer, or any controller, of that body,
- (b) in the case of a body corporate managed by its members, any member (but only in connection with his functions of management),
- (c) in the case of a partnership, any partner,
- (d) in the case of any other unincorporated body, any officer of that body who is bound to fulfil any duty whereof the breach of the duty mentioned in subsection (1) is a breach or, if there is no such officer, any member of the committee or other similar governing body,
- (e) any person purporting to act in any capacity described in paragraph (a), (b), (c) or (d).

(9) The provisions of this section are in addition to and not in derogation from any power, penalty, sanction, right, remedy or liability (criminal,

civil or administrative) provided for by or under any other provision of this Ordinance or any other enactment or otherwise arising in respect of the breach or apprehended breach of the duty mentioned in subsection (1).

(10) In this section an "**aggrieved person**" means a person who has suffered or is likely to suffer economic loss or damage as a result of an actual or apprehended breach of the duty mentioned in subsection (1).

*Proceedings, representations and appeals*

**Representations concerning proposed decisions of Authority or Department.**

**43.** (1) Where the relevant authority, otherwise than with the agreement of the undertaking concerned, proposes to make a decision in respect of which a right of appeal is conferred by section 46, other than a decision to serve a notice on the undertaking under section 23(1), (2) or (3), the procedure set out in this section shall be followed.

(2) The relevant authority shall serve on the undertaking concerned a notice in writing -

- (a) stating that the relevant authority is proposing to take the decision,
- (b) stating the terms of, and the grounds for, the proposed decision,
- (c) stating that the undertaking may, within a period of 28 days beginning on the date of the notice or such longer period as may be specified in the notice, make written or oral representations to the relevant authority in

respect of the proposed decision in such manner as the relevant authority may from time to time determine, and

- (d) giving particulars of the right of appeal which would be exercisable under section 46 if the relevant authority were to take the proposed decision.

(3) The relevant authority shall consider any representations made in response to a notice served under subsection (2) before giving further consideration to the proposed decision.

(4) The period of 28 days mentioned in subsection (2)(c) may be reduced in any case in which the relevant authority considers it necessary to do so -

- (a) in the interests of consumers or any class or description thereof or the economic development and well-being of the Bailiwick, or in the public interest,

- (b) where there are reasonable grounds for suspecting -

- (i) that if that period of notice were given any documents relevant to or relating to the proposed decision would be concealed, falsified, tampered with or destroyed, or

- (ii) that the giving of that period of notice might seriously prejudice -

- (A) any criminal, competition or regulatory

investigation, or any prosecution, in Guernsey or elsewhere,

(B) co-operation or relations with investigatory, prosecuting, competition or regulatory authorities, in Guernsey or elsewhere, or

(C) the performance by the relevant authority of its functions.

If by reason of those interests or suspicions the relevant authority considers that the decision in question needs to be taken -

- immediately as a matter of urgency, and / or
- without notice,

then the procedure prescribed in this section may be dispensed with altogether.

(5) For the avoidance of doubt -

- (a) a notice about a proposal to impose, vary or rescind -
  - (i) any condition in respect of an exemption or approval, or
  - (ii) any direction under section 21, 31, 32, 33 or 35,

must set out the terms of the proposed condition or direction, and

- (b) a notice about a proposal to impose a financial penalty must state the amount of the proposed penalty.

**Notice of decisions of Authority or Department.**

**44.** (1) Where the relevant authority, otherwise than with the agreement of the undertaking concerned, makes a decision in respect of which a right of appeal is conferred by section 46, the relevant authority shall serve on the undertaking notice in writing of the decision.

(2) The notice -

- (a) shall state the terms of, and the grounds for, the relevant authority's decision, and
- (b) shall give particulars of the right of appeal conferred by section 46.

**Disclosure of reasons for decisions of Authority or Department.**

**45.** (1) Where the relevant authority, otherwise than with the agreement of the undertaking concerned, makes a decision in respect of which a right of appeal is conferred by section 46, the person on whom the right of appeal is conferred may, whether or not he institutes an appeal, but subject to the provisions of subsection (2), require the relevant authority to furnish him with a written statement of the reasons for the decision.

(2) Subsection (1) does not require the relevant authority to specify any reason which would in its opinion involve the disclosure of confidential

information the disclosure of which would be prejudicial to -

- (a) any criminal, competition or regulatory investigation, or any prosecution, in Guernsey or elsewhere,
- (b) co-operation or relations with investigatory, prosecuting, competition or regulatory authorities, in Guernsey or elsewhere,
- (c) the performance by the relevant authority of its functions,
- (d) a third party (wherever situated), or
- (e) the public interest.

(3) Where, pursuant to subsection (2), the relevant authority omits any matter from a statement of reasons, it shall inform the undertaking concerned of the fact that there has been such an omission and give particulars of the right of appeal conferred by section 46.

**Appeals against decisions of Authority or Department.**

**46.** (1) An undertaking aggrieved by a decision of the relevant authority -

- (a) to refuse an application by the undertaking for -
  - (i) an exemption under section 3, 4, 6, 9, 10, 14 or 15, or

- (ii) an approval of a merger or acquisition under section 13(1),
- (b) to revoke the undertaking's exemption or approval,
- (c) to impose, vary or rescind any condition in respect of the undertaking's exemption or approval,
- (d) to refuse to extend the period of validity of the undertaking's exemption or approval under section 18(2),
- (e) following an investigation conducted under section 22, that the undertaking -
  - (i) has contravened section 1(1), 5(1) or 13(1),
  - (ii) has contravened any condition of an exemption or approval,
  - (iii) has contravened a direction of the Authority under section 21, 31, 32, 33 or 35, or
  - (iv) intends to contravene section 13(1),
- (f) to refuse the undertaking consent for the provision of copies of documents under section 26 instead of originals or to impose, vary or rescind any term or condition in respect of any such consent,

- (g) to give the undertaking a direction under section 27(1),
- (h) to refuse the undertaking access to documents or to allow the undertaking to copy documents under section 28(2) or to impose, vary or rescind any term or condition in respect of any such access or copying,
- (i) to exercise any relevant power in relation to the undertaking at the request of an overseas competition authority under section 30(1),
- (j) to impose a financial penalty on the undertaking under section 31(4), 32(4) or 33(7),
- (k) under section 34(8), to vary -
  - (i) the amount of a financial penalty, or
  - (ii) the number, amounts and times of the instalments by which the financial penalty is to be paid,
- (l) to give the undertaking a direction under section 21, 31, 32, 33 or 35,
- (m) to vary or rescind any direction so given,
- (n) to omit, pursuant to the provisions of section 45(2), any matter from a statement of reasons given to the



undertaking,

- (o) to serve a notice on the undertaking under section 23(1), (2) or (3),
- (p) which is a decision of such description as the Department may by regulation prescribe for the purposes of this section,

may appeal to the Royal Court against the decision.

(2) The grounds of an appeal under this section are that –

- (a) the decision was ultra vires or there was some other error of law,
- (b) the decision was unreasonable,
- (c) the decision was made in bad faith,
- (d) there was a lack of proportionality, or
- (e) there was a material error as to the facts or as to the procedure.

(3) An appeal under this section shall be instituted –

- (a) within a period of 28 days immediately following the date of the notice of the relevant authority's decision, and

- (b) by summons served on the Minister of the Department or, as the case may be, the Authority stating the grounds and material facts on which the appellant relies.

(4) The relevant authority may, where an appeal under this section has been instituted, apply to the Royal Court, by summons served on the appellant, for an order that the appeal shall be dismissed for want of prosecution; and on hearing the application the Royal Court may -

- (a) dismiss the appeal or dismiss the application (in either case on such terms and conditions as the Royal Court may direct), or
- (b) make such other order as the Royal Court considers just.

The provisions of this subsection are without prejudice to the inherent powers of the Royal Court or to the provisions of rule 52 of the Royal Court Civil Rules, 2007<sup>f</sup>.

- (5) On an appeal under this section the Royal Court may -
  - (a) set the decision of the relevant authority aside and, if the Royal Court considers it appropriate to do so, remit the matter to the relevant authority with such directions as the Royal Court thinks fit, or

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<sup>f</sup> O.R.C. No. IV of 2007 as amended by O.R.C No. II of 2008.

(b) confirm the decision, in whole or in part.

(6) On an appeal under this section against a decision described in subsection (1)(c), (l) or (m) the Royal Court may, on the application of the appellant, and on such terms and conditions as the Royal Court thinks just, suspend or modify the operation of the condition or direction in question, or the variation or rescission thereof, pending the determination of the appeal.

(7) For the purposes of determining an appeal under this section against a decision described in subsection (1)(n) to omit, pursuant to the provisions of section 45(2), any matter from a statement of reasons, the Royal Court may examine the information the disclosure of which the relevant authority considers would be prejudicial, and unless the Royal Court orders otherwise the information shall not, pending the determination of the appeal, be disclosed to the appellant or any person representing him.

(8) An appeal from a decision of the Royal Court made on an appeal under this section lies, with leave of the Royal Court or Court of Appeal, to the Court of Appeal on a question of law.

(9) Section 21 of the Court of Appeal (Guernsey) Law, 1961<sup>g</sup> ("powers of a single judge") applies to the powers of the Court of Appeal to give leave to appeal under subsection (8) as it applies to the powers of the Court of Appeal to give leave to appeal under Part II of that Law.

(10) This section does not confer a right of appeal on a question which has been determined by the Royal Court on an application by the Authority

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<sup>g</sup> Ordres en Conseil Vol. XVIII, p. 315.

for directions, or for a determination of a question of fact, law or procedure, under section 8 of the Guernsey Competition and Regulatory Authority Ordinance, 2012<sup>h</sup>.

**Interpretation of sections 43 to 46.**

**47.** In sections 43 to 46 -

**"relevant authority"** means -

- (a) the Department, in relation to an exemption under section 3, 9 or 14, or
- (b) the Authority, in any other case, and

**"undertaking"** includes a person.

*Offences*

**Offence of providing false or misleading information, etc.**

**48.** (1) If a person -

- (a) in connection with an application for, or for the purposes of obtaining, an exemption from the Authority or Department under section 3, 4, 6, 9, 10, 14 or 15 or the approval of the Authority under section 13(1),
- (b) in making any statement or producing or furnishing or causing or permitting to be produced or furnished any

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<sup>h</sup> Approved by the States of Deliberation on the 30<sup>th</sup> May, 2012.

information or document to the Authority or any officer or servant of its when acting in the exercise of their functions conferred by or under this Ordinance, or

- (c) otherwise than as mentioned in paragraphs (a) and (b) but in circumstances in which he intends, or could reasonably be expected to know, that the statement, information or document would or might be used by the Authority or any other person or body entitled to information under this Ordinance for the purpose of exercising their functions conferred by or under this Ordinance,

does any of the following -

- (i) he makes a statement which he knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular,
- (ii) dishonestly or otherwise, he recklessly makes a statement which is false, deceptive or misleading in a material particular,
- (iii) he produces or furnishes or causes or permits to be produced or furnished any information or document which he knows or has reasonable cause to believe to be false, deceptive or misleading in a material particular, or

- (iv) dishonestly or otherwise, he recklessly produces or furnishes or recklessly causes or permits to be produced or furnished any information or document which is false, deceptive or misleading in a material particular,

he is guilty of an offence.

- (2) A person guilty of an offence under subsection (1) is liable -
  - (a) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both,
  - (b) on summary conviction, to imprisonment for a term not exceeding three months, or to a fine not exceeding level 5 on the uniform scale, or to both.

**Offence of withholding information.**

**49.** (1) An applicant for or the holder of an exemption under section 3, 4, 6, 9, 10, 14 or 15 or an approval under section 13(1), or a person or body who is the subject of an investigation of the Authority under Part V, or any director, controller, partner, manager or employee of such an applicant, holder, person or body, who fails to provide the Authority with any information or document in his possession or power knowing or having reasonable cause to believe-

- (a) that the information or document is relevant to the exercise by the Authority of its functions conferred by

or under this Ordinance in relation to the applicant, holder, person or body, and

- (b) that the withholding of the information or document is likely to result in the Authority being misled as to any matter which is relevant to and of material significance to the exercise of those functions in relation to the applicant, holder, person or body,

is guilty of an offence.

- (2) A person guilty of an offence under subsection (1) is liable -
  - (a) on conviction on indictment, to a fine,
  - (b) on summary conviction, to a fine not exceeding level 5 on the uniform scale.

**Offence of falsification, etc. of documents.**

- 50.** (1) An undertaking or person -
- (a) upon whom a notice under section 23 has been served, or
  - (b) who knows or has reasonable grounds to suspect -
    - (i) that such a notice has been or is likely to be served, or
    - (ii) that an investigation is being or is likely to be

carried out under section 22,

and who conceals, falsifies, tampers with or destroys, or causes or permits to be concealed, falsified, tampered with or destroyed, documents which he knows or has reasonable grounds to suspect -

(A) are or would be specified in the notice, or

(B) are or would be relevant to the investigation,

is guilty of an offence unless he proves that he had no intention of concealing facts disclosed by the documents from the Authority or, as the case may be, from the persons carrying out the investigation.

(2) A person guilty of an offence under subsection (1) is liable -

(a) on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine, or to both,

(b) on summary conviction, to imprisonment for a term not exceeding three months, or to a fine not exceeding level 5 on the uniform scale, or to both.

**Offences by bodies corporate, etc. and defence of due diligence.**

**51.** (1) Where an offence under this Ordinance is committed by a body corporate and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of -

(a) any director, manager, secretary or other similar officer of the body corporate, or



- (b) any person purporting to act in any such capacity,

he as well as the body corporate is guilty of the offence and may be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies to a member in connection with his functions of management as if he were a director.

(3) Where an offence under this Ordinance is committed by an unincorporated body and is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of -

- (a) in the case of a partnership, any partner,
- (b) in the case of any other unincorporated body, any officer of that body who is bound to fulfil any duty whereof the offence is a breach or, if there is no such officer, any member of the committee or other similar governing body, or
- (c) any person purporting to act in any capacity described in paragraph (a) or (b),

he as well as the unincorporated body is guilty of the offence and may be proceeded against and punished accordingly.

(4) Where an offence under this Ordinance is alleged to have been committed by an unincorporated body, proceedings for the offence shall be

brought in the name of that body and not in the name of any of its members.

(5) A fine imposed on an unincorporated body on its conviction of an offence under this Ordinance shall be paid from the funds of that body.

(6) In any proceedings for an offence under this Ordinance, it is a defence for the accused to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself and by any person under his control.

### *Miscellaneous*

#### **Authority to keep legislation under review.**

**52.** (1) The Authority may advise the Department on -

- (a) the effect or likely effect of any enactment or proposed enactment or any other legal development on competition in Guernsey, and
- (b) generally in respect of competition matters.

(2) In this section "**enactment**" includes this Ordinance and any regulations made under it.

(3) This section is in addition to and not in derogation from the provisions of section 4 of the Guernsey Competition and Regulatory Authority Ordinance, 2012 ("functions of Authority").

**Right of Authority to make representations in proceedings.**

**53.** (1) This section applies to any civil proceedings before the Royal Court to which the Authority and Department are not parties but in which it is alleged that there has been a contravention of -

- (a) section 1(1), 5(1) or 13(1),
- (b) any condition of any exemption or approval, or
- (c) a direction of the Authority under section 21, 31, 32, 33 or 35.

(2) The Authority -

- (a) shall be served with notice of the proceedings not less than 7 days (or such other period as the Royal Court may, in its absolute discretion, direct) before the day of the hearing of the proceedings, and
- (b) shall be given an opportunity to make representations to the Royal Court which the Royal Court shall take into account in making any decision, determination or finding in respect of the alleged contravention.

**Authority and Court to have regard to EU authorities.**

**54.** The Authority and the Court must in determining questions arising in relation to -

- (a) the abuse by one or more undertakings of a dominant position within any market in Guernsey for goods and

services,

- (b) anti-competitive practices between undertakings, and
- (c) the merger and acquisition of undertakings,

take into account the principles laid down by and any relevant decisions of the Court of Justice or General Court of the European Union in respect of corresponding questions arising under Community law in relation to competition within the internal market of the European Union.

**Power of Authority to publish guidelines.**

**55.** (1) The Authority may issue such guidelines as it considers appropriate -

- (a) in connection with the administration, implementation and enforcement of this Ordinance and any matter relating to it (and generally for the purposes of this Ordinance), and
- (b) for the purpose of providing practical guidance in respect of any provision made by or under it and any duties, obligations, requirements, restrictions, prohibitions and liabilities arising under or in connection with it and the procedures and best practices to be observed by undertakings affected by it.

- (2) Guidelines shall come into force on such date as the Authority

may appoint.

(3) The Authority may revoke or revise any guidelines.

(4) The Authority shall publish guidelines and any revision thereof in such manner and for such period as it considers appropriate.

(5) Before publishing guidelines the Authority shall consult such persons or bodies as appear to it to have an interest or concern in respect of the content thereof.

(6) Guidelines and any contravention thereof must be taken into account by the Authority in determining whether and in what manner to exercise its functions conferred by or under this Ordinance; but, unless the guidelines provide otherwise -

- (a) they are not binding on the Authority or, except to the extent indicated in subsection (7), on any other person or body,
- (b) they are merely indicative of the Authority's likely approach to any particular issue,
- (c) they do not prejudice the Authority's discretion to decide any particular case or matter differently according to its merits, and
- (d) they do not relieve any person of any duty, obligation, requirement, restriction, prohibition or liability imposed by or under this Ordinance.

(7) Without prejudice to any other provision of this Ordinance as to the consequences of any such contravention, a contravention by any person of guidelines does not of itself render him liable to any criminal or civil proceedings; but in any legal proceedings (criminal or otherwise), whether or not under this Ordinance, the guidelines are admissible in evidence, and if the guidelines appear to the court or other tribunal before which the proceedings are being conducted to be relevant to any question arising in the proceedings then the guidelines may be taken into account in determining that question.

(8) Guidelines may contain provision which is incidental, supplementary or ancillary to the provisions of this Ordinance or any regulations under it.

(9) Section 63(1)(b) and (2) applies to guidelines as it applies to regulations.

**Non-application of Ordinance to States and statutory bodies; and other exemptions.**

**56.** (1) For the avoidance of doubt, this Ordinance applies to -

- (a) the States and its departments, and
- (b) any person, body or office created or established by an enactment,

in so far as they are carrying on a business, but it does not apply to them when acting in any other capacity.

(2) This Ordinance does not apply to -

- (a) any matter in respect of which provision may be made by Ordinance under the Public Transport (Guernsey) Law, 1984<sup>i</sup>,
- (b) any matter in respect of which provision may be made by Ordinance under the Milk and Milk Products (Guernsey) Law, 1955<sup>j</sup>,
- (c) any matter in respect of which provision is made under the Air Transport Licensing (Guernsey) Law, 1995<sup>k</sup>,
- (d) an agreement to the extent to which it is made in order to comply with a requirement imposed by or under an enactment in force in Guernsey,
- (e) an agreement to the extent to which it is made in order to comply with, or to the extent to which it is or includes, a planning covenant within the meaning of the Land Planning and Development (Guernsey) Law, 2005<sup>l</sup>,

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<sup>i</sup> Ordres en Conseil Vol. XXVIII, p. 423.

<sup>j</sup> Ordres en Conseil Vol. XVI, p. 193 as amended by Vol. XIX, p. 134 and Recueils d'Ordonnances Tome XXVIII, p. 433 and Tome XXIX, p. 406.

<sup>k</sup> Ordres en Conseil Vol. XXXVI, p. 370 as amended by Recueil d'Ordonnances Tome XXIX, p. 406.

<sup>l</sup> Order in Council No. XVI of 2005 to which there are amendments not relevant to this Ordinance; see also Ordinance No. XXVI of 2011.

- (f) any other matter, or class or description of matter, specified by Resolution of the States where the States are satisfied that there are exceptional and compelling reasons of public policy why this Ordinance or any provision thereof specified in the Resolution ought not to apply.

In this subsection "**matter**" includes, without limitation, any conduct, agreement, merger or acquisition, undertaking, person or business.

**General provisions as to States Resolutions.**

- 57. (1) The States may by Resolution -
  - (a) amend or repeal paragraph (a), (b), (c), (d) or (e) of section 56(2), and
  - (b) specify exceptions, adaptations and modifications to the provisions of -
    - (i) those paragraphs, or
    - (ii) any Resolution under paragraph (f) of section 56(2).
- (2) A Resolution under section 56 or under section 3(1), 9(1) or 14(1) -
  - (a) may be amended or revoked by a subsequent Resolution, and



- (b) may contain such consequential, incidental, supplementary, savings and transitional provisions as may appear to be necessary or expedient,

and section 63(2) applies in relation to any such Resolution as it applies in relation to regulations under this Ordinance.

**Savings for customary law.**

**58.** This Ordinance is in addition to and, except to the extent that there is any inconsistency, not in derogation from the customary and common law of Guernsey relating to restraint of trade.

**Constitution and rules of Royal Court.**

**59.** (1) In this Ordinance, unless the context requires otherwise, "**the Royal Court**" means the Royal Court sitting as an Ordinary Court; and, for the purposes of this Ordinance, the Royal Court -

- (a) is constituted by the Bailiff sitting unaccompanied by the Jurats, and
- (b) may appoint one or more assessors to assist it in the determination of the matter before it.

(2) The Royal Court sitting as a Full Court may by Order make rules of court for the purposes of this Ordinance.

(3) Rules under this section may, without limitation, make provision in respect of -

- (a) the conduct of proceedings under or for the purposes

of this Ordinance,

- (b) the practice and procedure, including the method of pleading, to be followed in or in connection with any such proceedings,
- (c) evidence, proof and privilege in or in connection with any such proceedings, including -
  - (i) the means by which particular facts may be proved,
  - (ii) the method by which evidence may be given,
  - (iii) the matters in respect of which evidence may be admitted, and
  - (iv) evidential presumptions,
- (d) the costs of or in connection with any such proceedings and the award, payment and recovery thereof including, without limitation, provision in respect of -
  - (i) the payment of costs on a full or partial indemnity basis,
  - (ii) the giving of security for costs,
  - (iii) the taxation of costs,

- (iv) the limitation of costs (whether by reference to scales of costs or otherwise),
- (v) fees, expenses and allowances (for example, of witnesses and the court),
- (e) any other matters incidental, ancillary, supplementary or relating to matters set out in the preceding paragraphs.

(4) Rules under this section may, in respect of proceedings under or for the purposes of this Ordinance, disapply or modify the application of the provisions of any enactment relating to evidence, proof, privilege, practice or procedure (including, without limitation, any provision of the Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009<sup>m</sup>).

(5) In this section the expression "**proceedings under or for the purposes of this Ordinance**" includes (without limitation) -

- (a) proceedings on an appeal under section 46,
- (b) proceedings in which it is alleged that there has been a contravention of -
  - (i) section 1(1), 5(1) or 13(1),
  - (ii) a condition of an exemption or approval, or

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<sup>m</sup> Order in Council No. X of 2010.

(iii) a direction of the Authority under section 21, 31, 32, 33 or 35, and

(c) proceedings under or by virtue of section 42 (civil actions for contravention of Ordinance).

(6) The provisions of this section are without prejudice to any other power (statutory, customary or inherent) vested in the Royal Court to enact Orders of the Royal Court.

(7) Section 63(1) and (2) applies to rules under this section as it applies to regulations.

### **Interpretation.**

**60.** (1) In this Ordinance, unless the context requires otherwise -

**"abuse of a dominant position"** : see section 1,

**"agreement between undertakings"** means any type of agreement, arrangement or understanding between undertakings, whether or not legally enforceable, and includes a decision by an association of undertakings and a concerted practice involving undertakings,

**"anti-competitive practice"** : see section 5(6),

**"approval"** means an approval of the Authority under section 13(1) for a merger or acquisition,

**"associate"**, in relation to a person, means -

- (a) the spouse, child or stepchild of that person,
- (b) any person who is an employee of, or who is in partnership with, that person,
- (c) any body of which that person is a director,
- (d) where that person is a company -
  - (i) any director or employee of that company,
  - (ii) any subsidiary of that company, and
  - (iii) any director or employee of any such subsidiary,
- (e) where that person is an unincorporated body, any partner or member of the committee or other similar governing body thereof,
- (f) if that person has with some other person an agreement or arrangement as to the acquisition, holding or disposal of shares or other interests in a company or under which they undertake to act together in exercising their voting power in relation to a company, that other person,

**"associated party"**, in relation to an undertaking, means -

- (a) any person who is in partnership with that undertaking,
- (b) any company of which that undertaking is a controller,
- (c) any body of which that undertaking is a director,
- (d) where that undertaking is a company -
  - (i) a holding company, subsidiary or related company of that undertaking,
  - (ii) a subsidiary or related company of a holding company of that undertaking,
  - (iii) a holding company of a subsidiary of that undertaking, or
  - (iv) a company in the case of which a shareholder controller of that undertaking, alone or with associates, is entitled to exercise, or control the exercise of, more than 50% of the voting power in general meeting,

and where, pursuant to the above provisions, any person or body is an associated party in relation to an undertaking, then that undertaking is an associated party in relation to that person or body,

**"Authority"** means the Guernsey Competition and Regulatory Authority established by section 1 of the Guernsey Competition and

Regulatory Authority Ordinance, 2012,

**"Bailiff"** means the Bailiff, Deputy Bailiff, Judge of the Royal Court, Lieutenant-Bailiff or Juge Délégué,

**"Bailiwick"** means the Bailiwick of Guernsey,

**"business"** includes any economic activity, trade or profession, whether or not carried on for profit,

**"charged"** includes secured, encumbered, mortgaged and hypothecated, and related expressions shall be construed accordingly,

**"chief executive"**, in relation to a company or unincorporated body, means a person who, alone or jointly with other persons, is responsible under the immediate authority of the directors for the conduct of the business of the company or body and, in relation to a company or body whose principal place of business is outside Guernsey, includes a person who, alone or jointly with other persons, is responsible for the conduct of its business in Guernsey,

**"company"** means a body corporate incorporated with or without limited liability in any part of the world,

**"conduct"** includes an omission, failure or refusal to do anything,

**"contract of employment"** means a contract of service or apprenticeship, or a contract personally to execute any work or labour, whether express or implied and whether written or oral,

**"contravention"** includes a failure to comply and a breach, and related expressions shall be construed accordingly (and in relation to an abuse of a dominant position, an anti-competitive practice and a merger or acquisition, see respectively sections 1(3), 5(7) and 13(5)),

**"control"** of a business or undertaking : see section 61(2),

**"controller"**, in relation to a company, means -

- (a) a managing director or chief executive of that company or of any other company of which that company is a subsidiary,
- (b) a shareholder controller or an indirect controller,
- (c) any person who has the power, alone or with another, to appoint or remove a director of a board or an executive committee,

**"Court of Appeal"** means the Court of Appeal established under the Court of Appeal (Guernsey) Law, 1961<sup>n</sup>,

**"a department"** means any department, council or committee of the States, however styled,

**"the Department"** means the States Commerce and Employment Department,

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<sup>n</sup> Ordres en Conseil Vol. XVIII. p. 315.



**"director"** includes any person who occupies the position of or fulfils the role of director, by whatever name called, and also includes -

- (a) the chief executive or any member of the committee or other similar governing body, and
- (b) any person in accordance with whose directions or instructions any director is accustomed to act,

**"document"** includes information stored or recorded in any form (including, without limitation, in electronic form); and, in relation to information stored or recorded otherwise than in legible form, references to its production, however expressed, include (without limitation) references to the production of the information in a form -

- (a) in which it can be taken away, and
- (b) in which it is visible and legible or from which it can readily be produced in a visible and legible form,

**"electronic form"**, in relation to the storage or recording of documents, includes storage or recording by means of any form of information storage technology,

**"employee"** means an individual who has entered into or who works under (or, where the employment has ceased, who worked under) a contract of employment, and related expressions shall be construed accordingly,

**"enactment"** means any Law, Ordinance or subordinate legislation,

**"equity share capital"** means, in relation to a company, its issued share capital excluding any part thereof which, as respects neither dividends nor capital, carries any right to participate beyond a specified amount in a distribution,

**"execute"** in relation to a merger or acquisition includes to complete or implement it or to be a party to it,

**"exemption"** means an exemption of the Authority or Department under section 3, 4, 6, 9, 10, 14 or 15,

**"functions"** includes duties and powers,

**"group"**, in relation to a company, means that company and any other company which is its holding company or subsidiary or which is a subsidiary of its holding company,

**"Guernsey"** includes Herm and Jethou,

**"holding company"** has the meaning given by section 531 of the Companies (Guernsey) Law, 2008<sup>o</sup>,

**"indirect controller"**, in relation to a company, means a person in accordance with whose directions or instructions any director of that company or of any other company of which that company is a subsidiary, or any controller of that company, is accustomed to act,

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<sup>o</sup> Order in Council No. VIII of 2008 to which there are amendments not relevant to this Ordinance.

**"interest in land"** includes any estate, interest, servitude or right in or over land (including any interest or right created by a lease or licence),

**"investigation"** means an investigation by the Authority under Part V of this Ordinance, and **"investigate"** and related expressions shall be construed accordingly,

**"joint venture"** : see section 61(4),

**"land agreement"** means an agreement which creates, alters, charges, transfers or terminates an interest in land, or an agreement to enter into such an agreement, together with any obligation and restriction to which section 62 applies,

**"Law"** means the Competition (Enabling Provisions) (Guernsey) Law, 2009<sup>P</sup>,

**"manager"**, in relation to a company or unincorporated body, means a person other than a chief executive who, under the immediate authority of a director or chief executive of the company or body -

- (a) exercises managerial functions, or
- (b) is responsible for maintaining accounts or other records of the company or body,

**"market in Guernsey"** includes -

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<sup>P</sup> Order in Council No. XV of 2009.

- (a) any market which operates only in a part of Guernsey,  
and
- (b) so far as it operates in Guernsey or a part of  
Guernsey, any market which operates there and in  
another country or territory or in a part of another  
country or territory,

and references to a market for goods and services include references to a market for goods and services,

**"merger or acquisition"** : see section 61,

**"non-business day"** means a Saturday, a Sunday, Christmas Day and Good Friday, and any day appointed as a public holiday by Ordinance of the States under section 1(1) of the Bills of Exchange (Guernsey) Law, 1958<sup>q</sup>,

**"overseas competition authority"** means an authority which appears to the Authority to exercise in a place outside the Bailiwick functions corresponding to any of the functions conferred on the Authority by or under this Ordinance,

**"partner"** and related expressions shall be construed in accordance with the Partnership (Guernsey) Law, 1995<sup>r</sup>,

**"party to an agreement"** in respect of a land agreement includes a

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<sup>q</sup> Ordres en Conseil Vol. XVII, p. 384, Vol. XXIV, p. 84, No. XI of 1993, No. XIV of 1994.

<sup>r</sup> Ordres en Conseil Vol. XXXVI, p. 179.

successor in title to a party to the agreement,

**"person"** includes an individual and also -

- (a) a body corporate, and
- (b) a partnership or other unincorporated body of persons,

incorporated or established with or without limited liability in any part of the world,

**"prescribed"** means prescribed by regulations of the Department,

**"prevent"**, in relation to competition, means prevent, restrict or distort competition or, in each case, attempt to do so,

**"price"** includes any charge, fee or valuable consideration of any description, and any discount, margin or other element of a price,

**"property"** includes money and all other property, real or personal, immovable or movable, including things in action and other intangible or incorporeal property,

**"publish"**, in respect of any information, means publish in a manner likely in the opinion of the publisher to bring the information or how the information may be obtained to the attention of the public or any particular section thereof,

**"related company"**, in relation to a company ("company A"), means any company (other than one which is a group company in relation to

company A) in which company A holds for a significant period a qualifying capital interest for the purpose of securing a contribution to company A's own activities by the exercise of any control or influence arising from that interest; and for the purposes of this definition -

(a) a "**qualifying capital interest**" means, in relation to a company, an interest in shares comprised in the equity share capital of that company of a class carrying rights to vote in all circumstances at general meetings of that company,

(b) where -

(i) a company holds a qualifying capital interest in another company, and

(ii) the nominal value of any relevant shares in that other company held by the first-mentioned company is equal to 20% or more of the nominal value of all relevant shares in that other company,

the first-mentioned company shall be presumed to hold that interest on the basis and for the purpose mentioned above, unless the contrary is shown, and

(c) in paragraph (b) "**relevant shares**" means, in relation to any company, any such shares in that company as are mentioned in paragraph (a),

**"relevant authority"** : see section 47,

**"relevant Ordinance"** means an Ordinance made under the Law,

**"Royal Court"** means the Royal Court sitting as an Ordinary Court, constituted in accordance with section 59,

**"service"** includes any benefit, advice, privilege or facility which is, or which is to be, provided, granted or conferred in the course of business,

**"shareholder controller"** -

- (a) in relation to a company, and subject to paragraph (b), means a person who, alone or with associates, is entitled to exercise, or control the exercise of, 15% or more of the voting power in general meeting of that company or of any other company of which that company is a subsidiary,
- (b) in relation to a protected cell company within the meaning of the Companies (Guernsey) Law, 2008, includes a person who, alone or with associates, beneficially owns 50% or more of the cell shares issued in respect of any cell of that company,

**"significant shareholder"**, in relation to a company, means a person who, alone or with associates, is entitled to exercise, or control the exercise of, 5% or more but less than 15% of the voting power in general meeting of that company or of any other company of which that company is a subsidiary,

**"States"** means the States of Guernsey,

**"subordinate legislation"** means any regulation, rule, order, rule of court, resolution, scheme, byelaw or other instrument made under any enactment and having legislative effect,

**"subsidiary"** has the meaning given by section 531 of the Companies (Guernsey) Law, 2008,

**"supply"** includes -

- (a) in relation to goods, supply (including re-supply) by way of sale, exchange, lease, hire or hire-purchase, and
- (b) in relation to services, provide, sell, lease, grant or confer,

**"tampering with"**, in relation to a document, includes altering it, removing it and disposing of it, and related expressions shall be construed accordingly,

**"undertaking"** means a person carrying on a business and includes an association, whether or not incorporated, which consists of or includes such persons,

and other words and expressions have the same meanings as in the Law.

- (2) Any reference in this Ordinance to an enactment is a



reference thereto as from time to time amended, re-enacted (with or without modification), extended or applied.

**Meaning of merger and acquisition.**

**61.** (1) A "**merger or acquisition**" occurs for the purposes of this Ordinance when -

- (a) there is a transfer from one undertaking ("**the transferor**") to another ("**the transferee**") of the business of the transferor, or
- (b) an undertaking, or a person who controls an undertaking, directly or indirectly acquires or establishes control of -
  - (i) another undertaking, or
  - (ii) the business of another undertaking.

(2) 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.

In determining whether decisive influence exists there shall be taken into account, in addition to the ostensible effect in law of any document, transfer, assignment or other instrument, act or arrangement, all relevant facts and circumstances of the case.

(3) A merger or acquisition also occurs for the purposes of this Ordinance -

- (a) if an undertaking acquires the whole or a substantial part of the assets of another undertaking and the result of the acquisition is to place the acquiring undertaking in a position to replace or substantially replace the other undertaking in the business in which it was engaged immediately before the acquisition, or
- (b) on the creation of a joint venture.

(4) A joint venture is created when a business previously carried on independently by two or more undertakings, or a new business, is carried on jointly by them, whether or not in partnership or by means of their joint control of, or ownership of shares in the capital of, a body corporate.

(5) Without prejudice to the generality of the foregoing, a merger or acquisition -

- (a) may be achieved in any manner, including -
  - (i) by purchase, lease, acquisition of shares or assets, or by some other disposition or arrangement or by operation of law,
  - (ii) by amalgamation of or other combination between undertakings or their businesses,

and whether or not the parties to the merger or acquisition, or their business or assets, thereafter maintain identities which are distinct,

- (b) may be effected by a single transaction or by a series of two or more transactions, and
- (c) may take place whether or not any property is transferred by the transferor to the transferee.

(6) References in this section to an undertaking or business are references to the whole or any part of the undertaking or business.

**Obligations and restrictions - land agreements.**

**62.** (1) This section applies to an obligation which is accepted by a party to a land agreement in its capacity as holder of an interest -

- (a) in the relevant land or other relevant land and is for the benefit of another party to the agreement in its capacity as holder of an interest in the relevant land, or
- (b) in other relevant land and relates to the imposition in respect of that land of -
  - (i) restrictions of a kind described in paragraph (2)(a) which correspond to those accepted by a party to the agreement in its capacity as holder of an interest in the relevant land, or
  - (ii) obligations which correspond to those accepted by a party to the agreement in its capacity as holder of an interest in the relevant land.

- (2) This section applies to a restriction which -
- (a) restricts the activity that may be carried out on, from, or in connection with the relevant land or other relevant land and is accepted by a party to the agreement in its capacity as holder of an interest in the relevant land or other relevant land and is for the benefit of another party to the agreement in its capacity as holder of an interest in the relevant land,
  - (b) is accepted by a party to the agreement in its capacity as holder of an interest in other relevant land and relates to the imposition of restrictions on the activity that may be carried out on, from, or in connection with the other relevant land which correspond to those accepted by a party to the agreement in its capacity as holder of an interest in the relevant land, or
  - (c) restricts the freedom of a party to the agreement to create or transfer an interest in the relevant land to another person.

(3) In this section "**relevant land**" means the land in respect of which a land agreement creates, alters, charges, transfers or terminates an interest, or in respect of which it constitutes an agreement to do so; and "**other relevant land**" means other land in which a party to a land agreement has an interest.

**General provisions as to subordinate legislation.**

63. (1) Regulations under this Ordinance -

- (a) may be amended or repealed by subsequent regulations hereunder, and
- (b) may contain such consequential, incidental, supplementary, savings and transitional provisions as may appear to be necessary or expedient (including, without limitation, provisions making consequential amendments to this Ordinance and any other enactment).

(2) Any power conferred by this Ordinance to make regulations may be exercised -

- (a) in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of cases,
- (b) so as to make, as respects the cases in relation to which it is exercised -
  - (i) the full provision to which the power extends, or any lesser provision (whether by way of exception or otherwise),
  - (ii) the same provision for all cases, or different provision for different cases or classes of cases, or different provision for the same case or class of case for different purposes,

- (iii) any such provision either unconditionally or subject to any prescribed conditions.

(3) Regulations under this Ordinance shall be laid before a meeting of the States as soon as possible after being made; and, if at that or the next meeting the States resolve that the regulations be annulled, then they shall cease to have effect, but without prejudice to anything done under them or to the making of new regulations.

**Transitional provisions – anti-competitive practices.**

**64.** (1) This section applies to agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services and to which an undertaking was a party immediately before the date of commencement of this Ordinance.

(2) The prohibition set out in section 5(1) shall not apply in respect of the agreement until the expiration of a period of 6 months immediately following the date of commencement of this Ordinance, and the provisions of this Ordinance shall apply in respect of the agreement accordingly.

(3) If at the expiration of that period of 6 months the agreement -

(a) is still in force, and

(b) continues to be an anti-competitive practice,

it shall be deemed to have been made immediately after the end of that period and accordingly, subject to the provisions of this Ordinance, to be prohibited under section 5(1) and void to the extent specified in section 5(4).

**Amendment of Companies Law.**

**65.** After section 428(3)(c) of the Companies (Guernsey) Law, 2008<sup>s</sup> insert the following paragraph -

"(ca) any conviction he has for an offence under the Competition (Guernsey) Ordinance, 2012 and any decision, determination or finding of a court of tribunal in respect of him in proceedings under or concerning that Ordinance,".

**Citation.**

**66.** This Ordinance may be cited as the Competition (Guernsey) Ordinance, 2012.

**Commencement.**

**67.** This Ordinance shall come into force on the 1<sup>st</sup> August, 2012.

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<sup>s</sup> Order in Council No. VIII of 2008.

## **The Housing (Control of Occupation) (Amendment of Housing Register) (No.2) Ordinance, 2012**

**THE STATES**, in pursuance of their Resolution of the 21st February, 2012<sup>a</sup> and in exercise of the powers conferred upon them by sections 52 and 66 of the Housing (Control of Occupation) (Guernsey) Law, 1994<sup>b</sup>, hereby order:-

### **Addition of dwelling to Part B of Housing Register.**

1. The Authority may inscribe in Part B of the Housing Register the dwelling known as the "Longfrie Inn", Route de Longfrie, Saint Pierre du Bois.

### **Application to be made within 6 months.**

2. An application to the Authority to inscribe the dwellings described in section 1 in Part B of the Housing Register must be made within a period of 6 months immediately following the date of commencement of this Ordinance.

### **Interpretation.**

3. Except where the context requires otherwise, expressions used in this Ordinance have the same meanings as in the Housing (Control of Occupation) (Guernsey) Law, 1994, as amended.

### **Citation.**

4. This Ordinance may be cited as the Housing (Control of Occupation)

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<sup>a</sup> Article IX of Billet d'État No. IV of 2012.

<sup>b</sup> Ordres en Conseil Vol. XXXV(1), p. 75; amended by Ordres en Conseil Vol. XXXVIII, p. 193 and Vol. XLII(1), p. 34; Order in Council No. VIII of 2007 and No. I of 2009; and Recueil d'Ordonnances Tome XXIX, p. 406; Tome XXXIII, p. 100; and Ordinance No. VII of 2010.



(Amendment of Housing Register) (No.2) Ordinance, 2012.

**Commencement.**

- 5.** This Ordinance shall come into force on the 26<sup>th</sup> July, 2012.