

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

THE CUSTOMS AND EXCISE (DISCRETIONARY FINANCIAL PENALTIES) (BAILIWICK OF GUERNSEY) ORDINANCE, 2019

The States are asked to decide:-

Whether they are of the opinion to approve the draft Ordinance entitled "The Customs and Excise (Discretionary Financial Penalties) (Bailiwick of Guernsey) Ordinance, 2019", and to direct that the same shall have effect as an Ordinance of the States.

This proposition has been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

EXPLANATORY MEMORANDUM

The Ordinance is made under section 62A of the Customs and Excise (General Provisions) (Bailiwick of Guernsey Law, 1972, which was inserted by the Customs and Cross-Border Trade (General and Enabling Provisions) (Bailiwick of Guernsey) Law, 2018 and which empowers the States by Ordinance to provide for the imposition of civil penalties by the Committee for Home Affairs where persons have engaged in dishonest conduct for the purpose of evading paying a duty of customs or excise duty, or where their conduct has led to a contravention of a duty or obligation under the customs and excise Laws. The Ordinance is based on and promotes correspondence with relevant UK legislation, pursuant to the Customs Arrangement entered into with the UK last year, and provides an additional tool to combat duty evasion and non-compliance (as opposed to reliance on the prosecution of offences).

Section 1 sets out the circumstances in which the Committee for Home Affairs may impose a penalty, and factors which it must (and must not) take into account when so deciding. Section 2 provides, for the avoidance of doubt, that a warning letter may be sent by the Committee instead of its imposing a penalty. Sections 3 and 4 set out a regime for written representations to be made the Committee in respect of a notice of intent to impose a penalty, and for appeals to be made to the Magistrate's Court.

Section 5 provides for the Committee to determine and publish default penalties (or ranges of penalty) that will normally be imposed for specific categories of conduct. It makes clear that the Committee is not bound to follow such determinations. Section 6 is concerned with the liability of directors and other officers where a body corporate is liable to a penalty in respect of the dishonest evasion of duty. The remaining provisions are concerned with the service of notices, the meaning of "evading duty", and extent, citation and commencement.

The Customs and Excise (Discretionary Financial Penalties) (Bailiwick of Guernsey) Ordinance, 2019

THE STATES, in pursuance of their Resolution of 18th July, 2018^a, and in exercise of the powers conferred on them by section 62A of the Customs and Excise (General Provisions) (Bailiwick of Guernsey) Law, 1972^b, and all other powers enabling them in that behalf, hereby order:-

Discretionary financial penalties.

1. (1) Where the Committee is satisfied that a person has –
 - (a) engaged in any conduct for the purpose of evading any duty to customs, or excise duty, and the person's conduct involves dishonesty (whether or not such as to give rise to any criminal liability), or
 - (b) engaged in any conduct by which the person has contravened a duty, obligation, requirement or condition imposed by or under the customs Laws or

^a Article IV of Billet d'État No. XIX of 2018.

^b Ordres en Conseil Vol. XXIII, p. 573; amended by Ordres en Conseil Vol. XXIV, p. 87; Vol. XXXI, p. 278; Vol. XXXIII, p. 217; Order in Council No. X of 2004; No. II of 2010; No. XIV of 2007; No. XV of 2012; Ordinance No. XXXIII of 2003; No. XXIX of 2004; No. XLVIII of 2007; No. XXXV of 2007; No. VII of 2008; No. XLIII of 2013; No. XL of 2014; No. IX of 2016; No. XXXI of 2017; G.S.I. No. 56 of 2008; G.S.I. No. 76 of 2009; G.S.I. No. 97 of 2010; G.S.I. No. 42 of 2011; G.S.I. No. 54 of 2012; G.S.I. No. 53 of 2013; G.S.I. No. 61 of 2014; G.S.I. No. 70 of 2015; G.S.I. No. 46 of 2016; and G.S.I. No. 81 of 2017.

the excise Laws,

it may, subject to the provisions of this Ordinance, impose on that person a financial penalty in respect of the contravention in such amount as it considers appropriate and proportionate.

(2) For the avoidance of doubt, and subject to section 6, the Committee may impose a penalty on a body corporate under subsection (1).

(3) The Committee may not impose a penalty on a person under subsection (1) where that person is being or has been proceeded against in respect of an offence arising from the conduct in question.

(4) In a case falling within subsection (1)(a), the amount of the financial penalty that the Committee may impose may not exceed the amount of the duty evaded or, as the case may be, sought to be evaded; and in any other case the amount of the financial penalty may not exceed £2,500.

(5) In deciding whether or not to impose a penalty under this section and, if so, the amount thereof, the Committee must take into consideration any relevant determination made under section 5(1), and the following factors -

- (a) whether the conduct was brought to the attention of the Chief Revenue Officer or the Committee by the person concerned,
- (b) the seriousness of the evasion, intended evasion or contravention, as the case may be,

- (c) in the case of conduct falling within subsection (1)(b), whether or not the contravention was inadvertent,
- (d) in the case of conduct falling within subsection (1)(b), what efforts, if any, have been made to rectify the contravention and to prevent a recurrence,
- (e) whether a letter under section 2 has previously been issued to the person in respect of that person's engaging in broadly similar conduct,
- (f) the potential financial consequences to any third party of imposing a penalty, and
- (g) the penalties imposed by the Committee under this section in other cases (if any).

(6) In deciding whether or not to impose a penalty under this section and, if so, the amount thereof, the Committee may not take into consideration any of the following factors –

- (a) an insufficiency of funds available to a person obliged to pay any duty,
- (b) that reliance was placed by any person on another to perform any task,
- (c) that the contravention is attributable, in whole or in part, to the conduct of a person on whom reliance to

perform any task was so placed.

(7) Any financial penalty imposed under this section is payable to the States and is recoverable as a civil debt.

(8) Where the Committee proposes to impose a financial penalty, it must notify in writing the person on whom the penalty is to be imposed of –

- (a) the proposed penalty, and the reasons for the same,
- (b) the date on which it is proposed, subject to sections 3 and 4, to impose the penalty, which must not be less than 21 days after the date of the notice, and
- (c) that person's right to make written representations to the Committee under section 3(1).

(9) Where the Committee imposes a financial penalty it must -

- (a) issue to the person on whom the penalty is being imposed notice of the penalty, and
- (b) include in the notice a statement of the right of appeal under section 4.

Warning letters.

2. (1) For the avoidance of doubt, in a case falling within section 1(1), the Committee may, instead of imposing a financial penalty, decide to issue a letter to the person –

- (a) identifying the relevant conduct the Committee is satisfied that the person has engaged in, and
- (b) warning the person that if the person engages in broadly similar conduct within a specified period, a financial penalty is likely to be imposed.

(2) Sections 1(5) and (6) apply in respect of a decision as to whether to issue a letter under subsection (1) as they apply to a decision as to whether to impose a financial penalty under section 1(1).

Representations prior to financial penalty.

3. (1) The person on whom a notice is served under section 1(8) may make written representations to the Committee concerning the proposed financial penalty within 14 days of the date of the notice.

(2) If the person in question exercises their right under subsection (1) the Committee -

- (a) must consider the person's representations, and
- (b) may decide to –
 - (i) impose the penalty,
 - (ii) impose a penalty in a lesser amount,
 - (iii) withdraw the penalty, or

(iv) postpone the date for imposing the penalty,

but in any event must inform that person of its decision in writing, and the reasons for the same, before the date on which financial penalty is imposed or would otherwise have been imposed.

(3) Without prejudice to section 4(7), and for the avoidance of doubt, where the Committee has imposed a financial penalty under section 1 it may not seek to recover payment of that penalty until –

- (a) 28 days immediately following the date of the notice of the penalty issued under section 1(9)(a), or
- (b) if an appeal is instituted within that period, the final determination, or withdrawal, of that appeal,

and for the purposes of this subsection, an appeal shall be deemed not to have been finally determined until the expiration of the time allowed for the institution of an appeal to the Court of Appeal under the Court of Appeal (Guernsey) Law, 1961^c or until the determination of any such appeal instituted within that time.

Appeals against Committee review decisions.

4. (1) A person aggrieved by a decision of the Committee under section 3(2) may appeal to the Court against the decision.

^c Ordres en Conseil Vol. XVIII, p. 315; as amended by Order in Council No. III of 2012; and Recueil d'Ordonnances Tome XXIX, p. 406.

- (2) The grounds of an appeal under this section are that -
- (a) the Committee's decision was ultra vires or there was some other error of law,
 - (b) the Committee's decision was unreasonable,
 - (c) the Committee's decision was made in bad faith,
 - (d) there was a lack of proportionality, or
 - (e) there was a material error as to the facts or as to the procedure.

- (3) An appeal under this paragraph shall be instituted -
- (a) within a period of two months immediately following the date of the notice of the Committee's decision, and
 - (b) by summons served on the Committee stating the grounds and material facts on which the appellant relies.

(4) The Committee may, where an appeal under this paragraph has been instituted, apply to the Court, by summons served on the appellant, for an order that the appeal shall be dismissed for want of prosecution; and on hearing the application the Court may -

- (a) dismiss the appeal or dismiss the application (in either

case on such terms and conditions as the Court may direct), or

(b) make such other order as the Court considers just.

(5) On an appeal under this paragraph the appellant shall have the burden of proof and the final right of reply.

(6) On an appeal under this paragraph the Court may -

(a) set the Committee's decision aside and, if the Court considers it appropriate to do so, remit the matter to the Committee with such directions as the Court thinks fit, or

(b) confirm the Committee's decision, in whole or in part.

(7) On an appeal under this paragraph against a decision of the Committee, the Court may, on the application of the appellant or the Committee or of its own volition, and on such terms as the Court thinks just, suspend or modify the operation of the Committee's decision pending the determination of the appeal.

(8) In this section "**the Court**" means the Magistrate's Court.

Committee may determine, and shall publish guidance in respect of, default penalty amounts.

5. (1) The Committee may determine from time to time the amount of a financial penalty that it will, subject to subsection (3), impose in respect of specified conduct and contraventions, for the purpose of ensuring fairness and

consistency in the administration of this Ordinance.

(2) A determination under subsection (1) may be in respect of specified categories of conduct and contravention, and may specify a range of amounts.

(3) For the avoidance of doubt, the Committee –

(a) is not bound by determinations made under subsection (1), and accordingly

(b) may in any case impose a financial penalty in a different amount from that specified in a relevant determination where it considers the circumstances so merit, or impose no penalty,

and subsection (1) shall be construed accordingly.

(4) When the Committee has made a determination under subsection (1) it shall publish guidance in respect of that determination in such manner as it thinks fit, including by publication on the States of Guernsey website.

Liability of directors etc. where body corporate liable to penalty for evasion.

6. (1) Where the Committee has decided to impose a penalty on a body corporate in respect of conduct falling within section 1(1)(a), and it appears to the Committee that the conduct giving rise to the penalty is attributable to the dishonesty of a person who is, or was at the material time, a director or managing officer of the body corporate ("**a relevant officer**"), the Committee may give a notice under this section to the body corporate (or its representative) and to the relevant

officer (or the relevant officer's representative).

(2) A notice under this section must state the amount of the penalty referred to in subsection (1) and that the Committee proposes to recover the penalty from the relevant officer.

(3) If a notice is given under this section, this Ordinance shall apply in relation to the relevant officer as if he or she were personally liable to the penalty, and the body corporate shall be treated as discharged from liability for the penalty.

(4) In this section, "**managing officer**" means –

- (a) a manager, secretary or similar officer of the body corporate, or
- (b) a person purporting to act in any such capacity or as a director.

(5) Where the affairs of a body corporate are managed by its members, this section applies in relation to the conduct of a member in connection with that member's functions of management as if he or she were a director of the body corporate.

Service of notices.

7. Any notice to be given to any person for the purposes of this Ordinance may be given by sending it by post in a letter addressed to that person or his or her representative at the last or usual residence or place of business of that person or representative.

Meaning of "evading" duty.

8. (1) Any reference in this Ordinance to a person's "**evading**" any duty to customs or excise duty includes a reference to that person obtaining or securing, without being entitled to it -

- (a) any repayment, rebate or drawback of the duty,
- (b) any relief or exemption from, or any allowance against, the duty, or
- (c) any deferral or other postponement of his or her liability to pay any relevant duty or of the discharge by payment of any such liability,

and also includes a reference to the person evading the cancellation of any entitlement to, or the withdrawal of, any such repayment, rebate, drawback, relief, exemption or allowance.

(2) In relation to any such evasion of any duty as is mentioned in subsection (1), the reference in section 1(4) to the amount of duty evaded is a reference to –

- (a) the repayment, rebate or drawback,
- (b) the relief, exemption or allowance, or
- (c) the payment which, or the liability to make which, is deferred or otherwise postponed,

as the case may be.

Extent.

9. This Ordinance has effect throughout the Bailiwick of Guernsey.

Citation.

10. This Ordinance may be cited as the Customs and Excise (Discretionary Financial Penalties) (Bailiwick of Guernsey) Ordinance, 2019.

Commencement.

11. This Ordinance shall come into force on the day it is made.