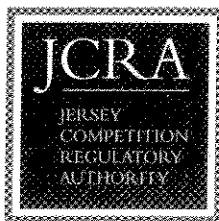


Ref: C442/09

25 August 2009



Senator Alan Maclean
Minister for Economic Development
Economic Development Department
Jubilee Wharf
24 Esplanade
St Helier
JE1 1BB

Dear Alan

Proposed Amendments to Merger Thresholds – Competition (Mergers and Acquisitions) (Jersey) Order 2005

In this letter, the Jersey Competition Regulatory Authority (the 'JCRA') proposes two amendments to the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the 'Order'). The purpose of these proposed amendments is to reduce the number of mergers and acquisitions that require notification to, and approval by, the JCRA under Article 20(1) of the Competition (Jersey) Law 2005 (the 'Law'), and thus reduce regulatory compliance burdens in Jersey. The details of these proposed amendments are set out below.

Legal Framework

Article 20(1) of the Law requires that certain mergers and acquisitions receive the JCRA's approval prior to their execution. The type of mergers and acquisitions that require notification to, and approval by, the JCRA, are detailed in the Order. Under Article 20(3) of the Law, the contents of the Order are within your discretion as the Minister for Economic Development, after consultation with the JCRA.

The JCRA's Procedure Concerning this Matter

In accordance with the JCRA's Aims and Objectives for 2009, the JCRA published a Consultation Paper on 1 June 2009 setting out proposed amendments to the merger filing thresholds presently contained in the Order. A copy of this Consultation Paper is attached as Exhibit 1. The consultation period closed on 1 July 2009. As explained in this Consultation Paper, the goal of the proposed amendments was 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 intention of prohibiting those mergers and acquisitions which would substantially lessen competition in Jersey or any part thereof.

The JCRA received three responses to the Consultation Paper: from Mourant, Ogier and The Jersey Chamber of Commerce. Copies of these responses are attached as

JERSEY COMPETITION REGULATORY AUTHORITY

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Exhibit 2. Subsequently, the JCRA met with representatives from Mourant and Ogier on 8 July to discuss their respective comments.

The Proposed Amendments to the Order

Based on the Consultation Paper and the comments received thereto, we propose two amendments to the Order. Both concern Article 1(4) of the Order, which currently provides:

*'A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the [Law] 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.'*¹

The proposed amendments would create two exemptions to Article 1(4):

- The first (proposed Article 1(4)(a)) would create an exemption in situations where the undertaking being acquired has no existing share of supply or purchase of goods or services in Jersey, and does not own or control any tangible or intangible assets located in Jersey.
- The second (proposed Article 1(4)(b)) would create an exemption in situations where the seller may have a 40% share of supply or purchase in a product or service in Jersey, but that 40% share of supply is not subject to the merger or acquisition.

Taken together, the addition of proposed Articles 1(4)(a) and 1(4)(b) would result in Article 1(4) of the Order reading as follows:

'A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the [Law] 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 provided that any non-competition, non-solicitation or confidentiality clauses included therein do not exceed a period of*

¹ We have focused on Article 1(4) of the Order because, as explained in the Consultation Paper, a large majority of mergers and acquisitions that have been reported to the JCRA since the Law first came into effect on 1 May 2005 have done so, at least in part, under this specific threshold.

three years and are strictly limited to the products or services supplied by the undertaking being acquired.'

A copy of the proposed Order as amended is attached as Exhibit 3.

Reasoning Behind the Proposed Amendments

A. Proposed Article 1(4)(a)

Proposed Article 1(4)(a) would exempt the acquisition of undertakings located outside of Jersey, and with no Jersey assets or sales, by undertakings with a current 40% share of supply or purchase in Jersey.

You may notice that this proposal is the same as that contained in the Consultation Paper. In its response to the Consultation Paper, Mourant suggested that this exemption be broadened by removing the caveat that the acquired company not own or control tangible or intangible assets located in Jersey. In our subsequent meeting on 8 July, Ogier also expressed support for this idea.

We have carefully considered Mourant's suggestion and the reasoning behind it; however, we would not recommend adopting it at this time. As stated above, the central goal of this process is to reduce compliance burdens without compromising the Law's intention of prohibiting those mergers and acquisitions which would substantially lessen competition in Jersey or any part thereof. We can envisage potential scenarios where the acquisition of a company with no current sales in Jersey, but with assets located in this jurisdiction, could raise potential competitive concerns. For example, Colt Telecom (Jersey) Limited currently has no sales in Jersey, but owns a licence for 3G Spectrum issued by Ofcom. A proposed acquisition of Colt by one of the three current mobile telecommunications providers in Jersey therefore could raise competitive concerns. Under the proposed Article 1(4)(a) in the Consultation Paper such an acquisition still would require JCRA approval; whereas under the Mourant proposal it would not. Other similar examples could be the acquisition of undertakings that hold intellectual property rights in Jersey, J Category Licences or Regulations of Undertakings permits, or leaseholds or real property rights, but have yet to commence their business operations.

Thus, on balance, we recommend the adoption of Article 1(4)(a) as originally proposed in the Consultation Paper and as set out in this letter. We would endeavour to keep the number of mergers and acquisitions reported to the JCRA under Article 1(4) under review, and propose further changes later if warranted.

B. Proposed Article 1(4)(b)

Proposed Article 1(4)(b) would exempt a merger or acquisition from reporting in situations where the seller may have a 40% share of supply or purchase in a product or service, but that 40% share of supply is not subject to the merger or acquisition.

You may notice that our current proposal for this exemption differs from the one we originally proposed in the Consultation Paper. As originally proposed, for this exemption to apply there must have been 'no ancillary restraints between the parties concerning the proposed merger or acquisition.' An 'ancillary restraint' is an

agreement associated with the proposed merger or acquisition that may restrict competition between the buyer and seller after the transaction is concluded. A typical example is a non-competition clause, i.e., an agreement by the seller not to compete in an identified market for a given period of time after the merger or acquisition.

In their consultation responses, both Ogier and Mourant suggested that this requirement was overbroad. Both argued that most mergers or acquisitions would contain ancillary restraints, and a majority of these would have little to no effect on competition. Thus, by disqualifying the exemption on the basis of any ancillary restraints, both Ogier and Mourant argued that the exemption as originally proposed would have little practical effect.

Upon further consideration of this question in light of these responses, we largely agree. We have therefore made this requirement more specific: mandating that for the exemption to apply, ‘any non-competition, non-solicitation or confidentiality clauses included therein do not exceed a period of three years and are strictly limited to the products or services supplied by the undertaking being acquired.’ The revised language limits the restriction to particular non-competition clauses only (not all ancillary restraints) and places a three year limitation on them. This proposed three year limitation is based on the maximum period allowed for non-competition clauses under relevant EC guidelines.² This change was presented to and discussed with Ogier and Mourant during our meeting on 8 July.

It is important to note that this restriction would not create an absolute prohibition to potentially longer non-competition periods between buyers and sellers for these type of mergers or acquisitions – they simply would not qualify for the exemption and would require notification to, and approval by, the JCRA under the Law (as they do currently). This point would be made clear in our Mergers and Acquisition Guidelines, should this amendment be included in the Order.

We therefore recommend the incorporation of proposed Article 1(4)(b). As stated above with respect to proposed Article 1(4)(a), we would endeavour to keep the number of mergers and acquisitions reported to the JCRA under Article 1(4) under review, and propose further changes later if warranted.

A Note on the Chamber’s Response

In its response to the Consultation, The Jersey Chamber of Commerce expresses its strong support for the proposed amendments to the Order. The Chamber also suggests ‘that the proposed wording of the new Article 1(4)(b) could be made a little clearer, as without the explanation and example set out in the consultation paper, its precise intent might be a little difficult to ascertain.’

As discussed above, we have changed the proposed wording of Article 1(4)(b) as a result of other comments received. The new wording makes Article 1(4)(b) clearer and more precise. Furthermore, as the Chamber suggests, we intend to give a detailed

² See *Commission Notice on restrictions directly related and necessary to concentrations*, O.J. C 56/03 (5 March 2005). Article 60 of the Law requires that, so far as possible, matters arising under the Law in Jersey are treated in a manner that is consistent with the treatment of corresponding questions arising under competition law in the European Union.

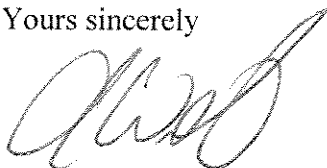
explanation of Article 1(4)(b) (and Article 1(4)(a)) in our revised Mergers and Acquisitions Guidelines, should these amendments be adopted.

Conclusion

Based on the reasoning set out above, we recommend that the Order be amended by including proposed Articles 1(4)(a) and 1(4)(b). Based on the broad support expressed by all consultees for these amendments, we would suggest that they be incorporated as soon as reasonably possible. We would be pleased to provide further assistance to this process if needed.

Please note that as required by Article 20(4) of the Law, the JCRA will publish a copy of this advice on its website. I would be pleased to answer any queries you may have on this matter.

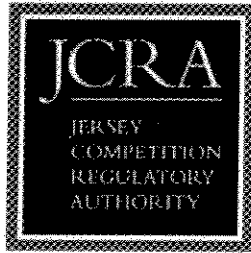
Yours sincerely

A handwritten signature in black ink, appearing to read 'CW', written in a cursive style.

Chuck Webb
Executive Director

Attachments

EXHIBIT 1



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

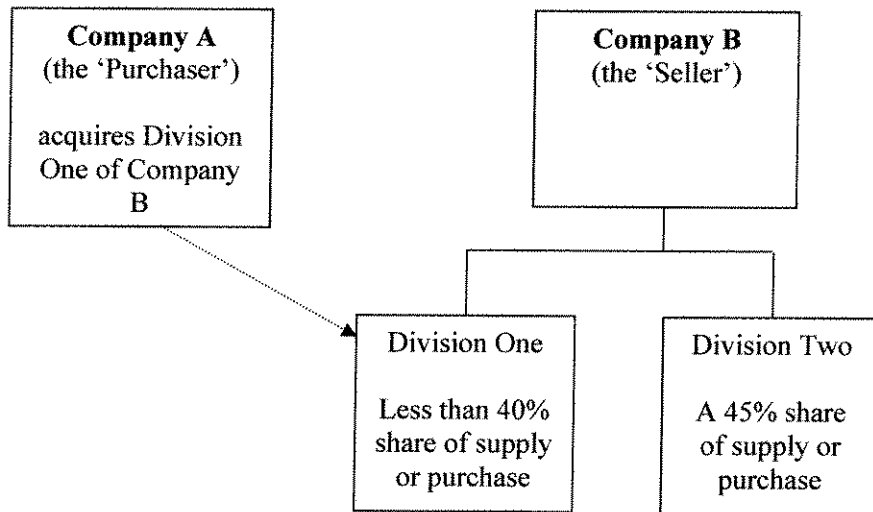
A. Undertakings outside this Jurisdiction

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:

Elaine Kelly
Competition Case Officer
Jersey Competition Regulatory Authority
2nd Floor, Salisbury House
1-9 Union Street
St. Helier, Jersey
JE2 3RF

E-mail: e.kelly@jcra.je
Fax: +44 (0) 1534 514995

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

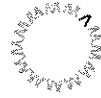
- (1) A merger or acquisition is a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if its execution would –
 - (a) create an undertaking with a share of 25% or more of the supply or purchase of goods or services of any description supplied to or purchased 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; *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.

2 Citation

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

EXHIBIT 2



Mourant

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Private and Confidential

Ms E Kelly
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JE2 3RF

22 June 2009

Your ref:
Our ref: 2021930/SHAXM/MdFJ/1978461/2

RECEIVED
24 JUN 2009

Dear Elaine

Consultation on Proposed Amendments to Merger Thresholds

I am writing with reference to the Jersey Competition Regulatory Authority's ("JCRA") Consultation Paper dated 1 June 2009 in which it set out proposed amendments to the merger thresholds presently contained in the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the "**Order**").

We welcome the proposals from the JCRA to reduce the number of mergers or acquisitions that require notification to and approval by the JCRA, as well as its recent announcement of a revised fee structure for transactions which are referred to it.

In terms of the proposed amendments to the merger thresholds as set out in Article 1(4) of the Order, we have the following comments:-

1) **Acquisition of Undertakings Outside Jersey**

We agree with the need to exclude from the merger criteria transactions by a Jersey entity which involve the acquisition of an undertaking in another jurisdiction which has no share of supply or purchase of goods or services in Jersey. Firstly, it does not seem appropriate that the JCRA's authority should extend to transactions which have no foreseeable impact on competition in Jersey as they affect only another jurisdiction and secondly, in our view, the majority of the sanctions which apply under the Competition (Jersey) Law 2005 (the "**Law**") for breach of Article 20 of the Law would appear to have very limited impact in the context of a foreign acquisition.

In terms of the specific drafting of the proposed exemption, however, we do not agree that it should be a condition of the exemption that the target business should neither own nor control tangible or intangible assets located in the Island. It appears to us that the key point to be considered is whether the target conducts business operations and has any share of supply or purchase of any goods or services in Jersey.

The fact that the undertaking in question may own an asset (for example, a bank account) in Jersey should not, of itself, increase any potentially anti-competitive effect of the transaction. Indeed, this provision could, in some cases, make the exemption sufficiently ambiguous that it becomes ineffective in relation to some transactions. For example, if a Jersey business decides to buy a business which operates and has customers only in the United Kingdom or mainland Europe and does not provide or purchase any goods or services in Jersey, there would appear to be no reason why this transaction should be

caught by the Order, even if the purchaser has a 40% share of supply of any goods or services in Jersey. If, however, the target business owns an asset such as a small private plane which is used by the directors of the target business in the United Kingdom or Europe but which is registered in Jersey, the target's ownership of that one asset would mean that the exemption would not be available to this transaction.

We suggest, therefore, that the wording at the end of the proposed amendment to Article 1(4)(a) reading "and otherwise owns no tangible or intangible assets located in Jersey" should be deleted.

2) **Sale of an Undertaking with Less than a 40% Share of Supply or Purchase**

We also agree with the JCRA's proposal that a sale by a business, which has a 40% or more share of supply in respect of certain products or services, of a discrete part of its business which has a share of supply of less than 40%, should be exempt from the requirement to obtain JCRA approval.

This firm has been involved in several transactions where JCRA approval has been required only because the vendor has had a 40% share of supply in its retained business but neither the purchaser nor the target had significant shares of supply and the transaction did not create any concentration issues under either Article 1(1) or 1(2) of the Order. It is difficult to see circumstances in which the vendor's shares of supply are relevant to future competition in the Island in such circumstances and our understanding is that most jurisdictions with merger control rules focus only on the position or market shares of the purchaser and the target undertaking and not on those of the vendor. This exemption is, therefore, very welcome.

Again, however, the qualification to the exemption, that there be no "ancillary restraints" between the parties concerning the proposed merger or acquisition, means that this exemption will, in the vast majority of cases, not be available and will render the exemption virtually worthless in practice.

In our experience it would be extremely rare for a purchaser to buy a business from a vendor which continues to have business operations in the jurisdiction without seeking a degree of protection for the goodwill of its customers and the target business by some form of protective covenant from the vendor, for example, requiring the vendor not to compete with the target business for a short period, not to solicit its customers and not to solicit its employees.

The European Commission accepts that non-competition obligations which are imposed on the vendor in the context of a transfer of an undertaking or of part of it can be directly related and necessary to the implementation of the relevant transaction and that, in order to obtain the full value of the assets transferred, the purchaser must be able to benefit from some protection against competition from the vendor in order to gain the loyalty of customers and to assimilate and exploit the knowhow. Such non-competition clauses are not only directly related to the concentration but are also necessary to its implementation because, without them, there would be reasonable grounds to expect that the sale of the undertaking or a part of it could not be accomplished (OJ/C56/24, 5.3.2005). The Commission accepts that non-competition clauses may be justifiable for periods of between two and three years.

The qualification to the proposed exemption would deny a purchaser the ability to seek any form of covenant from the vendor if it wished to rely on the exemption. We would expect that most purchasers would rather require some form of protective covenant and seek the JCRA's approval under Article 1(4) than proceed with no protective covenant at all. It appears to us that the proposed exemption as drafted would not be consistent with the treatment afforded to ancillary restraints in Europe, as required by Article 60 of the Law.

If, as set out above, it is accepted that the vendor's share of supply is largely irrelevant to future competition and any ancillary restraints are within the terms of the Commission's

Page 3
Ms E Kelly
22 June 2009

guidance referred to above, we believe that there is no reason to include this qualification in the exemption and it should be deleted.

One alternative to exemption (b) would be to delete paragraph (b) in its entirety and to amend Article 1(4) itself to read as follows:

"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 either the purchaser or the undertaking(s) which is the subject of the proposed merger or acquisition has an existing share of 40% or more of the supply or purchaser of goods or services of any description supplied to or purchased from persons in Jersey."

Exemption (a) as discussed above would still be required.

We trust that the foregoing comments are helpful and would be very happy to meet with you to discuss in more detail if you would find that useful.

With kind regards.

Yours sincerely
For and on behalf of Mourant du Feu & Jeune



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The Jersey Chamber of Commerce

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Elaine Kelly

Competition Case Officer
JCRA
2nd Floor Salisbury House
1 – 9 Union Street
St. Helier
JE2 3RF

RECEIVED
02 JUL 2009

1st July 2009

Dear Ms. Kelly,

Proposed amendments to merger thresholds

The Chamber of Commerce would like to congratulate JCRA for proposing these amendments to the Law. The changes are welcomed as they should reduce the compliance burden by excluding certain mergers and acquisitions which are unlikely to have any effect on competition in Jersey from the current notification and approval requirements.

This recognition by JCRA of the burden placed on businesses with regard to compliance and the introduction of sliding scale fees for the preliminary merger assessment will have beneficial results for businesses, in particular for small businesses. However, whilst Chamber supports the amendments, it is hoped that the proposal is the first step to waiving charges altogether for small businesses.

I would like to suggest that the proposed wording of the new Article 1(4)(b) could be made a little clearer, as without the explanation and example set out in the consultation paper, its precise intent might be a little difficult to ascertain.

Yours sincerely,

Ray Shead
President



Direct line: + 44 1534 504205
Direct Email: sara.johns@ogier.com

Reference: MSY/SKJ/BISHC
Your reference:

30 June 2009

RECEIVED
30 JUN 2009

BY HAND

Miss Elaine Kelly
Competition Case Officer
Jersey Competition Regulatory Authority
2nd Floor, Salisbury House
1-9 Union Street
St Helier
Jersey JE2 3RF

Dear Miss Kelly

Consultation in relation to Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the "Order")

I am writing in response to your request for submissions in relation to the JCRA's proposals to amend the Order, as referred to in the paper entitled "Consultation on Proposed Amendments to Merger Thresholds" dated 1 June 2009 (the "**Consultation Paper**").

Whilst we generally endorse the amendments to the Order suggested in the Consultation Paper, we question whether the proposed new Article 1(4)(b) of the Order should be qualified by reference to there being "no ancillary restraints between the parties concerning the proposed merger or acquisition".

In our view, the qualification of proposed new Article 1(4)(b) by reference to ancillary restraints could potentially restrict the usefulness of the exemption because, under Article 1(4)(b) as presently drafted, the parties would - where an ancillary restraint is being considered - still be required to make an application for JCRA approval under the Order even though a seller's 40% share of supply or purchase is unrelated to the proposed merger or acquisition. We

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**Consultation in relation to Competition (Mergers and Acquisitions) (Jersey) Order 2005
(the "Order")**

suggest, therefore, that the qualification be removed from draft Article 1(4)(b) in order to help achieve the JCRA's stated objective of narrowing to any significant degree the number of mergers and acquisitions that are subject to the Order. Ancillary restraints would then fall to be considered as a separate and distinct matter.

We appreciate the opportunity to comment in relation to the JCRA's proposals and look forward to the outcome of the Consultation in due course.

Yours sincerely



Sara Johns

EXHIBIT 3

EXHIBIT 3

PROPOSED AMENDMENTS TO THE ORDER

COMPETITION (MERGERS AND ACQUISITIONS) (JERSEY) ORDER 2009
THE MINISTER FOR ECONOMIC DEVELOPMENT, 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; 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 provided that any non-competition, non-solicitation or confidentiality clauses included therein do not exceed a period of three years and are strictly limited to the products or services supplied by the undertaking being acquired.
- (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 2009.