Jersey Competition Regulatory Authority

Proposed amendments to thresholds for notification and review of mergers and acquisitions -

Decision

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Jersey Competition Regulatory Authority
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A. Introduction and Executive Summary

1. In May 2011, the Jersey Competition Regulatory Authority (the "**JCRA**") consulted on proposed amendments to the *Competition (Mergers and Acquisitions) (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. Eight consultation responses were received. The JCRA has considered those responses, and has reflected further on the issues raised in the Consultation Paper. As a result, it has revised its proposal for changes to the merger control thresholds.

3. The general principles for a revised order are set out in **Annex B** to this paper. In summary, under the thresholds to be recommended by the JCRA to Jersey's Minister for Economic Development (the "**Minister**"), mergers and acquisitions would need to be notified to the JCRA if:

   (a) The combined aggregated annual turnover in Jersey and Guernsey of the undertakings concerned in a transaction (i.e. the purchaser and the target, or all parties to a joint venture) exceeds £5 million; and
   (b) The annual turnover in Jersey of each of at least 2 undertakings concerned exceeds £2 million.

4. A separate deeming provision will address the issue of "creeping acquisitions" (i.e. situations where a party, through a series of small, and seemingly separate, acquisitions, each of which falls below the merger control thresholds, builds up a position of potential market power). The proposed order would also include three exemptions of transactions that rarely give rise to competition concerns.

5. The format of the proposed thresholds – with one limb based on the combined turnover of the parties in the local territory, and the other based on the turnover of each of at least 2 of the parties in the local territory – is used in the merger control regimes in many other jurisdictions. In addition, it was recommended by many of the consultation respondents.

6. By altering the categories of mergers and acquisitions that are subject to notification and review, the JCRA believes that it will be better-placed to concentrate its resources on scrutinising 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.

7. 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.

8. The Order's content is within the discretion of the Minister, upon consultation with the JCRA. This document sets out the advice that the JCRA will provide to the Minister. The ultimate decision on whether or not to amend the Order and, if so, in what form, remains with the Minister.

9. The JCRA wishes to record its sincere thanks to all parties that responded to the Consultation Paper. The responses were of great assistance to the JCRA in reaching this decision.

B. The current Order

10. The Order currently 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 Order.

11. The Order sets out three categories of potential applicability: horizontal mergers or acquisitions (Article 2); vertical mergers or acquisitions (Article 3) and conglomerate mergers or acquisitions (Article 4).

12. 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 moving away from thresholds based on share of supply or market shares, and its Best Practice Guidelines[1] 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 March 2011 consultation paper from the UK Department for Business, Innovation & Skills[2] in relation to reform of the UK's competition regime 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.'*

13. At present, the conglomerate merger threshold in Article 4 of the Order requires notification of essentially any transaction involving a party with a share of supply or purchase in Jersey of more than 40% (unless the target has no activities whatsoever in Jersey). The conglomerate merger threshold is the basis for a majority of the merger notifications made to the JCRA; however, these transactions have rarely given rise to any substantive competition concerns.

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*

C. The Consultation Paper and responses

14. The Consultation Paper on proposed amendments to the merger thresholds was issued by the JCRA on 12 May 2011. The Consultation Paper expressed a provisional view that the Order should be amended so that a merger or acquisition was notifiable if:

    - The total turnover in Jersey of all of the undertakings involved was at least £2 million; and
    - One or more of the parties to the merger or acquisition had:
        - An undertaking where employees work in Jersey;
        - A registered subsidiary, representative or branch office in Jersey; or
        - "a level of influence over local agents or facilities that equate to a local asset".

15. Responses to the Consultation Paper were received from: the European Competition Lawyers Forum (ECLF); Ogier; Jersey Telecom Limited (now JT (Jersey) Limited); Deputy David De Lisle, a member of the States of Deliberation in Guernsey; Baker Botts LLP; Carey Olsen; Mourant Ozannes; and Mr William Kovacic, Vice Chair, Steering Group of the ICN.

16. There were a number of consistent themes in the responses, which are discussed in the paragraphs below.

    Turnover/assets or 'share of supply'?

17. Almost all of the respondents supported the adoption of a threshold based on turnover and/or assets. However, Deputy De Lisle was in favour of the retention of the existing 'share of supply' thresholds, which he considered were simple and practical. He noted that the UK merger control regime used the 'share of supply' concept, and considered that a 'share of supply' test actually avoided the problem of a threshold based on market shares, for which parties would need to engage in the process of market definition in order to identify whether a merger was notifiable. By contrast, he believed that a turnover test would be arbitrary, and, if set at £2m, would exempt transactions involving many small businesses in the Channel Islands, particularly in service sectors, which might allow some markets to be dominated by a few players. He queried whether the current thresholds in fact needed reform, given the low number of merger notifications in Jersey in recent years.

18. Mourant Ozannes noted that calculation of turnover may be more difficult for companies operating in Jersey since, unlike in most other jurisdictions, there is no statutory obligation on Jersey companies to submit or prepare audited accounts. It submitted that if thresholds based on turnover were to be used, detailed rules should be provided as to the calculation of turnover.

19. For the reasons set out in Section D below, the JCRA remains of the view that merger notification thresholds based on turnover are to be preferred. It intends to address the

concern expressed by Mourant Ozannes by setting out detailed rules regarding the calculation of turnover in revised M&A Guidelines, which will draw heavily on the established practice under the European Community Merger Regulation ("**ECMR**"), as outlined in the Commission's *Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*[3] ("**the EC Jurisdictional Notice**"). It will have regard to the concerns expressed by Deputy De Lisle in reviewing the outcomes of the proposed order and considering whether a voluntary merger notification regime would be more appropriate (see paragraphs 29-30 below).

Dual-limb turnover test

20. For those respondents that favoured the use of thresholds based on turnover and assets, there was concern regarding the fact that the thresholds proposed in the Consultation Paper could be satisfied if just one of the parties to the transaction had a presence in Jersey. For example, Jersey Telecom Limited observed that the proposed thresholds would oblige it to notify any merger or acquisition that it was involved in anywhere in the world, regardless of whether any of the other undertakings involved had any presence in Jersey. The ECLF also observed that combined turnover thresholds are now rare in Europe, and are not consistent with international best practice. It noted that the thresholds outlined in the Consultation Paper would "effectively give the JCRA universal jurisdiction to review virtually all deals carried out anywhere in the world by multinational groups present in Jersey". The ICN emphasised that under its recommended practices, a notification obligation should, generally speaking, only be triggered by the domestic turnover or assets of at least two parties to the transaction.

21. The JCRA has taken account of these concerns, and the proposed thresholds do require at least 2 parties to the transaction to have significant turnover (£2m per annum) in Jersey.

22. The ECLF recommended to the JCRA the approach adopted by Malta under its revised merger notification thresholds, whereby each of the undertakings concerned must have turnover in Malta equivalent to at least 10% of the parties' combined turnover in Malta. The JCRA notes this innovative approach; however, it considers that requiring each of the parties to have significant turnover in Jersey will be more effective at ensuring that the transaction has a clear nexus with Jersey.

The assets threshold: "level of influence"

23. There was also general concern regarding the formulation of the assets threshold; in particular, the "level of influence" test, which most respondents considered would be ambiguous and subjective, and "not based on objectively quantifiable criteria", and which they feared would negate the JCRA's stated aim in the Consultation Paper of making it easier for parties to identify whether their transaction needed to be notified

[3] 2008/C 95/01

to the JCRA. Certain parties also expressed concern that parties would find it difficult to identify the extent of any assets located in Jersey.

24. The JCRA has noted these concerns, and removed the asset threshold. It believes that there are better ways of ensuring that transactions have a sufficient local nexus. In the proposed order, there remains a test relating to whether parties "carry on business" in Jersey, but its application is limited to the narrow circumstances in which "creeping acquisitions" might arise.

Definition of "undertakings involved in a merger or acquisition"

25. Mourant Ozannes raised concerns regarding the definition of "undertakings involved in a merger or acquisition". In particular, it submitted that the vendor, guarantors and financial institutions financing the acquisition should be excluded when calculating turnover, for example.

26. As noted below, the JCRA intends to follow closely the well-established rules under the ECMR when determining which undertakings are regarded as being "concerned" in the transaction. Rules on this point are likely to appear in any new order, and would be elaborated upon in revised M&A Guidelines.

Mergers or acquisitions involving "essential" sectors

27. The Consultation Paper considered whether a revised order should endeavour to require notifications of transactions involving certain important sectors, even where the turnover/asset thresholds were not met. Respondents expressed scepticism as to this proposal. Baker Botts LLP noted that the creation of additional, targeted thresholds for particular sectors would increase the order's complexity and would be discriminatory in terms of the industries involved.

28. The JCRA has taken account of these criticisms, and does not intend to propose special notification rules for "essential" sectors.

A voluntary notification regime?

29. The ECLF urged the JCRA to consider whether a voluntary notification regime would be more appropriate for a small, island economy such as Jersey. It submitted that a voluntary regime would be particularly appropriate for transactions involving "pure importers" (i.e. where neither party has material assets in Jersey, but merely generates activity in Jersey through sales), since many of these transactions are unlikely to raise any competition issues. The ECLF considered that a voluntary regime would be more proportionate, and would serve the JCRA's stated aim of focussing its scarce resources on scrutiny of transactions that are most likely to raise competition issues. It also noted that a voluntary regime would allow the JCRA to review mergers that would fall below mandatory notification thresholds but might still pose a threat to

competition (e.g. in niche markets in Jersey that are relatively small, but may only have 2 or 3 active firms).

30. The JCRA has given further consideration to the question of a voluntary notification regime for mergers and acquisitions, and can see its attractions. As noted in the Consultation Paper, a voluntary notification regime would require a change to the Law, and such an opportunity is unlikely to present itself in the short term. By contrast, a change to the Order is far more easily undertaken. The JCRA intends to review carefully its experience of the operation of the proposed new thresholds over a period of 2 years, and to use that experience to inform a deliberation on whether to propose a move to a voluntary notification regime.

D. Proposed new order

31. As detailed below, the JCRA has decided to propose the abolition of the current 'share of supply' test and the introduction of merger control thresholds based exclusively on parties' turnover in the Channel Islands. The JCRA is of the view that adopting a local turnover test can best capture those mergers and acquisitions with the greatest likelihood of substantially lessening competition in Jersey.

32. An outline of the principles of the proposed new order is in **Annex B**; it should be noted that the provisions there are for illustrative purposes only, and do not comprise a draft of any future order. The main notification threshold has two limbs: one based on the combined turnover of the "undertakings concerned" in Jersey and Guernsey, and the other based on the turnover of at least 2 of the "undertakings concerned" in Jersey.

"Undertakings concerned"

33. The current Order refers both to "the undertakings involved in the proposed merger or acquisition" (Article 3(1)) and "the parties to the proposed merger or acquisition" (Article 4).

34. The JCRA's new proposal would use the concept of "undertakings concerned in the transaction", following the approach in the ECMR. The JCRA has proposed the following definition of "undertakings concerned" in **Annex B**: "the merging parties, or the Target and the Acquirer, or, in the case of a joint venture, all parties acquiring control as well as the business to be established". It also proposes definitions of "Acquirer" and "Target".

35. The EC Jurisdictional Notice contains further detail regarding the concept of "undertakings concerned": see paragraphs 132-156. The JCRA's intention would be to incorporate portions of the EC Jurisdictional Notice, where appropriate, into either a new order or revised M&A Guidelines.

The use of turnover as a criterion

36. The JCRA considers that adopting a turnover test is consistent with international best practice, is more appropriate for a mandatory filing regime such as Jersey's, 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. This approach was supported by almost all respondents to the Consultation Paper.

37. The notification thresholds in the current Order are not based on turnover. Therefore, parties and their advisors will need to be provided with guidance regarding the calculation of turnover, and the geographic allocation of turnover. Given that notification thresholds based on turnover are used in the merger control regimes of many other jurisdictions, the JCRA believes that many parties contemplating

transactions will be familiar with the process of calculating their turnover for the purposes of assessing merger control notification obligations.

38. There is extensive discussion in both the ECMR and the EC Jurisdictional Notice regarding the concept of turnover: both its calculation (paragraphs 157-194 of the EC Jurisdictional Notice) and geographic attribution (paragraphs 195-202 of the EC Jurisdictional Notice). In relation to each of these topics, the JCRA's intention would be to incorporate portions of the ECMR or EC Jurisdictional Notice, where appropriate, into either a new order or revised M&A Guidelines. Any new order might also draw on the comprehensive provisions for calculation of turnover set out in the relevant UK legislation[4], which also follow closely the provisions of the ECMR. The JCRA can confirm that it proposes to ensure that the turnover of an undertaking is calculated as including all turnover of the corporate group to which it belongs, in accordance with the rules under the ECMR. It can also confirm that it intends to follow the EC practice of using parties' financial statements as the basis for turnover calculations, to avoid parties being required to undertake extra work specifically for the purposes of assessing notification obligations.

39. In relation to geographic allocation, the practice of the JCRA in relation to the current Order has been, on occasion, to take account of indirect sales by parties into Jersey (i.e. where their products have been sold to third parties in another jurisdiction, and then sold by those third parties into Jersey). If the notification thresholds are revised so that they are based on turnover, the JCRA intends to follow the practice under the ECMR, so that, broadly speaking, an undertaking's turnover will only be regarded as arising in Jersey if that undertaking has sold or delivered a product or service directly to a customer located in Jersey. Where parties sell and deliver goods to wholesalers or distributors in the UK, and those goods are subsequently transported by those wholesalers or distributors to Jersey, the new rules would not regard the parties as having turnover in Jersey.

40. The ECMR has special rules for geographic allocation of the turnover of "credit institutions and other financial institutions": see Article 5(3) of the ECMR. In general, turnover in these cases is allocated to the branch or division which receives the income. Given the prominence of Jersey as a financial centre, there are a number of branches or divisions of international financial institutions situated in Jersey, and application of such a rule would result in many of these financial institutions being regarded as having significant amounts of turnover in Jersey, despite the fact that they rarely deal with customers based in Jersey. The JCRA is keen to focus on transactions which affect Jersey consumers, and therefore wishes to avoid the Jersey merger control regime applying to transactions involving large offshore financial institutions based in Jersey, unless those institutions also have significant numbers of customers based in Jersey. On this particular issue, the rules for geographic allocation of turnover in Jersey are likely to need to vary from those in the ECMR and the EC Jurisdictional Notice. The JCRA intends to consult with institutions such as

[4] *Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003*

the Jersey Financial Services Commission and the Jersey Bankers Association in framing the provisions and guidelines on this topic.

How high should the turnover thresholds be?

41. In deciding on turnover threshold figures, consideration has been given to the local turnover of parties involved in mergers and acquisitions that were notified to the JCRA between January 2009 and January 2011 and the type of mergers and acquisitions that would fall outside the proposed turnover threshold.

42. A turnover threshold offers to some extent a proxy for the significance of a merger or acquisition to the Jersey economy. 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. If the individual threshold were set at £1 million (or less), then acquisitions of single outlets would begin to be notifiable[5], and there might be a substantial risk of a dramatic increase in merger notifications. For these reasons, the JCRA is proposing thresholds that would not capture transactions involving very small businesses.

43. However, the JCRA acknowledges the issues raised by Deputy De Lisle regarding the potential in the Channel Islands' economies for relatively small, but potentially anti-competitive, mergers to fall under turnover thresholds. At £5m (combined, across Guernsey and Jersey) and £2m (individual, in Jersey), the proposed turnover thresholds are set at levels that are larger than those applying in the merger control regimes of many other European countries, once account is taken of the size of the Jersey and Guernsey economies. If the thresholds are amended in the way proposed by the JCRA in this paper, then the JCRA will monitor its experience with thresholds set at this level of turnover. If, after that monitoring, the JCRA forms the view that there have been potentially anti-competitive transactions that have fallen outside the thresholds as formulated, then it will consider whether to move to a voluntary notification system (thereby enabling it to 'call-in' transactions on the basis of their anti-competitive effect, regardless of the parties' turnover).

Should turnover in Guernsey be an element of the thresholds?

44. In moving to "dual-limb" turnover thresholds, the JCRA has considered whether the "combined turnover" limb should be based on turnover worldwide, in a smaller sub-set of countries (e.g. Europe) or in Jersey alone. There is a wide range of practice among jurisdictions with "dual-limb" turnover thresholds. On balance, the JCRA believes that the "individual turnover" limb is sufficiently directed to the local nexus of the parties to the transaction (requiring at least 2 of them to have turnover exceeding £2m in Jersey), and also ensures that transactions involving very small parties are not captured by the merger control regime. The function of the "combined

[5] Eg the average turnover of the UK pharmacy exceeds £1 million (Verdict research); the average turnover of a UK pub is around £2 million.

turnover" limb should therefore act as a further filter regarding the overall size of the transaction.

45. While Jersey and Guernsey do not form a common market from a legal standpoint, their geographic proximity, significant transport and communications links and historical ties increasingly mean that the next closest competitors to firms based in one Bailiwick are those in the other Bailiwick. The tendency for firms to coordinate activities across the Channel Islands means that entities with a significant presence in Guernsey are often more credible potential competitors than those based further afield. For example, a firm with substantial turnover in Guernsey but minimal turnover in Jersey might be a more significant potential competitor to firms in Jersey than a firm with the same pattern of turnover in the UK and Jersey.

46. The JCRA acknowledges that the "combined limb" is only likely to be decisive in a small number of cases – if two parties each have turnover of at least £2m in Jersey, then it is likely that their combined turnover in Jersey and Guernsey will exceed £5m. However, in the JCRA's view, the "combined limb" is still worth including, as it will filter out a small number of transactions which are unlikely to be sufficiently large to warrant merger control scrutiny. Moreover, it is likely that the merger control thresholds to apply in Guernsey in the event that it adopts a substantive competition law will take a similar format.

"Creeping acquisitions"

47. While the JCRA considers, on balance, that thresholds based on turnover are the preferred approach for merger control notification in Jersey, the JCRA has a concern that this will mean that "creeping acquisitions" (i.e. situations where a party, through a series of small, and seemingly separate, acquisitions, each of which falls below the merger control thresholds, builds up a position of market power) are entirely exempt from any competition scrutiny. The risk is particularly acute at the retail level, where many individual outlets are likely to have turnover below £2m. By contrast, "creeping acquisitions" are likely to be notifiable under the "share of supply" thresholds in the current Order.

48. In order to address "creeping acquisitions", the proposed new provisions would add to the turnover of the target any turnover of a business acquired by the acquirer during the previous 24 months, although only if:

    a) the acquired business carried on business in Jersey when it was acquired; and
    b) 30% or more of the turnover of the acquired business arose in a market where there is a horizontal overlap between the parties to the current transaction and they have a market share exceeding 25% (i.e. previous acquisitions of businesses that are unrelated to the markets affected by the present transaction will not count).

49. The JCRA acknowledges that the proposed rules on "creeping acquisitions" would add a certain amount of complexity to the new thresholds. In particular, the provisions would incorporate the concept of "market shares", which, as detailed above, is contrary to international best practice. However, the JCRA notes that parties would only need to conduct a detailed assessment of whether the "creeping acquisitions" provisions applied, and define markets, if:

    - the merger was not otherwise notifiable, given the turnover of the parties; and
    - the acquirer had acquired within the past 24 months a business that had a physical presence in Jersey.

50. The JCRA believes that the limited timeframe during which acquisitions by the acquirer would need to be reviewed should mean that this process will be relatively straightforward. On reviewing merger notifications over the past 5 years, the JCRA has identified instances of acquisitions that would be caught by the new rules, and that, in its view, should continue to undergo competition scrutiny. On balance, therefore, the JCRA has decided that the risks posed by "creeping acquisitions" warrant the limited extra complexity that would be introduced by these provisions.

Exemptions

51. Given the nature of markets in Jersey and, in particular, the role of financial services in the local economy, the JCRA also proposes that certain types of transactions should be exempted from notification, given they are unlikely to raise competitive concerns. The following proposed exemptions appear in the merger control regimes of many other jurisdictions, and were generally welcomed in responses to the Consultation Paper:

    - 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; and

    - Asset securitisation transactions.

52. The Consultation Paper also proposed an exemption for a transfer of assets within the same group. A number of consultation respondents suggested that this exemption should be broadened to include all transactions not involving an ultimate change of control. The JCRA considers that this is, broadly speaking, the intended effect of the definition of "merger" and "acquisition" in Article 2 of the Law, although it understands that some in the Jersey legal community may have a different view. Given that the ECMR only regards a concentration as arising where there is a merger of undertakings or an acquisition of "control" (see Article 3(1) ECMR and paragraphs 7ff in the EC Jurisdictional Notice), the JCRA believes that it would be appropriate to create an express exemption for any transactions (other than mergers) which do not result in a lasting change in "control" (as that term is defined in Article 2(2) of the Law), or in the quality of control, of the undertakings concerned.

E. Next steps

53. As noted in paragraph 8 above, the Order's content is within the discretion of the Minister, upon consultation with the JCRA. This document sets out the advice that the JCRA will provide to the Minister. The ultimate decision on whether to amend the Order and, if so, in what form, remains with the Minister.

54. In the event that the Minister accepts the JCRA's recommendations, then the JCRA will liaise with the Economic Development Department and the Law Officers' Department in relation to the drafting of a new order.

55. Once the timing of any new order is confirmed, the JCRA will also consult on revised M&A Guidelines, which, as noted above, it is intended will include detailed guidance regarding a number of new concepts, including "undertakings concerned", calculation of turnover and geographic allocation of turnover.

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 in not subject to the proposed merger or acquisition and provided that any non competition, non-solicitation or confidentially 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 Key elements of the proposed new order

General rule

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) The combined aggregated turnover in Jersey and Guernsey of all Undertakings Concerned exceeds £5 million; and
(b) The turnover in Jersey of each of at least two Undertakings Concerned exceeds £2 million.

Creeping acquisitions

For the purposes of calculating the turnover in Jersey of the Target, that turnover shall be increased by the turnover in Jersey of any Acquired Undertaking, provided that:

(a) The Acquired Undertaking carried on business in Jersey at the time of its acquisition by the Acquirer; and
(b) 30% or more of the turnover of the Acquired Undertaking during the 12 months prior to its acquisition by the Acquirer arose in an Affected Market.

The Acquired Undertaking's turnover for the purposes of this Article shall be deemed to be its turnover for the 12 months prior to its acquisition by the Acquirer.

Exemptions

Notwithstanding the general rule above, a merger or acquisition is not a merger or acquisition of a type to which Article 20(1) of the Competition (Jersey) Law 2005 applies if it is an:

- Acquisition of shares by a financial institution for the purposes of resale where voting rights are not exercised and resale occurs within one year;
- Acquisition for the sole purpose of asset securitisation; or
- Acquisition which do not result in a lasting change in control (as that term is defined in Article 2(2) of the Law), or in the quality of control, of the Undertakings Concerned.

Definitions

"Acquired Undertaking" means any undertaking of which the Acquirer has acquired control (as that term is defined in Article 2(2) of the Law) during the 24 months prior to the date on which the merger or acquisition is to be completed.

"Acquirer" means the undertaking that is acquiring control, or, if the merger or acquisition is a joint venture, the undertaking concerned with the largest turnover in Jersey.

"Affected Market" means a product market in Jersey where two or more undertakings concerned in the merger or acquisition are engaged in business activities in the same product market and where the merger or acquisition will lead to a combined share of the product market of 25 % or more.

"Target" means the undertaking that is being acquired, or, if the merger or acquisition is a joint venture, the undertaking concerned with the smallest turnover in Jersey.

"Undertakings Concerned" means the merging parties, the Target and the Acquirer, or, in the case of a joint venture, all parties acquiring control as well as the business to be established.

An undertaking will be regarded as "carrying on business in Jersey" if

a) it has a physical presence in Jersey (including a registered office, subsidiary, branch, representative office or agency); and
b) it makes sales, or supplies services, or both, to customers located in Jersey.