

**The Companies (Purchase of Own Shares)  
Ordinance, 1998**

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# **The Companies (Purchase 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<sup>a</sup>, and of all other powers enabling them in that behalf, hereby order:-

## PART I PROVISIONS AS TO PURCHASE OF OWN SHARES

### **Power of company to purchase own shares.**

1. (1) Subject to the following provisions of this Ordinance, a company limited by shares or limited by guarantee and having a share capital may, if so authorised by its articles, purchase its own shares (including any redeemable preference shares).

(2) A company may not under this section purchase its own shares if, as a result of the purchase, there would no longer be any member of the company holding shares other than redeemable preference shares.

### **Terms and manner of purchase.**

2. (1) A company may not purchase its own shares under this Ordinance unless the shares are fully paid.

(2) A company may not purchase its own shares under this Ordinance without the consent of the member whose shares are to be purchased unless the company is authorised to do so by virtue of-

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

- (a) the provisions of its memorandum or articles;
- (b) the terms and conditions subject to which, or the rights, qualifications or restrictions with which, the shares were issued; or
- (c) the subscription agreement for the issue of the shares.

**Financing of purchase.**

3. (1) Subject to subsection (2) and to sections 10 and 16(4)-

- (a) shares may only be purchased out of distributable profits of the company or out of the proceeds of a fresh issue of shares made for the purposes of the purchase; and
- (b) any premium payable on purchase shall be paid out of distributable profits of the company.

(2) If the shares were issued at a premium, any premium payable on their purchase may be paid out of the proceeds of a fresh issue of shares made for the purposes of the purchase, up to an amount equal to-

- (a) the aggregate of the premiums received by the company on the issue of the shares purchased; or
- (b) the current amount of the company's share premium account (including any sum transferred to that account in respect of premiums on the new shares);

whichever is the less; and in that case the amount of the company's share premium account shall be reduced by a sum corresponding (or by sums in the aggregate corresponding) to the amount of any payment made by virtue of this subsection out of the proceeds of the issue of the new shares.

(3) Shares purchased under this Ordinance shall be treated as cancelled on purchase and the amount of the company's issued share capital shall be diminished by the nominal value of those shares accordingly; but the purchase of shares by a company is not to be taken as reducing the amount of the company's authorised share capital.

(4) Without prejudice to subsection (3), where a company is about to purchase shares, it has power to issue shares up to the nominal value of the shares to be purchased as if those shares had never been issued.

**Authority for purchase.**

4. (1) A company may only make a purchase of its own shares, other than a market purchase under section 5, in pursuance of a contract authorised in advance in accordance with this section.

(2) The terms of the proposed contract shall be authorised by a special resolution of the company before the contract is entered into; and the following subsections apply with respect to that authority and to resolutions conferring it.

(3) Subject to subsection (4), the authority may be varied, revoked or from time to time renewed by special resolution of the company.

(4) The authority conferred by the resolution shall specify a date on which the authority is to expire.

**Authority for market purchase.**

5. (1) A company shall not make a market purchase of its own shares unless-

(a) the purchase has first been authorised by the company in general meeting; or

(b) such purchases are authorised by the company's memorandum or articles.

(2) That authority may-

(a) be general for that purpose, or limited to the purchase of shares of any particular class or description; and

(b) be unconditional or subject to conditions.

(3) The authority shall-

(a) specify the maximum number of shares authorised to be acquired;

(b) determine both the maximum and minimum prices which may be paid for the shares; and

(c) specify a date on which it is to expire.

(4) The authority may be varied, revoked or from time to time renewed by the company in general meeting, but this is subject to subsection (3); and in a

resolution to confer or renew authority, the date on which the authority is to expire shall not be later than 18 months after that on which the resolution is passed.

(5) A company may under this section make a purchase of its own shares after the expiry of the time limit imposed to comply with subsection (3)(c), if the contract of purchase was concluded before the authority expired and the terms of the authority permitted the company to make a contract of purchase which would or might be executed wholly or partly after its expiration.

(6) A resolution to confer or vary authority under this section may determine either or both the maximum and minimum prices for purchase by-

- (a) specifying a particular sum; or
- (b) providing a basis or formula for calculating the amount of the price in question without reference to any person's discretion or opinion.

(7) A resolution of a company conferring, varying, revoking or renewing authority under this section shall be delivered to the Greffier within the 21 days immediately following the date of the resolution.

(8) If there is a failure to comply with subsection (7), then-

- (a) the resolution shall be void ab initio; and
- (b) the company shall be deemed to be guilty of an offence under section 73(3) of the 1994 Law, sections 111 and 113 of which shall apply accordingly.

**Assignment or release of company's right to purchase own shares.**

6. (1) The rights of a company under a contract approved under section 4, or under a contract for a purchase authorised under section 5, are not capable of being assigned.

(2) An agreement by a company to release its rights under a contract approved under section 4 is void unless the terms of the release agreement are approved in advance by a special resolution of the company before the agreement is entered into; and subsections (3) and (4) of section 4 apply to an approval for a proposed release agreement as they apply to an authority mentioned in those subsections.

**Payments apart from purchase price to be made out of distributable profits.**

7. (1) A payment made by a company in consideration of-

- (a) acquiring any right with respect to the purchase of its own shares in pursuance of a contract approved under section 4; or
- (b) the variation of a contract approved under section 4; or
- (c) the release of any of the company's obligations with respect to the purchase of any of its own shares under a contract approved under section 4 or under a contract for a purchase authorised under section 5;

shall be made out of the company's distributable profits.

(2) If the requirements of subsection (1) are not satisfied in relation to a contract-

- (a) in a case within subsection (1)(a), no purchase by the company of its own shares in pursuance of that contract is lawful under this Ordinance;
- (b) in a case within subsection (1)(b), no such purchase following the variation is lawful under this Ordinance; and
- (c) in a case within subsection (1)(c), the purported release is void.

**Disclosure by company of purchase of own shares.**

8. (1) Within the 28 days beginning on the date on which any shares purchased by a company under this Ordinance are delivered to it, the company shall deliver to the Greffier for registration a return stating, in respect of shares of each class purchased-

- (a) the number and nominal value of those shares; and
- (b) the aggregate amount paid by the company for the shares.

(2) Particulars of shares purchased by the company on different dates and under different contracts may be included in a single return; and in such a case the amount required to be stated under subsection (1)(b) is the aggregate amount paid by the company for all the shares to which the return relates.

(3) If default is made in delivering to the Greffier any return required by this section, the company shall be deemed to be guilty of an offence under section 73(3) of the 1994 Law, sections 111 and 113 of which shall apply accordingly.

**The capital redemption reserve.**

9. (1) Where under this Ordinance shares of a company are purchased wholly out of the company's profits, the amount by which the company's issued share capital is diminished in accordance with section 3(3) on cancellation of the shares purchased shall be transferred to a reserve called the "**capital redemption reserve**".

(2) If the shares are purchased wholly or partly out of the proceeds of a fresh issue and the aggregate amount of those proceeds is less than the aggregate nominal value of the shares purchased, the amount of the difference shall be transferred to the capital redemption reserve.

(3) Subsection (2) does not apply if the proceeds of the fresh issue are applied by the company in making a purchase of its own shares in addition to a payment out of capital under section 10.

(4) The provisions of the 1994 Law relating to the reduction of a company's share capital apply as if the capital redemption reserve were paid-up share capital of the company, except that the reserve may be applied by the company in paying up its unissued shares to be allotted to members of the company as fully paid bonus shares.

**Power of companies to purchase own shares out of capital.**

10. (1) Subject to the following provisions of this Ordinance, a company limited by shares or limited by guarantee and having a share capital may, if so authorised by its articles, make a payment in respect of the purchase under section 1 of its own shares otherwise than out of its distributable profits or the proceeds of a fresh issue of shares.

(2) References in this Ordinance to payment out of capital are (subject to subsection (6)) to any payment so made, whether or not it would be regarded apart from this section as a payment out of capital.

(3) The payment which may (if authorised in accordance with the following provisions of this Ordinance) be made by a company out of capital in respect of the purchase of its own shares is such an amount as, taken together with-

- (a) any available profits of the company; and
- (b) the proceeds of any fresh issue of shares made for the purposes of the purchase;

is equal to the price of purchase; and the payment permissible under this subsection is referred to in this Ordinance as the "**permissible capital payment**" for the shares.

(4) Subject to subsection (6), if the permissible capital payment for shares purchased is less than their nominal amount, the amount of the difference shall be transferred to the company's capital redemption reserve.

(5) Subject to subsection (6), if the permissible capital payment is greater than the nominal amount of the shares purchased-

- (a) the amount of any capital redemption reserve, share premium account or fully paid share capital of the company; and

- (b) any amount representing unrealised profits of the company for the time being standing to the credit of any reserve maintained by the company;

may be reduced by a sum not exceeding (or by sums not in aggregate exceeding) the amount by which the permissible capital payment exceeds the nominal amount of the shares.

(6) Where the proceeds of a fresh issue are applied by a company in making any purchase of its own shares in addition to a payment out of capital under this section, the references in subsections (4) and (5) to the permissible capital payment are to be read as referring to the aggregate of that payment and those proceeds.

**Availability of profits for purposes of section 10.**

11. (1) The reference in section 10(3)(a) to "**available profits**" of the company is to the company's profits which are available for distribution; and the question whether a company has any profits so available and the amount of any such profits are to be determined for the purposes of that section in accordance with the following subsections.

(2) Subject to subsection (3), that question is to be determined by reference to-

- (a) profits, losses, assets and liabilities;
- (b) provisions in respect of depreciation, diminution in value of assets and retentions to meet liabilities; and

- (c) share capital and reserves (including undistributable reserves);

as stated in the relevant accounts for determining the permissible capital payment for shares.

(3) The relevant accounts for this purpose are such accounts as are necessary to enable a reasonable judgment to be made as to the amounts of any of the items mentioned in subsection (2)(a) to (c).

(4) For the purposes of determining the amount of the permissible capital payment for shares, the amount of the company's available profits (if any) determined in accordance with subsections (2) and (3) is treated as reduced by the amount of any distributions lawfully made by the company after the date of the relevant accounts.

(5) The reference in subsection (4) to distributions lawfully made by the company includes-

- (a) financial assistance lawfully given out of distributable profits;
- (b) any payment lawfully made by the company in respect of the purchase by it of any shares in the company (except a payment lawfully made otherwise than out of distributable profits); and
- (c) a payment of any description specified in section 7(1) lawfully made by the company.

**Conditions for payment out of capital.**

12. (1) Subject to any order of the Court under section 15, a payment out of capital by a company for the purchase of its own shares is not lawful unless the requirements of this section and section 13 are satisfied.

(2) The payment out of capital shall be approved by a special resolution of the company; and the payment shall be made no earlier than 28, nor more than 56, days immediately following the date of the resolution.

(3) The company's directors shall reasonably believe that, immediately after the payment out of capital is made-

(a) the company will be able to discharge its liabilities as they become due in the normal course of its business; and

(b) the value of the company's assets will be 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.

**Publicity for proposed payment out of capital.**

13. (1) Within the 7 days immediately following the date of the resolution under section 12 for payment out of capital the company shall cause to be published in La Gazette Officielle a notice-

- (a) stating that the company has approved a payment out of capital for the purpose of acquiring its own shares by purchase;
- (b) specifying the amount of the permissible capital payment for the shares in question and the date of the resolution;
- (c) stating that any creditor of the company may at any time within the 28 days immediately following the date of the resolution apply to the Court under section 14 for an order prohibiting the payment.

(2) Within the 7 days immediately following the date of the resolution the company shall also give notice in writing to that effect to each of its creditors; and the provisions of section 116 of the 1994 Law shall apply in relation to the giving of such notice.

**Objections by company's members or creditors.**

**14.** (1) Where a company passes a special resolution under section 12 approving any payment out of capital for the purchase of any of its shares-

- (a) any member of the company other than one who consented to or voted in favour of the resolution; and
- (b) any creditor of the company;

may, within the 28 days immediately following the date of the resolution, apply to the Court for cancellation of the resolution.

(2) The application may be made on behalf of the persons entitled to make it by such one or more of their number as they may appoint in writing for the purpose.

**Powers of Court on application under section 14.**

15. (1) On the hearing of an application under section 14 the Court may, if it thinks fit, adjourn the proceedings in order that an arrangement may be made to the Court's satisfaction for the purchase of the interests of dissentient members or for the protection of dissentient creditors (as the case may be); and the Court may give such directions and make such orders as it thinks expedient for facilitating or carrying into effect any such arrangement.

(2) Without prejudice to its powers under subsection (1), the Court shall make an order on such terms and conditions as it thinks fit either confirming or cancelling the resolution; and, if the Court confirms the resolution, it may in particular by order alter or extend any date or period of time specified in the resolution or in any provision of this Ordinance which applies to the purchase of shares to which the resolution refers.

(3) The Court's order may, if the Court thinks fit, provide for the purchase by the company of the shares of any of its members and for the reduction accordingly of the company's capital, and may make such alterations in the company's memorandum and articles as may be required in consequence of that provision.

(4) If the Court's order requires the company to make any, or any specified, alteration in its memorandum or articles, the company shall not then have power without leave of the Court to make any such alteration in breach of the requirement.

(5) An alteration in the memorandum or articles made by virtue of an order under this section, if not made by resolution of the company, is of the same effect as if duly made by resolution; and the 1994 Law applies accordingly to the memorandum or articles as so altered.

**Effect of company's failure to purchase.**

16. (1) This section has effect where a company has, after the date of commencement of this Ordinance, agreed to purchase any of its own shares.

(2) The company is not liable in damages in respect of any failure on its part to purchase any of the shares.

(3) Subsection (2) is without prejudice to any right of the holder of the shares other than his right to sue the company for damages in respect of its failure.

(4) If the company is wound up and at the commencement of the winding up any of the shares have not been purchased, the terms of purchase may be enforced against the company; and when shares are purchased under this subsection, they are treated as cancelled.

(5) Subsection (4) does not apply if-

- (a) the terms provided for the purchase to take place at a date later than that of the commencement of the winding up; or
- (b) during the period beginning with the date on which the purchase was to have taken place and ending with the commencement of the winding up, the company could not at any time have lawfully made a distribution equal in value to the price at which the shares were to have been purchased.

(6) There shall be paid in priority to any amount which the company is liable under subsection (4) to pay in respect of any shares-

- (a) all other debts and liabilities of the company (other than any due to members in their character as such);
- (b) if other shares carry rights (whether as to capital or income) which are preferred to the rights as to capital attaching to the first-mentioned shares, any amount due in satisfaction of those preferred rights;

but, subject to that, any such amount shall be paid in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members.

## PART II MISCELLANEOUS PROVISIONS

### **Power of the Commission to make regulations.**

17. (1) The Commission, after consultation with the Committee, may make regulations modifying or supplementing the provisions of this Ordinance with respect to any of the following matters-

- (a) the circumstances and the manner in which a company may purchase its own shares;
- (b) the authority required for a purchase by a company of its own shares;

- (c) the authority required for the release by a company of its rights under a contract for the purchase of its own shares or a contract under which the company may, subject to any conditions, become entitled or obliged to purchase its own shares;
- (d) the information to be included in a return delivered by a company to the Greffier in accordance with section 8(1);
- (e) for wholly or partly relieving companies from the requirement of section 10(3)(a) that any available profits shall be taken into account in determining the amount of the permissible capital payment for shares under that section;
- (f) for permitting a company's share premium account to be applied, to any extent appearing to the Commission to be appropriate, in providing for the premiums payable on purchase by the company of any of its own shares;
- (c) generally for the implementation of this Ordinance.

(2) The Commission may also make such regulations as appear to be appropriate to carry the provisions of this Ordinance into effect.

(3) Regulations under this section-

- (a) may make such modification of any provisions of this Ordinance as appears to the Commission to be reasonably necessary in consequence of any provision made under such regulations;

- (b) may make different provisions for different cases or classes of cases;
- (c) may contain such consequential provisions, and such incidental, supplementary and transitional provisions, as the Commission thinks fit;
- (d) may be amended or repealed by subsequent regulations hereunder.

(4) 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.

**Interpretation.**

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

"available profits", in section 10(3)(a), shall be construed in accordance with section 11;

"capital redemption reserve" has the meaning given by section 9(1);

"Commission" means the Guernsey Financial Services Commission;

"Committee" means the States Commerce and Employment Department<sup>b</sup>;

"contingent purchase contract" means a contract entered into by a company relating to any of its shares-

- (a) which does not amount to a contract to purchase these shares; but
- (b) under which the company may, subject to any conditions, become entitled or obliged to purchase these shares;

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<sup>b</sup> The functions were transferred to the Commerce and Employment Department by Ordinance XXXIII of 2003.

**"contract"** includes a contingent purchase contract;

**"distributable profits"**, in relation to the making of any payment by a company, means those profits out of which the company could lawfully make a distribution equal in value to the payment;

**"distribution"** means every description of distribution of a company's assets to its members, whether in cash or otherwise, except distribution by way of-

- (a) an issue of shares as fully or partly paid bonus shares;
- (b) the redemption or purchase of any of the company's own shares out of capital (including the proceeds of any fresh issue of shares) or out of unrealised profits;
- (c) the reduction of share capital by extinguishing or reducing the liability of any of the members on any of the company's shares in respect of share capital not paid up, or by paying off paid up share capital; and
- (d) a distribution of assets to members of the company on its winding up;

**"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;

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

**"market purchase"** means a purchase made on a recognised investment exchange other than a purchase of shares not subject to a marketing arrangement on that exchange; and for this purpose a company's shares are subject to a **"marketing arrangement"** on a recognised investment exchange if-

- (a) they are listed under Part IV of the Financial Services Act 1986<sup>c</sup>; or
- (b) the company has been afforded facilities for dealings in those shares to take place on that exchange without prior permission for individual transactions from the authority governing that exchange and without limit as to the time during which those facilities are to be available;

**"permissible capital payment"** has the meaning given by section 10(3);

**"recognised investment exchange"** has the meaning given by section 44(1) of the Protection of Investors (Bailiwick of Guernsey) Law, 1987<sup>d</sup>;

**"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;

**"the 1994 Law"** means the Companies (Guernsey) Law, 1994<sup>e</sup>.

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

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<sup>c</sup> An Act of Parliament (1986 c. 60).

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

<sup>e</sup> Order in Council No. XXXIII of 1994; amended by No. XIV of 1996.

(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.**

20. The validity of the purchase by a company of its own shares prior to the commencement of this Ordinance shall not be affected by anything in this Ordinance.

**Citation.**

21. This Ordinance may be cited as the Companies (Purchase of Own Shares) Ordinance, 1998.

**Commencement.**

22. This Ordinance shall come into force on the 29th day of April, 1998.