# Consultation on amendments to the Jersey Mergers and Acquisitions Regime

## Consultation Document

## Channel Islands Competition and Regulatory Authorities

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## Contents

# 1. Introduction

1. In this Consultation Paper, the Channel Islands Competition and Regulatory Authorities (**CICRA**) consult on possible amendments to the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the **Order**). The Order prescribes the types of mergers and acquisitions that must be notified to, and approved by, the Jersey Competition and Regulatory Authority (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. The review of the mergers and acquisitions regime considers the market in Jersey. The Guernsey Competition Regulatory Authority (the **GCRA**) is undertaking a parallel review in Guernsey, and the consultations will proceed simultaneously. The JCRA and GCRA together comprise CICRA. For the purpose of this Consultation Paper, reference to CICRA shall include reference to the JCRA.

3. Jersey is expected 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, CICRA 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.

4. Following a consultation by the JCRA in 2011, it was proposed that the Jersey mergers and acquisitions notification regime be changed from its existing form, being a "share of supply or purchase" test, to a "turnover" test. The turnover test is currently applied in Guernsey but in Guernsey concerns have been raised in respect of the application of this test. What is at the heart of the concern is that the broad nature of the notification test results in transactions being captured even where they have no discernible anti-competitive effect in the Channel Islands. In those circumstances, parties are nevertheless required to comply with the notification requirements, thereby incurring further costs and time, whilst CICRA is also required to dedicate its time and resources on such applications. There is a common concern in Guernsey that the regulatory regime in its existing form could, in certain circumstances, have a negative impact on business in the island. Following the issues faced in Guernsey, CICRA is of the view that further consideration should be given to Jersey's regime.

5. The purpose of the amendments discussed in this Consultation Paper is to address these concerns by proposing a narrower category of mergers and acquisitions that are notifiable under the Order, with the result being that only those mergers which might have an impact on the local market are referred to CICRA.

6. One way to achieve this goal is to redefine the proposed turnover test so that only genuine "*local*" turnover of the entities engaged in the merger is taken into account. Such an amendment could be extended to all types of business rather than being limited to specific sectors. In order to simplify the notification regime further, the same turnover threshold could also be applied to both financial service business and non-financial service business sectors.

7. There may also be cases where a transaction falls below the turnover threshold, and is thus not caught by the merger notification regime, but where there is nevertheless a concern that such a transaction might have an anti-competitive effect. One potential way to address such a scenario is to enable CICRA to identify and call in those mergers and acquisitions which fall into this category. In order to assess whether such mergers and acquisitions need to be investigated by CICRA, a "share of supply or purchase" test could be applied to the transaction. The result is that those transactions which fall below the turnover threshold but which have the potential to significantly lessen local competition could also be considered further.

8. The advantage of introducing this additional layer of protection is that it will compensate for the weaknesses of the turnover test, which exist in a small market such as Jersey.

9. The goal of the amendments is to simplify and reduce compliance burdens in Jersey, as well as allowing CICRA to focus its resources on prohibiting those mergers and acquisitions which would substantially lessen competition in Jersey or any part thereof. As a result of the proposed amendments, the number of mergers and acquisitions that require notification to, and approval by, CICRA should reduce.

10. The Order's content is within the discretion of Jersey's Minister for Economic Development, upon consultation with the CICRA. CICRA's advice to the Minister will be developed based on these proposals and the results of this Consultation. The ultimate decision on whether or not to proceed to amend the Order and, if so, in what form, remains with the Minister.

11. CICRA is aware that the amendments considered in this Consultation Paper may result in changes being made to primary legislation as well as secondary legislation. Although changes to secondary legislation are more easily undertaken, proposals which will require amendments to primary legislation are also welcomed.

## 2. Structure of the Consultation Paper

This paper is structured as follows:

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|---|---|
| Section 1 | Introduction |
| Section 2 | Structure of the Consultation Paper |
| Section 3 | Background to the Order and possible amendments |
| Section 4 | Amendments to the Order |
| Section 5 | Next steps in amending the Order |

This Consultation Paper invites comments and suggestions as follows:

a) Adopting a "*local*" turnover test for the mandatory notification regime, and the turnover figure itself;
b) The definition of "financial institution";
c) The type of exemptions that might be considered reasonable under the mandatory notification regime;
d) Applying the "share of supply/purchase" test as a new voluntary notification regime, and the percentage figure for the share of supply/purchase test;
e) Introducing a "preliminary review" process;
f) Clarifying corresponding questions under EU law; and
g) Any other suggested amendments to the Regulations.

Guernsey is also looking to amend its mergers and acquisitions regime and a parallel consultation is therefore being carried out in Guernsey by the GCRA. CICRA would welcome comments on both Consultation Papers which can be submitted as a single response.

CICRA encourages the submission of responses by e-mail to info@cicra.je. Alternatively, responses to this consultation document should be submitted in writing to CICRA's office:

Channel Islands Competition and Regulatory Authorities
2nd Floor, Salisbury House
1-9 Union Street
St Helier
Jersey
JE2 3RF

The deadline for responses is **5.00pm** on 15th January **2016**.

All comments should be clearly marked '**Comments on the Mergers and Acquisitions Consultation Document**'. CICRA's normal practice is to publish all responses to consultations on its website. If you do not want your response to be published in part or in

full, the relevant sections should be clearly marked as confidential, and the response should explain why those parts of the response should be treated as confidential.

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

## 3. Background

12. The Order currently requires that a merger or acquisition be notified to, and approved by, CICRA 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.

13. The Order sets out three categories of potential applicability. These cover horizontal mergers or acquisitions (Article 2), vertical mergers or acquisitions (Article 3), and so-called conglomerate mergers or acquisitions (Article 4). The Order also has two exemptions to the requirement for prior CICRA approval in relation to conglomerate mergers (Articles 4(a) and 4(b)).

14. In May 2011 CICRA consulted on proposed amendments to the Jersey mergers and acquisitions regime. CICRA proposed the abolition of the 'share of supply' test and the introduction of merger control thresholds based exclusively on the parties' turnover in the Channel Islands. Such a test has been applied in Guernsey since 2012. Having considered the responses to that consultation and reflected on the issues raised therein, CICRA issued a Decision in February 2012 which set out its proposals for changes to the merger control regime. These proposals recommended that a turnover test be introduced in place of the share of supply test.

15. As a pure turnover test is already applied in Guernsey, the experiences in that island over the last few years are of interest. It is therefore of note that issues have arisen over the application of this test in Guernsey. In particular, given the nature of the financial services industry in Guernsey, it is considered that a large proportion of the transactions between local businesses will have little or no impact on Guernsey consumers. Nevertheless, as a result of their size, transactions carried out by such businesses will be caught by the notification regime. Conversely, there may be circumstances where a merger which will impact upon truly local consumers will not be caught by the notification regime as a result of its falling below the notification threshold.

16. Due to these concerns, CICRA is carrying out a consultation for amendments to the relevant mergers and acquisitions legislation in Guernsey. In the circumstances, prior to the adoption of a pure "turnover threshold" test in Jersey, CICRA also wishes to consider further amendments to the Order.

17. One proposal for addressing these concerns is to redefine the turnover test under the mandatory notification regime and also introduce a share of supply/purchase test under a voluntary notification regime. The rationale for this change follows a comprehensive review of international best practice and merger notification regimes in other jurisdictions, including small island economies. Adopting a *local* turnover test as a pre-notification regime complemented by a share of supply/purchase test that is not part of a pre-notification regime may appropriately capture the mergers and

acquisitions with the greatest likelihood of substantially lessening competition in Jersey.

## 4. Amendments to the Mergers and Acquisitions Regime

### A. Local Turnover Test

**Issue 1**

*(a) Comments on the merits, as well as the practical implications, of a "local" turnover notification test are welcomed.*

*(b) Where respondents have information that might further contribute to informing the appropriate level of the turnover threshold, CICRA would welcome receiving such data.*

***Applicable Turnover***

18. 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 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. A test based on turnover is considered more appropriate to a mandatory notification regime.

19. The advantage of the turnover threshold test is that it provides the parties to the transaction with an objective criterion as to whether to notify CICRA. However, experiences in Guernsey over the last few years have shown that are improvements that can be made to the process and it is appropriate in light of CICRA's experience in Guernsey of implementing the merger regime since 2012 to consider those as part of this review. This is primarily because in some sectors the method of calculating turnover requires both local and non-local turnover to be included. The result is that the finance industry (in which these concerns have mainly arisen) is being negatively impacted as the transactions are required to follow the mandatory notification regime (requiring both cost and time) even where there is no discernable anti-competitive effect.

20. Further, the availability of a "preliminary review" process in Guernsey, which is discussed in further detail below, may not adequately relieve these concerns as the parties to the transaction are still required to engage in the notification regime (which again costs time and money, and still leaves parties with an element of uncertainty). In addition, from CICRA's perspective, it too is required to dedicate time and resources to what are potentially unnecessary applications.

21. A potential remedy to these concerns is to introduce a test which only requires local turnover to be taken into account. Such a test would ensure continued compliance

[1] ICN Recommended Practice for Merger Notification and Review Procedures.

with current international best practice for the mandatory filing regime whilst only capturing those transactions where the genuine local turnover exceeds the thresholds.

22. CICRA appreciates that it will not be clear in every case what is to be considered as "local turnover". As is considered further below, in relation to the concept of turnover, regard could be had to the treatment of corresponding questions under EU law. Where respondents have information that might further contribute to the assessment of "local" turnover for the purposes of this test, CICRA would welcome receiving such data.

***Threshold Levels***

23. 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 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 do not generally present a material threat to competition since the entry barriers for such businesses are generally expected to be low. Further, and as considered below, a separate "voluntary" notification regime could be introduced for those mergers which have turnover below the prescribed levels but which nevertheless have the potential to significantly effect competition in their markets.

24. CICRA 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.

25. 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.

26. CICRA's provisional view is that a merger or acquisition should be notifiable if:

    a. The combined aggregated annual "local" turnover in the Channel Islands 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 "local" turnover in Jersey of each of at least 2 "Undertakings Concerned" exceeds £2 million.

27. The notification test therefore has two limbs: one based on the combined turnover of the "Undertakings Concerned" in the Channel Islands, and the other based on the turnover of at least 2 of the "Undertakings Concerned" in Jersey. The term "Undertakings Concerned" is discussed further below.

28. To keep the test simple, one option is to set the same turnover threshold for all transactions, irrespective of whether the undertakings involved are financial service businesses or non-financial service businesses. Further, the proposed turnover threshold levels could also be the same irrespective of the type of merger involved (i.e. horizontal, vertical or conglomerate).

29. Where respondents have information that might further contribute to informing the appropriate level of the turnover threshold and to whom it should apply, CICRA would welcome receiving such data.

***"Undertakings Concerned"***

30. 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).

31. A proposed use of the concept "Undertakings Concerned" would follow the approach in the EU Council Regulation (EC) No 139/2004 (the **EU Regulations**). By using this concept, third parties which are "involved" in the transaction but which are not "concerned" by the transaction will be excluded e.g. a company financing the acquisition.

32. A potential definition for "Undertakings Concerned" is as follows: "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". The terms "Acquirer" and "Target" could also be along the following lines - "Acquirer": "the undertaking that is acquiring control, or, if the merger or acquisition is a joint venture, the undertaking concerned with the larger turnover in Jersey"; and "Target": "the undertaking that is being acquired, or, if the merger or acquisition is a joint venture, the undertaking concerned with the smaller turnover in Jersey."

33. The European Commission Consolidated Jurisdictional Notice under the EU Regulations (the **EC Jurisdictional Notice**) contains further detail regarding the concept of "undertakings concerned": see paragraphs 132-156. Amendments to the regime could incorporate portions of the EC Jurisdictional Notice, where appropriate, into either a new order or revised Guidelines for Mergers and Acquisitions (**M&A Guidelines**).

## B. Definition of "Financial Institution"

**Issue 2**

*CICRA would welcome comments on the merits, as well as the practical implications, of applying a definition of "financial institution" which reflects the wording adopted in the EU Regulations.*

34. One of the aspects of the turnover test in Guernsey that has raised issues relates to the meaning of the term "financial institution" under The Competition (Prescribed Mergers and Acquisition) (Guernsey) Regulations 2012 (the **Regulations**).

35. By way of background, the Regulations distinguish between credit institutions, financial institutions and insurance undertakings, and all other "standard" businesses. This distinction is relevant in two areas. First, in calculating turnover and in considering the geographic attribution of an undertaking's turnover, special rules exist for credit institutions, financial institutions and insurance undertakings. Secondly, the preliminary review process in Guernsey is only available to credit and financial institutions.

36. The provisions in the Regulations regarding "financial institutions" closely follow the equivalent provisions in the EU Regulations. Financial institutions are therefore generally treated in the same way under the local Regulations as they are under the EU Regulations. There is however one key difference between the two regulations, in that the definition of "financial institution" is much broader under the Guernsey Regulations than it is under the EU Regulations.

37. Under the EU Regulations, the term "financial institution" is aimed at banking and finance businesses. The EC Jurisdictional Notice explains that, in order to define the term "financial institution", the Commission in its practice has consistently adopted the definitions provided in the applicable European regulation in the banking sector.[2] The Guernsey Regulations in comparison are much broader and capture service providers (not just providers of finance or brokers dealing in financial instruments). Given the nature of the financial services industry in Guernsey, a large proportion of local businesses are therefore caught by the definition of "financial institution" under the Regulations (whereas they would not be so under the EU Regulations).

38. The result is that there are two very different meanings of the term "financial institution" under the EU and Guernsey merger regulations. Despite the difference in meaning, the treatment of a "financial institution" is the same under both regulations. This has given rise to various issues. By way of example and as noted above, special rules exist for the calculation of turnover for a "financial institutions". The Competition (Calculation of Turnover) (Guernsey) Regulations 2010 Regulations have incorporated the categories of income listed in the EU Regulations for calculating turnover for a "financial institution". However, these categories have not been amended to reflect the differing meaning of financial institution i.e. that the term "financial institution" under the EU Regulations is aimed at the banking sector as opposed to the Guernsey Regulations which targets service providers. The description of "income" does not therefore appear to be appropriate for the type of businesses caught under the Regulations.

[2] Paragraph 207 of the EC Jurisdictional Notice

39. The pool of "financial institutions" in Guernsey is therefore potentially bigger than might otherwise be the case. Given that the EU Regulations wording has been tracked in large part, it might be considered more appropriate to use the definition of "financial institution" as contained in the EU Regulations.

40. As also noted above, in Guernsey a "preliminary review" process is available to "finance institutions". If it is considered appropriate that the EU Regulation definition be adopted, this will result in the service providers being excluded from the preliminary review process. In the event that a preliminary review process is incorporated into the Jersey notification regime, one option to remedy the issue faced in Guernsey would be to widen the category of businesses for which the preliminary review process can be used. Alternatively, it may be considered that the addition of further categories is not necessary should a "*local*" turnover test be adopted.

41. CICRA would welcome comments on the merits, as well as the practical implications, of applying a definition of "financial institution" which reflects the wording adopted in the EU Regulations.

## C. Exemptions

**Issue 3**

*CICRA 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.*

42. Given the nature of the Jersey market and, in particular, given the role of financial services in the local economy, certain types of transactions might be 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.
    - Transactions which do not result in a change of ultimate control.
    - Transactions which do not result in a lasting change in "control" or in the quality of "control" of the undertakings concerned.
    - Where "control" is acquired by an office-holder relating to liquidation, winding up, cessation of payments, compositions or analogous proceedings.

43. CICRA 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.

## D. Share of Supply/Purchase

**Issue 4**

*(a) Comments on the merits, as well as the practical implications, of a "share of supply/purchase" test are welcomed.*

*(b) Where respondents have information that might further contribute to informing the appropriate level of the share of supply/purchase threshold, CICRA would welcome receiving such data.*

### *Share of Supply/Purchase - Assessment*

44. Given the level of resources available to CICRA it is important to ensure that resources are focused on those mergers with the greatest likelihood of substantially lessening competition in Jersey and narrowing the turnover test to local turnover only will assist in that regard. However, there is a concern that there may be transactions which are not be caught by the turnover provisions but which might nevertheless have the potential to significantly affect competition in their markets. One possible way to address this issue is to afford CICRA the ability to call in those transactions where CICRA believes there to be a realistic prospect of a substantial lessening of competition. The assessment of such matters would be based on a "share of supply/purchase" test. The potential application of this test would be as follows.

45. Based on information gained through market intelligence, CICRA would identify those mergers and acquisitions not required to follow the notification regime but which might give rise to a substantial lessening of competition. If CICRA is of the opinion that there are competition concerns, the parties to the merger will be asked by CICRA to confirm their share of supply or purchase. Only if, on the application of the share of supply/purchase test (which is discussed further below), the transaction exceeds the prescribed thresholds of that test, will CICRA launch an assessment into the merger.

46. In the event that, following the assessment, CICRA concludes that the transaction does have an impact on the level of competition in the Island's economy, the remedy for such a finding may be for CICRA to obtain undertakings from the parties. Any obligation for undertakings would be carried out in a consultation with the parties to the transaction. It is of note that the use of undertakings to remedy competition concerns is a method already applied by the Competition and Markets Authority in the UK.

### *"Share of Supply/Purchase" - Threshold*

47. Should a share of supply/purchase test be considered a suitable approach to those transactions which fall below the turnover threshold, the appropriate threshold for the share of supply/purchase test needs to be addressed. One option is that CICRA will be

able to call in a merger or acquisition where the "share of supply or purchase" of one of more parties to the merger in any product or service exceeds one or more of the following thresholds:

a) Horizontal mergers or acquisitions - Where it results in a share of supply or purchase of 25% or more being achieved, or increased. This threshold is intended to apply to 'horizontal mergers', i.e. where the parties are existing competitors, and their combined shares of supply or purchase equal or exceed 25%. So, for example, where one competitor has 24% and the other has 1%, CICRA could assess the transaction further. Equally, where one party has 15% and the other has 10%, CICRA can carry out an assessment.

b) Vertical mergers or acquisitions - Where one party has a share of supply or purchase of 25% or more, and the other has a 'vertical' relationship with that party (for example, as a supplier to or customer of that party). So for example, if a company with a 25% or more share of supply of bricks in Jersey was to merge with a house builder, CICRA could assess the transaction. Equally, if a company with a retail share of 25% of potatoes was to merge with a potato producer, this could also require assessment.

c) Conglomerate mergers or acquisitions - Where one party has a share of supply or purchase of 40% or more and there is no horizontal or vertical relationship, the merger could be assessed by CICRA unless it qualifies for either one of the two exemption:

    a. exempts the acquisition of undertakings located outside Jersey, and with no Jersey assets or sales, by undertakings with a current share of supply or purchase of 40% or more in Jersey; and
    b. exempts a merger in situations where the seller has a share of supply or purchase of 40% or more in a product or service, but where that share is not subject to the merger and where any non-competition, non-solicitation or confidentiality clauses included do not exceed a period of three years and are strictly limited to the products or services supplied by the undertaking being acquired.

    This 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. These types of mergers are referred to as conglomerate mergers. An example might be if a major electricity supplier was to merge with a major telecommunications supplier.

48. As with the turnover test, the same threshold levels in the share of supply/purchase test could be applied to all industries as opposed to having different levels for different industries. However, CICRA does question whether the threshold levels set for the

share of supply/purchase and referred to above should in fact be increased. By way of example, the Seychelles has set the threshold at 40% of the market share.

49. It is also of note that the proposed provisions under the share of supply/purchase test limit the geographic market to Jersey. In relation to the proposed turnover test, this test considers both the Channel Island market (in relation to the "combined aggregated annual turnover") and the Jersey market (regarding the annual turnover of at least 2 undertakings concerned). There is therefore a question as to whether the share of supply market should be extended to all of the Channel Islands rather than being limited to Jersey.

50. If the share of supply/purchase test was to be adopted, there may be circumstances where the parties are concerned that, even though they are not required to follow the mandatory notification regime under the turnover test, an in-depth assessment of the transaction could still be carried out by CICRA under the share of supply/purchase test. Should the parties have such concerns, CICRA is of the view that they may still follow the notification regime should they so wish in order to have certainty that the merger can proceed (with or without undertakings).

51. Where respondents have information that might contribute to informing the appropriate level of the share of supply/purchase threshold, CICRA would welcome receiving such data.

## E. "Preliminary review" Process

**Issue 5**

*CICRA would welcome comments on the introduction of, and any amendments to, a "Preliminary Review" Process.*

### *Introduction of the Process?*

52. In Guernsey, where an acquiring undertaking involved in a merger is a credit institution or financial institution (as defined in Regulation 8 of the Regulations), it is entitled to apply for a "preliminary review" of the merger, using a Shortened Merger Application Form. This application is quicker and has a lower application fee than the standard application process. It nevertheless requires the investment of time, filing fees and the engagement of advisers.

53. The preliminary review process is available to credit and financial institutions for 2 principal reasons:

    a. the particular manner in which turnover is calculated for credit and financial institutions means that credit and financial institutions based in Guernsey are likely to have significant turnover in Guernsey for the purposes of the

Regulations, even where most or all of their account-holders are based in other territories; and

b. where Guernsey-based credit and financial institutions are providing services to account-holders or customers in other territories, they will typically be operating in markets that have a wide geographic scope, and will compete against a large number of alternate providers in jurisdictions other than Guernsey.

54. The proposed mandatory notification regime is one which is based on "local" turnover and, if adopted, it may no longer be necessary to introduce a preliminary review process, the reasoning being that a "local turnover" test will address the issues faced by those businesses with an international client base but very little local trading Further, in circumstances where notification is still necessary under the proposed regime, CICRA is likely to require a greater degree of review of such application than is afforded to it by a preliminary review process.

***Amendments to the Process***

55. In the event that the preliminary review process as applied in Guernsey is to be introduced to Jersey, there are amendments that could be made to the current Guernsey process.

56. At present, the preliminary review process in Guernsey is limited to cases where the acquirer is a credit institution or financial institution. It is not therefore available to insurance undertakings, nor is it available where the target entity is a credit or financial institution. There is therefore a question as to whether such a process should be made available to credit institutions, financial institutions and insurance undertakings, regardless of whether they are the acquirer or the target.

57. A further potential amendment is that eligibility for the process should be based on the nature of the underlying business and not the nature of the parties to the transaction. Finally, consideration should also be given to the extension of the process to certain categories of business which are currently not eligible (e.g. a fiduciary business which is not also a financial institution).

58. Comments on the introduction of, and any amendments to, such a preliminary review process for purposes of introducing such an approach in Jersey are welcomed.

## F. European Competition Law

**Issue 6**

*CICRA would welcome comments on the clarification that could be achieved in a new Regulation or revised M&A Guidelines regarding the treatment of corresponding questions under EU law.*

59. The competition laws in Jersey are modelled on the competition provisions in the Treaty on the Functioning of the European Union. Article 60 of the Law provides that so far as possible questions arising in relation to competition must be dealt with in a manner that is consistent with the treatment of corresponding questions arising under EU competition laws.

60. Accordingly, CICRA endeavours to ensure that, as far as possible, competition matters arising in Jersey are dealt with in a manner consistent with - or, at least, that takes account of - the treatment of corresponding questions under EU competition law. Article 60 does not however prevent CICRA from departing from EU precedents where this is appropriate in light of the particular circumstances of Jersey; EU jurisprudence is treated as persuasive but not binding.

61. If a turnover test is to be introduced and the issues identified above are resolved, there will potentially be greater alignment to the EU Regulations' wording than is currently the case.

62. Where appropriate, incorporation of sections of the EU Regulations and EC Jurisdictional Notice into either a new order or revised M&A Guidelines respectively are options for consideration. An example would be in relation to the concept of turnover, both with regards to its calculation (paragraph 157-194 of the EC Jurisdictional Notice) and geographic attribution (paragraphs 195-202 of the EC Jurisdictional Notice).

63. There are also a number of differences between the Jersey Order and the EU Regulations. Again, where appropriate, CICRA intends to clarify in its M&A Guidelines its position where there are clear differences in language between the EU Regulations and the Order.

64. CICRA would welcome comments on the approach to be taken by CICRA regarding the treatment of corresponding questions that arise under EU law.

## 5. Next Steps

**Consultation Process**

65. CICRA will carefully consider the responses to this Consultation and will take them into account in preparing formal advice and making specific recommendations Jersey's Minister for Economic Development.

66. CICRA will publish its formal proposals to the Minister, setting out the areas where amendments to the existing mergers and acquisitions regime should be made.

67. The Minister will consider CICRA's formal proposals and then determine whether or not to proceed with amendments to the current regime.

# 6. 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 criterion, 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) 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.

(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 the supply or purchase of goods or services of any description supplied to or purchased by persons in Jersey and otherwise owns or controls 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 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.