



Jersey Competition Regulatory Authority

Competition (Mergers and Acquisitions) (Jersey) Order 2005

Consultation on Proposed Amendments to Merger Thresholds

1 June 2009

Introduction & Executive Summary

1. In this Consultation Paper, the Jersey Competition Regulatory Authority (the '**JCRA**') proposes certain amendments to the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the '**Order**'). The Order prescribes the types of mergers or acquisitions that must be notified to, and approved by, the JCRA under Article 20(1) of the Competition (Jersey) Law 2005 (the '**Law**') prior to their execution by the parties.
2. The purpose of the amendments proposed in this Consultation Paper is to narrow the category of mergers or acquisitions that are subject to the Order and, consequently, reduce the number of mergers or acquisitions that require notification to, and approval by, the JCRA. The goal of these proposed amendments is to reduce compliance burdens in Jersey, as well as reducing the JCRA's own internal workload with respect to mergers and acquisitions, without compromising the Law's goal of prohibiting those mergers and acquisitions which would substantially lessen competition in Jersey or any part thereof.
3. The Order's content is within the discretion of Jersey's Minister for Economic Development (the '**Minister**'), upon consultation with the JCRA. This Consultation therefore will inform the JCRA's advice to the Minister in this regard. The ultimate decision on whether or not to amend the Order and, if so, in what form, remains with the Minister.

Background

4. The Order requires a merger or acquisition be notified to and approved by the JCRA before being executed where the 'share of supply or purchase' of one or more parties to the merger or acquisition in any goods or services in Jersey exceeds a certain threshold. Annex A to this Consultation contains a copy of the Order, as currently in force.
5. As detailed in Annex A, the Order sets out three categories of potential applicability. These cover horizontal mergers or acquisitions (Article 1(1)), vertical mergers or acquisitions (Article 1(2)), and so-called conglomerate mergers or acquisitions (Article 1(4)).
6. As detailed below, in this Consultation the JCRA proposes changes to Article 1(4) of the Order concerning conglomerate mergers. This Article currently states:

'A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if one or more of the parties to the proposed merger or acquisition has an existing share of 40% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey.'

7. As explained in the JCRA's Guidelines on Mergers and Acquisitions, Article 1(4) is designed to deal with a situation where there is no horizontal or vertical relationship between the parties, but where the merger may nevertheless raise competition concerns. An example might be if a major electricity supplier in Jersey were to merge with a major telecommunications supplier in Jersey.
8. The JCRA is of the tentative view, subject to the results of this Consultation, that the scope of Article 1(4) can be narrowed to reduce filing requirements without compromising the effective regulation of conglomerate mergers in Jersey. The JCRA's proposed amendments focus on Article 1(4) because, to date, approximately 79% of the mergers or acquisitions that have been notified to the JCRA under the Order have done so, in part at least, under this Article.
9. In this Consultation the JCRA proposes two amendments to the Order, which would create two exemptions to Article 1(4). These proposed amendments are detailed in Annex B to this Consultation and discussed below. These proposed amendments would exempt some, but not all, of the mergers and acquisitions that to date have been notified to the JCRA under Article 1(4). The JCRA also would endeavour to keep the mergers and acquisitions notified to it under review, and potentially propose further amendments to the Order if warranted.

Proposed Amendments to Article 1(4) of the Order

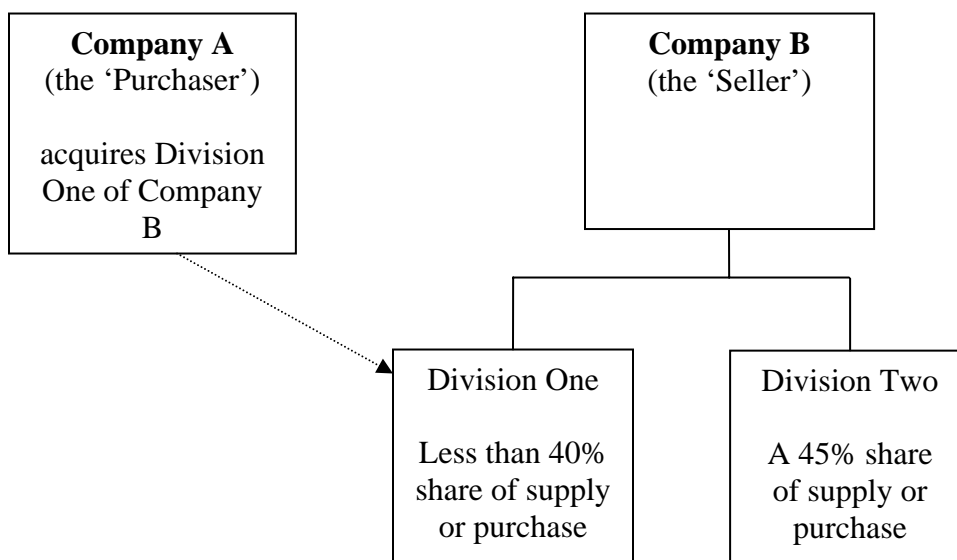
A. Undertakings outside this Jurisdiction

10. The first proposed amendment (the addition of Article 1(4)(a) to the Order) introduces an exemption to the requirement for prior JCRA approval in relation to conglomerate mergers, in situations where the undertaking being acquired:
 - a) has no existing share of the supply or purchase of goods or services of any description supplied to, or purchased by, persons in Jersey; and
 - b) does not own or control any tangible or intangible assets located in Jersey.
11. This exemption is illustrated by the following example:

JerseyCo, which has a 45% share of the supply of bicycles in Jersey, proposes to acquire an undertaking in China, which has a 2% share of the supply of bicycles in China (but which has no existing share of the supply of bicycles in Jersey, nor does it have any assets located in Jersey).
12. Because JerseyCo has an existing share of supply of 40% or more in Jersey, its proposed acquisition of a company located in China currently would require notification to, and approval by, the JCRA under Article 1(4) of the Order. The introduction of Article 1(4)(a) would remove the requirement for prior JCRA approval in this instance.

B. Part of an Undertaking with less than 40% share of supply or purchase

13. The second proposed amendment (the addition of Article 1(4)(b) to the Order) introduces an exemption to the requirement for prior JCRA approval in relation to conglomerate mergers, in situations where the seller is selling part of its business and that part does not have a 40% share of supply or purchase in any product or service (however, another part of the seller's business, not subject to the merger, does have a 40% share of supply or purchase in any product or service). This exemption is illustrated by the following diagram:



14. By way of example, the following proposed acquisition would require prior JCRA approval, pursuant to the Order as currently drafted:

Company A, proposes to acquire part (i.e., Division One) of Company B. The combination of Company A with Division One of Company B would not create or enhance a 25% or more share of supply or purchase in Jersey (i.e., is not a horizontal merger requiring reporting under Article 1(1) of the Order), or otherwise be subject to Article 1(2) of the Order (i.e., it is not a vertical merger). Through Division Two, Company B has a 45% share of the supply in the provision of a good or service in Jersey; however, Division Two is not subject to the proposed acquisition.

15. Because of Division Two's 45% share of supply, Company A's acquisition of Division One from Company B currently would require notification to, and approval by, the JCRA under Article 1(4) of the Order. The introduction of Article 1(4)(b) would remove the requirement for prior JCRA approval in this instance, if

there are otherwise no ancillary restraints (such as non-competition agreements) between Company A and Company B concerning the acquisition.

Questions for Discussion

16. This Consultation Paper invites:

- a) comments on the proposed amendments to the Order (see Annex B); and
- b) any other suggested amendments to the Order.

Request for Submissions

The JCRA welcomes responses from all interested parties to this Consultation. Responses should be made to the JCRA no later than **5pm on 1 July 2009**. Submissions may be supplied either in hard copy or electronically and should be sent to:

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Jersey Competition Regulatory Authority
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The JCRA reserves the right to publish on its web-site any responses which it receives in relation to this consultation. Any confidential or commercially sensitive information which a stakeholder submits as part of its response should be clearly marked as such, and a non-confidential version of the response should also be submitted.

Finally, please note that it is offense under Article 55 of the Law to knowingly or recklessly provide materially false or misleading information to the JCRA in response to this Consultation.

ANNEX A

CURRENT VERSION OF THE ORDER

COMPETITION (MERGERS AND ACQUISITIONS) (JERSEY) ORDER 2005

THE ECONOMIC DEVELOPMENT COMMITTEE, in pursuance of Article 20(3) of the Competition (Jersey) Law 2005 and after consulting the Jersey Competition Regulatory Authority, orders as follows

1 Mergers and acquisitions to which Article 20(1) of the Competition (Jersey) Law 2005 applies

- (1) A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if its execution would –
 - (a) create an undertaking with a share of 25% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey; or
 - (b) enhance such a share held by an undertaking.
- (2) A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if –
 - (a) one or more of the undertakings involved in the proposed merger or acquisition has an existing share of 25% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey; and
 - (b) another undertaking involved in the proposed merger or acquisition is active in the supply or purchase of goods or services of any description that are upstream or downstream of those goods or services in which that 25% share is held.
- (3) Paragraph (2) has effect irrespective of whether –
 - (a) the supply or purchase mentioned in paragraph (2)(b) is to or from persons in Jersey; or
 - (b) there is an existing supply or purchase relationship between the parties to the proposed merger or acquisition.

- (4) A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if one or more of the parties to the proposed merger or acquisition has an existing share of 40% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey.
- (5) To determine whether a condition specified in this Article is met in respect of a proposed merger or acquisition –
 - (a) any appropriate description of goods or services may be adopted;
 - (b) a reference to goods or services of any description that are the subject of different forms of supply is to be construed as a reference to any of those forms of supply taken separately, together, or in groups; and
 - (c) any appropriate criterion (whether as to value, cost, price, quantity, capacity, number of workers employed or some other criterion, of whatever nature), or any combination of criteria may be applied.

2 Citation

This Order may be cited as the Competition (Mergers and Acquisitions) (Jersey) Order 2005.

ANNEX B

PROPOSED AMENDMENTS TO THE ORDER

COMPETITION (MERGERS AND ACQUISITIONS) (JERSEY) ORDER 2005

THE ECONOMIC DEVELOPMENT COMMITTEE, in pursuance of Article 20(3) of the Competition (Jersey) Law 2005 and after consulting the Jersey Competition Regulatory Authority, orders as follows

1 Mergers and acquisitions to which Article 20(1) of the Competition (Jersey) Law 2005 applies

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 - (a) create an undertaking with a share of 25% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey; or
 - (b) enhance such a share held by an undertaking.
- (2) A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if –
 - (a) one or more of the undertakings involved in the proposed merger or acquisition has an existing share of 25% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey; and
 - (b) another undertaking involved in the proposed merger or acquisition is active in the supply or purchase of goods or services of any description that are upstream or downstream of those goods or services in which that 25% share is held.
- (3) Paragraph (2) has effect irrespective of whether –
 - (a) the supply or purchase mentioned in paragraph (2)(b) is to or from persons in Jersey; or
 - (b) there is an existing supply or purchase relationship between the parties to the proposed merger or acquisition.

- (4) A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if one or more of the parties to the proposed merger or acquisition has an existing share of 40% or more of the supply or purchase of goods or services of any description supplied to or purchased from persons in Jersey; unless
- (a) the undertaking or undertakings being acquired has or have no existing share of the supply or purchase of goods or services of any description supplied to, or purchased by, persons in Jersey, and otherwise own(s) or control(s) no tangible or intangible assets located in Jersey; or
- (b) as regards the seller only, the 40% share of supply or purchase is not subject to the proposed merger or acquisition, and there are no ancillary restraints between the parties concerning the proposed merger or acquisition.
- (5) To determine whether a condition specified in this Article is met in respect of a proposed merger or acquisition –
- (a) any appropriate description of goods or services may be adopted;
 - (b) a reference to goods or services of any description that are the subject of different forms of supply is to be construed as a reference to any of those forms of supply taken separately, together, or in groups; and
 - (c) any appropriate criterion (whether as to value, cost, price, quantity, capacity, number of workers employed or some other criterion, of whatever nature), or any combination of criteria may be applied.

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