

The Companies (Financial Assistance for Acquisition of Own Shares) Ordinance, 1998

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The Companies (Financial Assistance for Acquisition of Own Shares) Ordinance, 1998

THE STATES, in exercise of the powers conferred upon them by section 12 of the Companies (Amendment) (Guernsey) Law, 1996^a, and of all other powers enabling them in that behalf, hereby order:-

Financial assistance permitted subject to solvency test.

1. (1) Where a person is acquiring or is proposing to acquire shares in a company, the company and any of its subsidiaries may give financial assistance directly or indirectly for the purpose of or in connection with that acquisition before or at the same time as the acquisition takes place provided that the company or, as the case may be, the subsidiary-

- (a) is authorised to do so by the provisions of its memorandum or articles; and
- (b) will, immediately after the financial assistance is given, satisfy the solvency test.

(2) Where a person has acquired shares in a company and any liability has been incurred (by that or any other person) for the purpose of or in connection with that acquisition, the company and any of its subsidiaries may give financial assistance directly or indirectly for the purpose of or in connection with reducing or discharging the liability so incurred provided that the company or, as the case may be, the subsidiary-

^a Order in Council No. XIV of 1996.

- (a) is authorised to do so by the provisions of its memorandum or articles; and
- (b) will, immediately after the financial assistance is given, satisfy the solvency test.

(3) In this section-

- (a) a reference to a person incurring a liability includes his changing his financial position by making an agreement or arrangement (whether enforceable or unenforceable, and whether made on his own account or with any other person) or by any other means; and
- (b) a reference to a company giving financial assistance for the purpose of or in connection with reducing or discharging a liability incurred by a person for the purpose of or in connection with the acquisition of shares includes its giving such assistance for the purpose of or in connection with wholly or partly restoring his financial position to what it was before the acquisition took place.

(4) A company may by special resolution alter its memorandum so as to authorise the company to give financial assistance in accordance with the provisions of subsections (1) and (2).

Meaning of "financial assistance".

2. For the purposes of this Ordinance "**financial assistance**" means-

- (a) financial assistance given by way of gift;

- (b) financial assistance given by way of guarantee, security or indemnity, other than an indemnity in respect of the indemnifier's own neglect or default, or by way of release or waiver;
- (c) financial assistance given by way of a loan or any other agreement under which any of the obligations of the person giving the assistance are to be fulfilled at a time when, in accordance with the agreement, any obligation of another party to the agreement remains unfulfilled, or by way of the novation of, or the assignment of rights arising under, a loan or such other agreement; or
- (d) any other financial assistance given by a company the net assets of which are thereby reduced to a material extent or which has no net assets.

Meaning of "solvency test".

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

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

- (ii) the nominal amount of its issued shares; and
 - (iii) any amounts standing to the credit of its share premium account and capital redemption reserve fund; and
- (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-
- (i) the Protection of Investors (Bailiwick of Guernsey) Law, 1987^b;
 - (ii) the Insurance Business (Guernsey) Law, 1986^c;
 - (iii) the Banking Supervision (Bailiwick of Guernsey) Law, 1994^d; and
 - (iv) 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 a company's assets will be greater than the aggregate of the amounts specified in subsection (1)(b), reliance may be placed upon valuations of assets and estimates of liabilities which are reasonable in all the circumstances.

^b Ordres en Conseil Vol. XXX, p. 281.

^c Ordres en Conseil Vol. XXIX, p. 214.

^d Order in Council No. XIII of 1994.

Meaning of "supervised company".

4. 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^e 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^f 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^g; or
 - (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".

5. (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-

^e Ordres en Conseil Vol. XXX, p. 281.

^f Ordres en Conseil Vol. XXIX, p. 214.

^g Order in Council No. XIII of 1994.

- (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.

Dealings with third parties.

6. (1) In favour of a person dealing with a company in good faith, no act of the company shall be invalidated by reason of a failure to comply with any provision of section 1.

(2) For the purposes of this section, a person deals with a company if he is a party to any transaction or other act to which the company is a party.

(3) A party to a transaction with a company is not bound to enquire as to whether the transaction is in accordance with the provisions of section 1.

(4) Notwithstanding the provisions of this section, it remains the duty of a company's directors to observe any limitation on their powers imposed by or deriving from the provisions of section 1.

Power of Commission to make regulations.

7. (1) The Commission, after consultation with the Committee, may make regulations in respect of any of the following matters-

- (a) the circumstances and the manner in which a company may give financial assistance for the acquisition of its own shares or shares in its holding company;
- (b) the transactions, agreements or arrangements which are or are not to be treated as giving financial assistance for the acquisition of its own shares or shares in its holding company;
- (c) generally for the implementation of this Ordinance.

(2) Regulations under this Ordinance-

- (a) may make such modifications to any provision of this Ordinance as appears to the Commission to be necessary in consequence of any provision made under such regulations;
- (b) may contain such consequential, incidental, supplementary and transitional provisions as the Commission thinks fit;
- (c) may be amended or repealed by subsequent regulations hereunder.

(3) Any power conferred upon the Commission 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 exception, 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 or case for different purpose;

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

General interpretation provisions.

8. (1) In this Ordinance, unless the context requires otherwise-

"Commission" means the Guernsey Financial Services Commission;

"Committee" means the States Commerce and Employment Department^h;

"financial assistance" has the meaning given by section 2;

"holding company" has the meaning given by section 5;

"liabilities" includes any amount retained as reasonably necessary for the purpose of providing for any liability or loss which is either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which it will arise;

"net assets" means the aggregate of a company's assets less the aggregate of its liabilities;

"shares" includes stock, debentures, debenture stock, bonds and any other security or capital interest of or in a company, whether constituting a charge on the company's assets or not;

"solvency test" has the meaning given by section 3;

"subsidiary" and **"wholly-owned subsidiary"** have the meanings given by section 5;

"supervised company" has the meaning given by section 4;

^h The functions were transferred to the Commerce and Employment Department by Ordinance XXXIII of 2003.

"the 1994 Law" means the Companies (Guernsey) Law, 1994ⁱ.

(2) Expressions used in this Ordinance shall (unless the context requires otherwise) have the same meanings as in the 1994 Law.

(3) References in this Ordinance to an enactment are references thereto as amended, re-enacted (with or without modification), extended or applied.

Saving for transactions prior to commencement of Ordinance.

9. The validity of the giving of financial assistance by a company or any of its subsidiaries prior to the commencement of this Ordinance shall not be affected by anything in this Ordinance.

Citation.

10. This Ordinance may be cited as the Companies (Financial Assistance for Acquisition of Own Shares) Ordinance, 1998.

Commencement.

11. This Ordinance shall come into force on the 25th day of February, 1998.

ⁱ Order in Council No. XXXIII of 1994; amended by No. XIV of 1996.