

PROJET DE LOI

ENTITLED

The Competition (Enabling Provisions) (Guernsey) Law, 2009 *

[CONSOLIDATED TEXT]

NOTE

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* No. XV of 2009; as amended by the Guernsey Competition and Regulatory Authority Ordinance, 2012 (No. XIII of 2012); the Organisation of States' Affairs (Transfer of Functions) Ordinance, 2016 (No. IX of 2016).

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ARRANGEMENT OF SECTIONS

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THE STATES, in pursuance of their Resolutions of the 27th July, 2006^a, the 12th March, 2008^b and the 25th February, 2009^c, have approved the following provisions which, subject to the Sanction of Her Most Excellent Majesty in Council, shall have force of law in the islands of Guernsey, Herm and Jethou.

Power to enact Ordinances in relation to competition.

1. The States may by Ordinance make such provision as they think fit in relation to –

- (a) the abuse of a dominant position by undertakings,
- (b) anti-competitive practices of undertakings, and
- (c) the merger and acquisition of undertakings.

NOTE

The following Ordinances have been made under section 1:

Guernsey Competition and Regulatory Authority Ordinance, 2012;

a Article XVIII of Billet d'État No. XIII of 2006.

b Article IX of Billet d'État No. III of 2008.

c Article I of Billet d'État No. VII of 2009.

Competition (Guernsey) Ordinance, 2012;
Competition (Guernsey) (Amendment) Ordinance, 2014;
Guernsey Competition and Regulatory Authority (Amendment)
Ordinance, 2020;
Guernsey Competition and Regulatory Authority (Amendment) (No.
2) Ordinance, 2020.

Meaning of abuse of a dominant position.

2. In this Law an "**abuse of a dominant position**" means an abuse by one or more undertakings of a dominant position within any market in Guernsey for goods or services and, without limitation, includes –

- (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 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.

Meaning of anti-competitive practice.

3. In this Law an "**anti-competitive practice**" means any agreement between undertakings which has the object or effect of preventing competition within any market in Guernsey for goods or services and, without limitation, includes –

- (a) directly or indirectly fixing purchase or selling prices or any other trading conditions,
- (b) limiting or controlling production, markets, technical development or investment,
- (c) sharing markets or sources of supply,
- (d) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,
- (e) 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.

Meaning of merger and acquisition.

4. (1) A "**merger or acquisition**" occurs for the purposes of this Law 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 Law –

- (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.

Specific matters for which Ordinances may make provision.

5. An Ordinance under section 1 may, without limitation, make provision in relation to the following matters –

- (a) the prohibition, restriction or regulation of matters set out in section 1,
- (b) exceptions, exemptions and derogations from any such

prohibition, restriction or regulation including, without limitation, exceptions, exemptions and derogations –

- (i) in the public interest,
 - (ii) as a matter of public policy,
 - (iii) for the benefit of consumers or any class or description thereof, or
 - (iv) on social, community, economic, ethical and other grounds,
- (c) the establishment of an office of Director General of Competition ("**the Director General**"), whether as an office of a department of the States or as a separate legal entity, [or the establishment or appointment of any other body or authority,] with responsibility for the administration and enforcement of this Law and any Ordinance under section 1, and with such rights, liabilities, functions and capacity as may be specified by Ordinance,
- (d) the appointment, term of office and termination of office of the Director General,
- (e) the vesting of any right, liability, power and property in the Director General,
- (f) the investigation by the Director General of matters set out in section 1 and the making and publication by him

of reports on those matters, whether at the direction of [the Committee] or the States,

- (g) the Director General's powers of entry, inspection, search and inquiry for the purposes of –
 - (i) the administration and enforcement of any Ordinance under section 1,
 - (ii) carrying out investigations and making reports, and
 - (iii) generally for the performance of his functions,
- (h) the production, seizure, retention, use and disclosure of documents and information,
- (i) the obtaining and exchanging of information,
- (j) the service of documents,
- (k) the establishment by the Director General of his office, the appointment of his staff and the delegation of his functions,
- (l) the issue by the Director General of codes of practice, guidance and recommendations, and their status in law,
- (m) the imposition by the Director General of directions, orders, penalties (including, without limitation, financial penalties, whether calculated by reference to

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- an undertaking's turnover or otherwise), interim measures and other sanctions,
- (n) the appointment by the Director General of any person or body to advise him in relation to the exercise of his functions,
 - (o) the production and publication by the Director General of reports and accounts and the auditing of accounts,
 - (p) the making of grants and loans to the Director General,
 - (q) the establishment by the Director General of a fund and the status of that fund for income tax purposes,
 - (r) the objectives to be promoted and the other matters to be taken into account by the Director General, [the Committee] and the States in carrying out their respective functions under this Law and any Ordinance under it,
 - (s) the giving to the Director General of directions and recommendations by [the Committee], the States or any other body,
 - (t) co-operation and the provision of mutual assistance by the Director-General, in relation to matters set out in section 1, with or to authorities –
 - (i) discharging functions corresponding to any of his own, or

- (ii) which are of any prescribed class or description,
- (u) privilege and duties of confidentiality and exceptions, exemptions and derogations therefrom,
- (v) the implementation of –
 - (i) any international instrument relating to matters set out in section 1 or any aspect thereof,
 - (ii) any right, power, liability, obligation, prohibition or restriction created or arising, or any remedy or procedure provided for, by or under any such international instrument,subject to such exceptions, adaptations and modifications as may be specified in the Ordinance,
- (w) the administration and enforcement of any Ordinance under this Law including, without limitation, provision as to –
 - (i) appeals in relation to decisions in respect of such administration and enforcement,
 - (ii) modes of civil enforcement (including, without limitation, proceedings for injunctions),
 - (iii) modes of criminal enforcement (but subject to section 6(5)),

(iv) remedies in respect of contraventions of any prohibition, restriction, regulation, duty, obligation or requirement imposed by an Ordinance under this Law (but subject to section 6(5)), and

(v) the establishment of a tribunal and a panel of persons from whom the members of the tribunal are to be drawn,

and otherwise as to the administration of justice in relation to matters set out in section 1,

(x) without prejudice to paragraph (w), the conferring on the Director General of power to require undertakings-

(i) to transfer, dispose of or enter into any other transaction or arrangement in respect of –

(A) any business or part thereof, or

(B) the control of any undertaking or business or any part thereof,

(ii) to carry on any business or part thereof or any joint venture subject to such conditions, restrictions and limitations as may be specified,

(iii) to refrain from carrying on any business or part thereof or any joint venture or from entering

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into any transaction or arrangement or any class or description thereof,

- (iv) to transfer, dispose of or enter into any other transaction or arrangement in respect of any property or assets or the control, ownership, possession or use thereof,
- (y) the jurisdiction and powers of the courts, and the constitution and procedure of those courts, in relation to matters set out in section 1,
- (z) provision as to evidence including, without limitation, rules as to the admission of evidence and evidential presumptions,
- (aa) the authorisation of, and conferring of functions on, any person, body or office including, without limitation, the Director General of Competition, the [Director General of Utility Regulation], [the Committee] and the States (and their respective officers) for the purposes of the administration and enforcement of any Ordinance under this Law,
- (bb) the granting (conditionally or otherwise), refusal, variation, revocation and suspension of licences or other descriptions of authorisation or approval for the doing of anything restricted, regulated or controlled by an Ordinance under this Law,
- (cc) the making of applications for such licences,

authorisations or approvals,

- (dd) the levying of fees, and
- (ee) the recovery of costs associated with the administration and enforcement of any Ordinance under this Law.

NOTES

In section 5,

the words in square brackets in paragraph (c) were inserted by the Guernsey Competition and Regulatory Authority Ordinance, 2012, section 23, Schedule 4, paragraph 2, with effect from 1st June, 2012;

the words "the Committee" in square brackets, wherever occurring, were substituted by the Organisation of States' Affairs (Transfer of Functions) Ordinance, 2016, section 5(1), Schedule 3, paragraph 2, with effect from 1st May, 2016.

The functions, rights and liabilities of the Director General of Utility Regulation and the Office thereof arising under or by virtue of this Law were transferred to and vested in the Guernsey Competition and Regulatory Authority by the Guernsey Competition and Regulatory Authority Ordinance, 2012, section 5(1), with effect from 1st June, 2012, subject to the provisions of section 5(3) of, and section 6, Schedule 2 to, the 2012 Ordinance.

The following Ordinances have been made under section 5:

*Guernsey Competition and Regulatory Authority Ordinance, 2012;
Competition (Guernsey) Ordinance, 2012;
Competition (Guernsey) (Amendment) Ordinance, 2014;
Guernsey Competition and Regulatory Authority (Amendment) Ordinance, 2020.*

General provisions as to Ordinances, etc.

- 6. (1) The States may by Ordinance amend –
 - (a) sections 2, 3 and 4 so as to amend the meanings of the expressions "abuse of a dominant position", "anti-

competitive practice", "merger or acquisition", "control" and "joint venture", and

- (b) section 7(1) so as to amend the meaning of any expression defined therein or to define any other expression,

where they consider it necessary or expedient to do so for the purpose of –

- (i) enabling the Director General more effectively to carry out any of his functions,
- (ii) enhancing or protecting the reputation or economic interests of Guernsey,
- (iii) enhancing or facilitating competition, or prohibiting, restricting or regulating the prevention of competition, in the interests of consumers or any class or description thereof or the operation of any market in Guernsey,
- (iv) discharging any international obligation to which Guernsey is subject, or
- (v) assisting, in the interests of the public or otherwise, any authority which appears to the States to discharge in a place outside Guernsey functions corresponding to any of the functions of the Director General.

The provisions of this subsection are without prejudice to any other

provision of this Law conferring power to enact Ordinances (and vice versa).

- (2) An Ordinance under this Law –
 - (a) may be amended or repealed by a subsequent Ordinance hereunder, and
 - (b) may contain such consequential, incidental, supplementary, transitional and savings provisions as may appear to be necessary or expedient (including, without limitation, provision making consequential amendments to this Law and any other enactment).

- (3) Any power to make an Ordinance under this Law 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,
- (iv) different provision for different classes, descriptions and categories of markets, businesses and undertakings.

(4) Without prejudice to the generality of the foregoing provisions of this Law, an Ordinance under this Law –

- (a) may, subject to subsection (5), make provision in relation to the creation, trial (summarily or on indictment) and punishment of offences,
- (b) may empower [the Committee], any other department of the States and any other body (including, without limitation, any court in Guernsey) to make or issue orders, rules, regulations, codes or guidance, whether as to matters in respect of which an Ordinance can be made under this Law or otherwise,
- (c) may make provision for the purpose of dealing with matters arising out of or related to matters set out in section 1 or any international instrument relating to such matters,
- (d) may provide that no liability shall be incurred by any specified person, body or office in respect of anything done or omitted to be done in the discharge or

purported discharge of any of their functions under the Ordinance unless the thing is done or omitted to be done in bad faith,

- (e) may make provision under the powers conferred by this Law notwithstanding the provisions of any enactment for the time being in force,
 - (f) may repeal, replace, amend, extend, adapt, modify or disapply any rule of custom or law,
 - (g) without prejudice to the generality of the foregoing, may make any such provision of any such extent as might be made by *Projet de Loi*, but may not provide that a person is to be guilty of an offence as a result of any retrospective effect of the Ordinance.
- (5) An Ordinance under this Law may not –
- (a) provide for offences to be triable only on indictment,
 - (b) authorise the imposition, on summary conviction of an offence, of a term of imprisonment or a fine exceeding the limits of jurisdiction for the time being imposed on the Magistrate's Court by section 9 of the *Magistrate's Court (Guernsey) Law, 2008*, or
 - (c) authorise the imposition, on conviction on indictment of any offence, of a term of imprisonment exceeding two years.

NOTE

In section 6, the words in square brackets were substituted by the Organisation of States' Affairs (Transfer of Functions) Ordinance, 2016, section 5(1), Schedule 3, paragraph 2, with effect from 1st May, 2016.

Interpretation.

7. (1) In this Law, unless the context requires otherwise, the expressions listed below shall be construed as follows –

"abuse of a dominant position": see section 2,

"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 3,

"business" includes any economic activity, trade or profession, whether or not carried on for profit,

"control" of a business or undertaking: see section 4(2),

"[the Committee]" means the [Committee for Economic Development],

"a department" means any department, council or committee of the States, however styled,

"Director General" means the Director General of Competition, the office of whom [may be] established by Ordinance under this Law, [and

includes any other body or authority established or appointed by virtue of section 5(c),]

"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,

"enactment" means any Law, Ordinance or subordinate legislation,

"Guernsey" includes Herm and Jethou,

"implementation", in relation to –

- (a) any international instrument,
- (b) any right, power, liability, obligation, prohibition or restriction created or arising, or any remedy or procedure provided for, by or under any such international instrument,

includes the enforcement or enactment thereof, and the securing of the administration, execution, recognition, exercise or enjoyment thereof, in or under domestic law,

"international instrument" means –

- (a) any convention, treaty, protocol or other international instrument, or any provision thereof, or
- (b) any Community provision within the meaning of section 3(1) of the European Communities (Implementation) (Bailiwick of Guernsey) Law, 1994^d,

whether or not binding on Guernsey,

"joint venture": see section 4(4),

"market in Guernsey" includes –

- (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 or services include references to a market for goods and services,

^d Order in Council No. III of 1994.

"merger or acquisition": see section 4,

"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 Ordinance under this Law,

"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,

"service" includes any benefit, advice, privilege or facility which is, or which is to be, provided, granted or conferred in the course of business,

"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,

"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,

"undertaking" means a person carrying on a business and includes an association, whether or not incorporated, which consists of or includes such persons.

(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.

NOTES

In section 7,

the words, first, "the Committee" and, second, "Committee for Economic Development" in square brackets in the definition of the expression "the Committee" in subsection (1) were substituted by the Organisation of States' Affairs (Transfer of Functions) Ordinance, 2016, respectively section 5(1), Schedule 3, paragraph 2 and section 2, Schedule 1, paragraph 1(a), with effect from 1st May, 2016;

the words in the first and second pairs of square brackets in the definition of the expression "Director General" were, respectively, substituted and inserted by the Guernsey Competition and Regulatory Authority Ordinance, 2012, section 23, Schedule 4, paragraph 3(a) and paragraph 3(b), with effect from 1st June, 2012.

The functions, rights and liabilities of the Commerce and Employment Department and of its Minister or Deputy Minister arising under or by virtue of this Law were transferred to and vested in, respectively, the Committee for Economic Development and its President or Vice-President by the Organisation of States' Affairs (Transfer of Functions) Ordinance, 2016, section 1, Schedule 1, paragraph 1(a), with effect from 1st May, 2016, subject to the savings and transitional provisions in section 3 of the 2016 Ordinance.

Citation.

8. This Law may be cited as the Competition (Enabling Provisions) (Guernsey) Law, 2009.

NOTE

The Law received Royal Sanction on 10th June, 2009 and was registered on the Records of the Island of Guernsey and came into force on 6th July, 2009.
