

# **The Amalgamation of Companies Ordinance, 1997**

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# **The Amalgamation of Companies Ordinance, 1997**

**THE STATES**, in exercise of the powers conferred upon them by section 1 of the Companies (Enabling Provisions) (Guernsey) Law, 1996<sup>a</sup>, hereby order:-

## **Amalgamation of companies.**

1. (1) Subject to the provisions of this Ordinance, two or more companies may amalgamate and continue as one company, which may be one of the amalgamating companies or a new company.

(2) Not less than one of the amalgamating companies shall be a Guernsey company.

## **Consent of Commission needed in certain cases.**

2. Where any of the amalgamating companies-

(a) is a supervised company; or

(b) is not a Guernsey company;

the companies may not amalgamate pursuant to the provisions of this Ordinance except under the authority of and in accordance with the conditions of the consent of the Commission.

## **Amalgamation proposal.**

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<sup>a</sup> Order in Council No. XII of 1996.

3. (1) Where it is proposed to amalgamate two or more companies pursuant to the provisions of this Ordinance, an amalgamation proposal shall be prepared which shall set out the terms of the amalgamation, and in particular-

- (a) the name of the amalgamated company;
- (b) the registered office of the amalgamated company;
- (c) the full names and residential addresses of the directors of the amalgamated company;
- (d) the share structure of the amalgamated company, specifying-
  - (i) the number of shares of the company;
  - (ii) the rights, privileges, limitations, and conditions attached to each share of the company;
- (e) the manner in which the shares of each amalgamating company are to be converted into shares of the amalgamated company;
- (f) if shares of an amalgamating company are not to be converted into shares of the amalgamated company, the consideration that the holders of those shares are to receive instead of shares of the amalgamated company;
- (g) any payment to be made to a shareholder or director of an amalgamating company, other than a payment of a kind described in paragraph (f); and

(h) details of any arrangement necessary to complete the amalgamation.

(2) An amalgamation proposal shall specify the date on which the amalgamation is intended to become effective.

(3) If shares of one of the amalgamating companies are held by or on behalf of another of the amalgamating companies, the amalgamation proposal-

(a) shall provide for the cancellation of those shares without payment or the provision of other consideration when the amalgamation becomes effective;

(b) shall not provide for the conversion of those shares into shares of the amalgamated company.

**Approval of amalgamation proposal.**

4. (1) Where it is proposed to amalgamate two or more companies pursuant to the provisions of this Ordinance, the directors of each amalgamating company must resolve that-

(a) in their opinion the amalgamation is in the best interests of the company; and

(b) they are satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.

(2) The directors who vote in favour of a resolution required by subsection (1) shall sign a certificate stating that, in their opinion, the conditions set out in subsection (1) are satisfied, and the grounds for that opinion.

(3) The directors of each amalgamating company shall give to each member of the company, not less than 28 days before the day on which the amalgamation is proposed to take effect-

- (a) a copy of the amalgamation proposal;
- (b) copies of the certificates given by the directors of each company under subsection (2);
- (c) a summary of the principal provisions of, or a copy of, the memorandum and articles of the amalgamated company;
- (d) where a copy of the memorandum and articles of the amalgamated company has not been sent to each member, a statement that a copy thereof will be supplied to any member who requests it;
- (e) a statement of any material interests of the directors and other officers of the company in the proposal, whether in that capacity or otherwise; and
- (f) such further information and explanation as may be necessary to enable a reasonable member to understand the nature and implications for the company and its members of the proposed amalgamation.

(4) The directors of each amalgamating company shall, not less than 28 days before the day on which the amalgamation is proposed to take effect-

(a) give written notice of the proposed amalgamation to every creditor of the company; and

(b) give notice in La Gazette Officielle of the proposed amalgamation including a statement that-

(i) copies of the amalgamation proposal are available for inspection by any member or creditor of an amalgamating company, or any other person to whom an amalgamating company is under any obligation or liability, at the registered offices of the amalgamating companies, and at such other places as may be specified, during normal business hours; and

(ii) a member or creditor of an amalgamating company, or any other person to whom an amalgamating company is under any obligation or liability, is entitled to be supplied free of charge with a copy of the amalgamation proposal upon request to an amalgamating company.

(5) The amalgamation proposal shall be approved-

(a) by special resolution of the members of each amalgamating company;

- (b) if any provision in the amalgamation proposal would, if contained in an amendment to an amalgamating company's memorandum or articles or otherwise proposed in relation to that company, require the approval of any particular class of members, by a special resolution of that class.

(6) A director who in any respect fails to comply with subsection (2), (3) or (4) is guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the uniform scale.

**Short-form amalgamation for subsidiary companies.**

5. (1) A company and any other company which is a wholly-owned subsidiary of it may amalgamate and continue as one company (being the company first referred to) without complying with sections 3 and 4 (but subject in all other respects to the provisions of this Ordinance) if-

- (a) the amalgamation is approved by a resolution of the directors of each amalgamating company; and
- (b) each resolution provides that-
  - (i) the shares of each amalgamating company, other than the amalgamated company, will be cancelled without payment or other consideration;
  - (ii) the memorandum and articles of the amalgamated company will be the same as the memorandum and articles of the company first referred to; and

- (iii) the directors are satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.

(2) Two or more companies, each of which is a wholly-owned subsidiary of the same company, may amalgamate and continue as one company without complying with sections 3 and 4 (but subject in all other respects to the provisions of this Ordinance) if-

- (a) the amalgamation is approved by a resolution of the directors of each amalgamating company; and
- (b) each resolution provides that-
  - (i) the shares of all but one of the amalgamating companies will be cancelled without payment or other consideration;
  - (ii) the memorandum and articles of the amalgamated company will be the same as the memorandum and articles of the amalgamating company whose shares are not cancelled; and
  - (iii) the directors are satisfied on reasonable grounds that the amalgamated company will, immediately after the amalgamation becomes effective, satisfy the solvency test.

(3) In the case of an amalgamation pursuant to the provisions of this section-

(a) the directors of each amalgamating company, not less than 28 days before the day on which the amalgamation is proposed to take effect, shall give written notice of the proposed amalgamation to every creditor of the company and shall give notice in La Gazette Officielle of the proposed amalgamation including a statement that-

(i) copies of the resolution required by subsection (1) or subsection (2) are available for inspection by any member or creditor of an amalgamating company, or any other person to whom an amalgamating company is under any obligation or liability, at the registered offices of the amalgamating companies, and at such other places as may be specified, during normal business hours; and

(ii) a member or creditor of an amalgamating company, or any other person to whom an amalgamating company is under any obligation or liability, is entitled to be supplied free of charge with a copy of the said resolution upon request to an amalgamating company;

(b) the resolutions approving the amalgamation, taken together, shall be deemed to constitute an amalgamation proposal which has been approved; and

- (c) the directors who vote in favour of a resolution required by subsection (1) or subsection (2) shall sign a certificate stating that, in their opinion, the conditions set out in subsection (1) or (as the case may be) subsection (2) are satisfied, and the grounds for that opinion.

(4) A director who fails to comply with subsection (3)(a) or (3)(c) in any respect is guilty of an offence and liable on summary conviction to a fine not exceeding level 2 on the uniform scale.

**Applications for consent of Commission for amalgamation.**

6. An application for the Commission's consent for the amalgamation of two or more companies pursuant to the provisions of this Ordinance shall be made to the Commission in such form and manner as the Commission may require and shall be accompanied by-

- (a) either-
  - (i) the amalgamation proposal, which shall comply with the provisions of section 3 and which shall have been approved in accordance with the provisions of section 4; or
  - (ii) where section 5 applies (short-form amalgamation for subsidiary companies), the resolutions approving the amalgamation, which shall comply with the provisions of section 5(1) or (as the case may be) section 5(2);
- (b) any certificates required under section 4(2) or 5(3)(c);

- (c) a certificate signed by the directors of each amalgamating company stating that the amalgamation has been approved in accordance with the provisions of this Ordinance;
- (d) a copy of the memorandum and articles of the amalgamated company;
- (e) the name of the amalgamated company or-
  - (i) if the amalgamated company is not to be one of the amalgamating companies but is to be a new company; or
  - (ii) if the amalgamation proposal provides for a change of the name of the amalgamated company;the proposed name of the company;
- (f) where the proportion of the claims of creditors of the amalgamated company in relation to the value of the assets of the amalgamated company is greater than the proportion of the claims of creditors of any amalgamating company in relation to the value of the assets of that amalgamating company, a certificate signed by the directors of the amalgamating company and by the directors or proposed directors of the amalgamated company stating that no creditor will be prejudiced by that fact;

- (g) a document signed by each person named in the amalgamation proposal as a director of the amalgamated company containing a statement of his consent to be a director thereof;
- (h) such other information and documents, verified in such manner, as the Commission may require (whether in relation to any particular application or otherwise), including, without limitation, where any of the amalgamating companies is not a Guernsey company, evidence that the amalgamation is lawful under the law of the district, territory or place where the company is incorporated; and
- (i) such fee as may be prescribed by regulations of the Committee.

**Greffier's certificate of amalgamation.**

7. (1) When an amalgamation proposal has been approved in accordance with the provisions of section 4 or, where section 5 applies, when the provisions of that section have been complied with, the directors of each amalgamating company shall-

- (a) give notice of the fact to the Greffier in such form and manner as the Greffier may require; and
- (b) in cases where the consent of the Commission is required by section 2, provide the Greffier with a copy of the Commission's consent.

(2) The Greffier shall, upon receipt of the documents specified in subsection (1)(a) and (b) or as soon as reasonably practicable thereafter-

(a) if the amalgamated company is the same as one of the amalgamating companies, and whether or not the amalgamated company is a Guernsey company, issue a certificate of amalgamation stating-

(i) the registration numbers (if any) and names of the amalgamated company and all amalgamating companies; and

(ii) the date upon which the certificate has effect;

(b) if the amalgamated company is not one of the amalgamating companies but a new company-

(i) if the new company is a Guernsey company-

A: register the company's memorandum and articles in the Register of Companies (provided that the Court has authorised the registration thereof pursuant to section 4 of the 1994 Law); and

B: issue a certificate of registration in respect of the company and allocate a registration number to it; and

(ii) whether or not the new company is a Guernsey company, issue a certificate of amalgamation stating-

A: the registration numbers (if any) and names of the amalgamated company and all amalgamating companies; and

B: the date upon which the certificate has effect;

(c) in the case of those of the amalgamating companies which are Guernsey companies, delete the particulars of those companies (other than the amalgamated company) from the Register of Companies and enter a notice in the Register stating that the names of those companies have, pursuant to the provisions of this section, been so deleted for the purposes of the amalgamation of those companies with the amalgamated company (the name of which shall be specified in the notice); and thereupon those first-mentioned companies shall be deemed to have been removed from the Register of Companies.

(3) If an amalgamation proposal specifies a date on which the amalgamation is intended to become effective which is later than the date on which the Greffier issues a certificate of amalgamation or certificate of registration under this section, the certificate shall be expressed to have effect on the date specified in the amalgamation proposal.

(4) The Greffier, when performing his functions under this section, may rely upon the documents given to him under subsection (1)(a) and (b) by the

directors of each amalgamating company in all respects and accordingly shall not be bound to enquire further as to whether, in relation to those companies, the provisions of this Ordinance have been complied with.

**Effect of certificate of amalgamation.**

8. On the date shown in a certificate of amalgamation-

- (a) the amalgamation shall be effective;
- (b) the name of the amalgamated company shall (subject to the provisions of section 10) be the name specified in the amalgamation proposal;
- (c) the amalgamated company shall succeed by operation of law to all property, rights, powers and privileges of each of the amalgamating companies;
- (d) the amalgamated company shall be liable for all debts, liabilities and obligations of each of the amalgamating companies;
- (e) legal proceedings which could have been instituted or continued by or against an amalgamating company may be instituted or continued by or against the amalgamated company;
- (f) a conviction, ruling, order or judgment in favour of or against an amalgamating company may be enforced by or against the amalgamated company; and

- (g) any provisions of the amalgamation proposal which provide for the conversion of shares or rights of shareholders in the amalgamating companies shall have effect according to their tenor.

**Powers of Court to modify amalgamation proposal.**

9. (1) If the Court is satisfied that the implementation of an amalgamation proposal would unfairly prejudice a member or creditor of an amalgamating company or any other person to whom an amalgamating company is under any obligation or liability, it may, on the application of that person made at any time before the date on which the amalgamation becomes effective, 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 proposal, including, without limiting the generality of this subsection, an order-

- (a) directing that effect shall not be given to the proposal;
- (b) modifying the proposal in such manner as may be specified in the order;
- (c) directing the company or its directors to reconsider the proposal or any part of it.

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

**Approval of Court required for new company or new name.**

10. For the removal of doubt, where pursuant to the provisions of this Ordinance two or more companies amalgamate-

- (a) where the companies are to continue not as one of the amalgamating companies but as a new Guernsey company, that new company shall be formed in accordance with Part I of the 1994 Law, the provisions of which shall apply accordingly in relation to the new company;
  
- (b) where the companies are to continue-
  - (i) as one of the amalgamating companies, and that company is a Guernsey company; or
  
  - (ii) as a new Guernsey company;

the provisions of the 1994 Law as to company names and the changing thereof shall apply in relation to the name of the amalgamated company.

**Exclusion of Commission's liability.**

11. No liability shall be incurred by the Commission or by any member, officer or servant thereof in respect of anything done or omitted to be done in the discharge or purported discharge of any of their functions under this Ordinance unless the thing is done or omitted to be done in bad faith.

**Interpretation.**

12. In this Ordinance, unless the context requires otherwise-

"**amalgamation**" means an amalgamation of two or more companies pursuant to the provisions of this Ordinance, and cognate expressions shall be construed accordingly;

"**company**" means a body of persons incorporated under the laws of any district, territory or place;

"**Guernsey company**" means a company the memorandum and articles of which are registered in the Register of Companies;

"**special resolution**" means, in relation to a company which is not a Guernsey company, such resolution of the company, or such other action on the part of the company or its members, as the Commission shall certify in writing as being equivalent to a special resolution of a Guernsey company;

"**the 1994 Law**" means the Companies (Guernsey) Law, 1994<sup>b</sup> as amended by the Companies (Amendment) (Guernsey) Law, 1996<sup>c</sup>;

and other expressions have the same meanings as in the 1994 Law.

**Meaning of "solvency test".**

13. (1) For the purposes of this Ordinance a company satisfies the solvency test if-

- (a) the company is able to pay its debts as they become due in the normal course of its business;
- (b) the value of the company's assets is greater than the value of its liabilities; and

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<sup>b</sup> Order in Council No. XXXIII of 1994.

- (c) in the case of a supervised company, the company satisfies any other requirements as to solvency imposed in relation to it by or under the Protection of Investors (Bailiwick of Guernsey) Law, 1987<sup>d</sup>, the Insurance Business (Guernsey) Law, 1986<sup>e</sup>, the Banking Supervision (Bailiwick of Guernsey) Law, 1994<sup>f</sup> and any other enactment prescribed for the purposes of this section by regulations of the Commission.

(2) In determining for the purposes of this Ordinance whether the value of an amalgamated company's assets will be greater than the value of its liabilities, the directors of each amalgamating company-

- (a) shall have regard to-
- (i) the most recent auditors' report (except in the case of an unaudited company), balance sheet and profit and loss account and accounting records of each company, and a balance sheet and profit and loss account prepared as if the amalgamation had become effective, in each case complying with the requirements of the 1994 Law; and

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<sup>c</sup> Order in Council No. XIV of 1996.

<sup>d</sup> Ordres en Conseil Vol. XXX, p. 281.

<sup>e</sup> Ordres en Conseil Vol. XXIX, p. 214.

<sup>f</sup> Order in Council No. XIII of 1994.

- (ii) all other circumstances which the directors know or ought to know would or may affect the value of the amalgamated company's assets and liabilities; and
- (b) may rely upon valuations of assets and estimates of liabilities which are reasonable in all the circumstances.

**Meaning of "supervised company".**

14. For the purposes of this Ordinance a "**supervised company**" is-

- (a) a company which carries on controlled investment business within the meaning of the Protection of Investors (Bailiwick of Guernsey) Law, 1987<sup>g</sup> or which holds a licence under section 3 of that Law or an authorisation under section 8 of that Law;
- (b) a company which is registered as an insurer by the Commission under the Insurance Business (Guernsey) Law, 1986<sup>h</sup> or which is exempt from such registration by virtue of section 8 of that Law;
- (c) a company which is a licensed institution or former licensed institution within the meaning of the Banking Supervision (Bailiwick of Guernsey) Law, 1994<sup>i</sup>; or

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<sup>g</sup> Ordres en Conseil Vol. XXX, p. 281.

<sup>h</sup> Ordres en Conseil Vol. XXIX, p. 214.

<sup>i</sup> Order in Council No. XIII of 1994.

- (d) a company which is of any other class or description prescribed for the purposes of this section by regulations of the Commission.

**Meaning of "holding company", "subsidiary" and "wholly-owned subsidiary".**

15. (1) For the purposes of this Ordinance a company is, subject to the provisions of subsection (3), a subsidiary of another if, but only if-

- (a) that other-
  - (i) is a member of it and controls the composition of its board of directors; or
  - (ii) holds more than half in nominal value of its equity share capital; or
- (b) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

(2) For the purposes of subsection (1) the composition of a company's board of directors shall be deemed to be controlled by another company if, but only if, that other company has some power, exercisable without the consent or concurrence of any other person, to appoint or remove the holders of all or a majority of the directorships; and that other company shall be deemed to have power to appoint a person to any directorship in respect of which any of the following conditions is satisfied-

- (a) that a person cannot be appointed thereto without the exercise in his favour by that other company of such a power;
  - (b) that a person's appointment thereto follows necessarily from his appointment as director of that other company;
  - (c) that the directorship is held by that other company itself or by a subsidiary of it.
- (3) In determining whether a company is a subsidiary of another-
- (a) any shares held or power exercisable by that other in a fiduciary capacity shall be treated as not held or exercisable by it:
  - (b) subject to paragraphs (c) and (d), any shares held or power exercisable-
    - (i) by any person as a nominee for that other (except where that other is concerned only in a fiduciary capacity);
    - (ii) by, or by a nominee for, a subsidiary of that other, not being a subsidiary which is concerned only in a fiduciary capacity;
- shall be treated as held or exercisable by that other;

- (c) any shares held or power exercisable by any person by virtue of the provisions of any debentures of the first-mentioned company or of a trust deed for securing any issue of such debentures shall be disregarded;
- (d) any shares held or power exercisable by, or by a nominee for, that other or its subsidiary (not being held or exercisable as mentioned in paragraph (c)) shall be treated as not held or exercisable by that other if the ordinary business of that other or its subsidiary, as the case may be, includes the lending of money and the shares are held or power is exercisable as aforesaid by way of security only for the purposes of a transaction entered into in the ordinary course of that business.

(4) For the purposes of this Ordinance-

- (a) a company shall be deemed to be another's holding company if, but only if, that other is its subsidiary; and
- (b) a company shall be deemed to be the wholly-owned subsidiary of another if it has no members apart from that other and that other's wholly-owned subsidiaries and its or their nominees.

(5) For the purposes of this section "**equity share capital**", in relation to a company, means its issued share capital excluding any part thereof which, as respects neither dividends nor capital, carries a right to participate beyond a specified amount in a distribution.

**Offences in relation to false statements.**

16. A person who, in or in connection with any document, report or record required by or for the purposes of this Ordinance, or in compliance or purported compliance with any requirement imposed by or under this Ordinance, or otherwise for the purposes of this Ordinance-

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

shall be deemed to be guilty of an offence under section 112 of the 1994 Law ("false statements") and punishable accordingly.

**Service of documents.**

17. Any document other than a summons to be given or served under or for the purposes of this Ordinance may be given or served in accordance with the provisions of section 116 of the 1994 Law ("service of documents").

**Citation.**

18. This Ordinance may be cited as the Amalgamation of Companies Ordinance, 1997.

**Commencement.**

19. This Ordinance shall come into force on the 25th day of June, 1997.