



Jersey Competition Regulatory Authority

Competition (Mergers and Acquisitions) (Jersey) Order 2010

**A Consultation on Proposed Amendments to the Merger
Thresholds**

12 May 2011

Introduction and Executive Summary

1. In this Consultation Paper, the Jersey Competition Regulatory Authority (the “**JCRA**”) proposes certain amendments to the Mergers and Acquisition (Jersey) Order 2010 (the “**Order**”). The Order prescribes the types of mergers and 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 (a mandatory notification regime).
2. Jersey will continue to operate a mandatory notification regime, not least because it is enshrined in the Law and helps to ensure that in a small jurisdiction such as Jersey, the JCRA can assess the potential for a substantial lessening of competition, as a result of a merger or acquisition, before it negatively impacts on the local economy.
3. The purpose of the amendments proposed in this Consultation Paper is to change the type of mergers and acquisitions that are subject to the Order and, consequently, enable the JCRA to concentrate its resources on those mergers and acquisitions that have the greatest likelihood of substantially lessening competition in Jersey. In setting merger thresholds, an appropriate balance must be struck between capturing those mergers that present a material risk of substantially lessening competition in Jersey, and minimising the requirement to notify from those that do not. This takes on a greater level of importance for an island jurisdiction such as Jersey where a small competition authority has more limited resources.
4. Another aim of these proposed amendments is to make it easier for merged parties to know if they should notify, without compromising the Law’s goal of prohibiting those mergers and acquisitions that would substantially lessen competition in Jersey.
5. The Order’s content is within the discretion of Jersey’s Minister for Economic Development (the “**Minister**”), upon consultation with the JCRA. This Consultation will inform the JCRA’s advice to the Minister. The ultimate decision on whether or not to amend the Order and, if so, in what form, remains with the Minister.

Background

6. The Order requires that 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 contains a copy of the current Order.
7. The Order currently sets out three categories of potential applicability: horizontal mergers or acquisitions (Article 1(1)); vertical mergers or acquisitions (Article 1(2)) and conglomerate mergers or acquisitions (Article 1(4)).

8. As detailed below, the JCRA proposes abolishing the current share of supply test and instead introduce a combined turnover and asset test. The rationale for this change follows a comprehensive review of international best practice and merger notification regimes in other jurisdictions, including small island economies. The JCRA is of the view, subject to the results of this Consultation, that adopting a combined local turnover and asset test can best capture the mergers and acquisitions with the greatest likelihood of substantially lessening competition in Jersey.

Proposed amendments to the Order

A. Local Turnover

9. The current practice in Jersey of using a share of supply test is not consistent with International Competition Network (“ICN”) best practice. The ICN advocates a preference for other options to the share of supply or market test and best practice guidelines¹ state that merger notification thresholds should apply only to transactions with a material nexus in the reviewing jurisdiction, based on objectively quantifiable criteria such as assets or turnover that reflect domestic activity. The ICN regards market share based tests as not objectively quantifiable or appropriate in making the initial determination as to whether a transaction is notifiable. Further, a test based on turnover is considered more appropriate to a mandatory notification regime. The recently published consultation paper from the UK Department for Business, Innovation & Skills² stated
‘A test based on turnover is commonly used worldwide and is considered to be objective and appropriate to a mandatory notification regime. In contrast, a share of supply test is viewed as less appropriate as it is more subjective.’
10. Therefore, the JCRA considers that adopting a turnover test ensures compliance with current international best practice is more appropriate for a mandatory filing regime such as Jersey and addresses the issues in relation to an absence of objectively quantifiable criteria, making it easier for merged parties to know if they should notify.
11. In reaching a local turnover figure, consideration has been given to the local turnover of parties involved in mergers and acquisitions that were notified to the JCRA between January 2009 – January 2011 and the type of mergers and acquisitions that would be captured below the proposed turnover figure specified below. In reaching this figure, the JCRA has also examined turnover figures in other jurisdictions that have mandatory filing regimes. (See Annexes B and C)
12. A turnover threshold offers to some extent a proxy for the significance of a merger or acquisition to the Jersey economy. Given this, there is an argument that the total local turnover of all the parties involved in a merger or acquisition is the appropriate approach for Jersey and a local turnover threshold should therefore take account of

¹ ICN Recommended Practice for Merger Notification and Review Procedures.

² Department for Business Innovation & Skills (March 2011) A Competition Regime for Growth: A Consultation on Options for Reform.

this. The level of publicly available information on which to assess an appropriate turnover threshold for Jersey is limited. However, it is anticipated that the smallest Jersey businesses, measured by the number of employees, do not present a material threat to competition since the entry barriers for such businesses are generally expected to be low. The merit of setting a turnover threshold at a level that captures mergers and acquisitions that involve such businesses is therefore not apparent.

13. The JCRA has been involved in considering mergers in Jersey for several years and has acquired its own database of confidential information. This source provides the best available indicator as to the appropriate turnover threshold, given the objectives set out in the introduction to this paper.

14. The JCRA's provisional view therefore is that a merger or acquisition should be notifiable:

where, in the most recent financial year, total turnover in Jersey of all of the undertakings involved in the merger or acquisition is at least £2 million.

15. The proposed figure of £2 million is based on an examination of the JCRA's own database of confidential information. However, a limiting factor in calculating the proposed turnover figure of all the parties is that assumptions have to be made. For example, the JCRA have assumed that the acquired party is in general the smaller of the two parties in such transactions and as such the turnover of the acquiring business is likely to be higher than that of the acquired business. From the information available to the JCRA to date, proposing a local turnover threshold of £2 million appears to allow the JCRA to capture the mergers and acquisitions that have the greatest likelihood of substantially lessening competition in Jersey and provides an initial figure on which to solicit views.

16. Where respondents have information that might further contribute to informing the appropriate level of the turnover threshold, the JCRA would particularly welcome receiving such data.

B. Local Assets

17. It is the case that even a relatively high turnover threshold would still capture many international mergers, the parties to which often generate a turnover locally but have no active local presence, selling into Jersey through independent agents, and the risk to competition in Jersey is often negligible. Further, in terms of resolving any competition issues that may arise, international mergers are generally assessed by the competition authorities in large jurisdictions, who may be a more appropriate forum than the JCRA. Given the level of resources available to the JCRA it is important to ensure that resources are focused on those mergers with the greatest likelihood of substantially lessening competition in Jersey. The JCRA is therefore considering introducing an additional 'asset test' to the notification threshold. This is regarded as necessary, in conjunction with a local turnover test, in order to negate capturing mergers and acquisitions that do have a large local turnover but no material impact on

the level of competition in the Island's economy. The JCRA's initial thoughts on how this could be achieved are detailed as follows. A merger or acquisition will be notifiable if, in addition to meeting the turnover threshold detailed above, in the most recent financial year, one or more of the parties had

- a) an undertaking where employees work in Jersey; or
- b) a registered subsidiary, representative or branch office in Jersey; or
- c) parties to the merger hold a level of influence over local agents or facilities that equate to a local asset³.

18. Consideration is also being given to the need to ensure that the JCRA can assess mergers and acquisitions involving services that have to be delivered on the Island, where any such activity could result in a substantial lessening of competition, but which may not be captured by the thresholds being proposed. Comments on this proposal and suggestions, in relation to the services that may meet this criterion, are welcomed.

19. Concerns may also arise in respect of mergers which, though small in scale, take place in sectors with some importance to the wider Jersey economy, possibly due to specialist skills or other features. The JCRA would welcome views on the extent to which such concerns exist and, if so, how they might inform the setting of merger notification thresholds.

20. It is proposed to introduce two merger threshold criteria that parties will have to consider, but it is also the case that the parties to a merger or acquisition need only fail to meet either the turnover or asset test to negate notifying. Assessing the test with the most readily available information may therefore assist parties in identifying more quickly those mergers where notification is not necessary.

21. Comments on the merits, as well as the practical implications, of these notification criteria are welcomed.

C. Exemptions

22. Given the nature of the Jersey market and, in particular, given the role of financial services in the local economy, the JCRA is also proposing that certain types of transactions are exempted from notification, given they are unlikely to raise competitive concerns. The exemptions provided for in other jurisdictions include:

- Where credit institutions, financial institutions or insurance companies acquire shares in another company for the purpose of resale where voting rights are not exercised and resale occurs within one year.
- Asset securitisation transactions.
- A transfer of assets occurs within the same group.

³ A level of influence would include those agreements where a party has the ability to control decisions i.e. a party holding a blocking minority would be considered to exert control. Long-term exclusivity arrangements, whether involving access or rights to storage or distribution facilities, are examples of such arrangements.

23. The JCRA would welcome comments on the type of exemptions that might be considered reasonable, without compromising the Law's goal of prohibiting those mergers and acquisitions which would substantially lessen competition in Jersey or any part thereof.

Questions for Discussion

24. This Consultation Paper invites:

- a) Comments on the proposed amendments to the Order i.e. both adopting a local turnover and asset test and the turnover figure itself.
- b) Comments on the proposal that the JCRA assess mergers and acquisitions involving essential services which may not be captured by the thresholds being proposed and the services that may meet this criterion.
- c) Comments on the type of exemptions that might be considered reasonable.
- d) Any other suggested amendments to the Order. In this instance the JCRA may wish to revert to discuss further.

Requests for Submissions

The JCRA welcomes responses from all interested parties. The JCRA would also be happy to meet with respondents if it was felt that this would help them in considering their response. Submissions can be made in either hard copy or electronically and should be sent to the JCRA no later than **4pm on Wednesday 22 June 2011** for the attention of:

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

E mail: k.norris@jcra.je
Fax: +44 (0)1534 514995

The JCRA reserves the right to publish on its website any responses which it receives in relation to this consultation. Any confidential or commercially sensitive information which is submitted as part of a response should be clearly marked as such and a non-confidential version of the response should also be submitted.

Please note that it is an offence under Article 55 of the Law to knowingly or recklessly provide materially false or misleading information to the JCRA.

Annex A

Current Version of the Order

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. Interpretation

To determine for the purposes of this Order whether a specified condition 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 criterions, of whatever nature), or any combination of criteria may be applied.

2. Horizontal mergers or acquisitions

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.

3. Vertical mergers or acquisitions

(1) A merger or acquisition is a merger or acquisition of a type to which Article 20(1) or 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.

(2) Paragraph (2) has effect irrespective of whether -

- (a) the supply or purchase mentioned in paragraph (1)(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. Conglomerate mergers and acquisitions

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 supply or purchase of goods or service of any description supplied to or purchased by persons in Jersey and otherwise owns or controls non-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 and services supplied by the undertaking being acquired.

5. Citation

This Order may be cited as the Competition (Mergers and Acquisitions) (Jersey) Order 2010.

Annex B

Chart of ICN jurisdictions' conforming thresholds (mandatory regimes)⁴

Jurisdiction	2006 Total GDP (EUR <u>billions</u>) ⁵	Turnover Local Threshold Amount (each of 2/target) (in EUR <u>millions</u>)	Assets Local Threshold Amount (each of 2/target) (in EUR <u>millions</u>)
Belgium	312.2	40	
Croatia	34.0	3.5	
Canada	996.7	34.6	
Denmark	219.2	40.2	
EFTA	562.7	100.0	
Estonia	13.1	1.9	
European Union	11569.9	100.0	
Finland	166.8	20.0	
France	1,776.6	50	
Hungary	89.9	1.9	
Iceland	12.6	0.6	
Ireland*	177.3	2	
Japan	3456.6	6.8	6.8
Korea	707.3	16.7	25.0
Lithuania	23.7	1.4	
Malta	4.4	0.2	
Mexico	668.4	66.5	31.0
Netherlands	523.7	30	
Norway	247.7	2.5	
Romania	96.9	4.0	
South Africa	203.1	23.4 and 3.5	23.4 and 3.5
Sweden	306.6	10.8	
Switzerland	302.5	63.6	
United States of America	10514.4	50.2	

* One prong of Ireland's two part nexus test does not specify a value, and therefore does not meet the 'materiality' requirement of the recommended practices.

⁴ ICN Merger Working Group (2008) *Setting notification Thresholds for Merger Review: Report to the Annual Conference Kyoto, Japan.*

⁵ Exchange rate calculated at 2006 figures.

Annex C

National turnover requirements of most of the mandatory filing regimes worldwide focusing on aggregate and individual national turnover thresholds

	one company with (in million)	two companies with (in million)		aggregate domestic
Italy	£ 53.4		OR	£ 535.5
Denmark		£ 34.6	AND	£ 438.6
Switzerland		£ 66.9	AND	£ 334.4
Spain		£ 29.0	AND	£ 278.8
China		£ 38.0	AND	£ 190.2
Portugal		£ 2.3	AND	£ 174.2
Belgium		£ 46.5	AND	£ 116.2
Sweden		£ 19.5	AND	£ 97.4
Czech		£ 8.8	AND	£ 53.0
Hungary		£ 1.6	AND	£ 47.2
Austria		£ 5.8	AND	£ 34.8
Latvia		£ 1.8	AND	£ 30.6
Israel		£ 1.7	AND	£ 24.4
Bulgaria		£ 1.3	AND	£ 11.0
Iceland		£ 1.6	AND	£ 10.7
Lithuania		£ 1.2	AND	£ 7.5
Estonia		£ 1.7	AND	£ 5.5
Norway		£ 2.2	AND	£ 5.5
Serbia		£ 0.0	AND	£ 0.2
Ireland				£ 46.5
Slovenia				£ 40.7
Argentina				£ 31.0
Nigeria				£ 20.1
Poland				£ 10.7
Macedonia				£ 2.9
Malta				£ 2.7
Indonesia				£ 0.4
Germany		5.8 + 29		
Taiwan		0.2 + 0.02		
France		£ 58.1		
Greece		£ 58.1		
Netherlands		£ 34.8		
Finland		£ 23.2		
Slovakia		£ 16.3		
Croatia		£ 11.6		
Romania		£ 4.6		
Faroe		£ 0.5		
Canada	£ 256.6			
Brazil	£ 150.4			
United Kingdom	£ 70.0			
Ukraine	£ 0.1			