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BY ELECTRONIC MAIL

Kerstee Norris
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Jersey
Channel Islands

Re: Response to JCRA Merger Threshold Consultation

Dear Ms Norris:

Please accept this response to the JCRA's consultation paper entitled *A Consultation on Proposed Amendments to the Merger Thresholds*, dated 12 May 2011. I am submitting this response based on my experience as an antitrust/competition lawyer and in my capacity as a Non-Governmental Advisor to the International Competition Network ("ICN").

For convenience, the response addresses the four questions invited for discussion in Paragraph 24 of the Consultation.

a) Comments on the proposed amendments to the Order i.e. both adopting a local turnover and asset test and the turnover figure itself

1. The Proposed Local Turnover Test

It is most welcome that the JCRA intends to adopt merger thresholds based on objectively quantifiable criteria, as recommended in the *ICN's Recommended Practices for Merger Notification Procedures* (as used hereinafter, the *ICN Recommended Practices*).[1] Central to the proposed amendments to the Mergers and Acquisitions (Jersey) Order 2010 (the "Order") is the incorporation of a threshold based on local turnover.

While the proposed threshold level of £2 million is low compared to turnover thresholds applicable in most other jurisdictions, the JCRA itself is best-placed to determine the level of this threshold, based on the number of mergers and acquisitions it has reviewed since the Order first came into effect on May 1, 2005. To improve transparency; however, the JCRA may want to consider publishing the formula of how the turnover threshold was calculated, in a manner that does not disclose any particular party's confidential information.

[1] *See ICN Recommended Practices*, ¶ II.B.

Although adoption of the turnover threshold is welcome, the way the current proposed threshold is drafted in the Consultation is potentially problematic.

First, the draft language would make the £2 million threshold applicable to the "total turnover in Jersey of all the undertakings involved in the merger or acquisition." Because this language refers to "all the undertakings involved", it is unclear whether *just one* of the concerned undertakings can satisfy the threshold. If an undertaking such as Jersey Telecom, Jersey Post or Jersey Electricity; for example, made *any* acquisition, it could be subject to notification under the Order if the £2 million threshold for "all the undertakings involved" is interpreted as being satisfied when just one of the concerned undertakings surpasses this level.

Such an outcome does not appear to be the JCRA's intent, although the language used in Paragraph 12, that "the local turnover of all parties involved in a merger or acquisition is the appropriate approach for Jersey" appears to leave open the possibility that if the acquiring undertaking alone has local turnover of £2 million or above, notification could still be required. Such an interpretation would be contrary to the *ICN Recommended Practices*, which states:

> *Notification should not be required solely on the basis of the acquiring firm's local activities, for example, by reference to a combined local sales or assets test which may be satisfied by the acquiring person alone irrespective of any local activity by the business to be acquired.*[2]

To resolve this ambiguity, the JCRA may consider requiring that both the acquiring and acquired undertakings individually satisfy the £2 million threshold. Alternatively, Jersey could follow the turnover thresholds of other small jurisdictions, such as Iceland, Ireland and Cyprus, which have thresholds that combine the aggregate turnover of all parties to the transaction and also require that at least two of the undertakings satisfy separate turnover requirements.

The second difficulty with the proposed turnover threshold is how it is to apply to the acquired undertaking. Does this mean the selling party, or the subsidiary, entity or assets actually being acquired? For example, a company may have substantial turnover in Jersey, but selling a subsidiary located abroad. Such a transaction is unlikely to be of competitive significance in Jersey and thus should not be subject to notification. To address this problem, the ICN states that "the relevant local activities of the acquired party should generally be limited to the local sales or assets of the business(es) being acquired."[3] It is therefore recommended that the JCRA include this limitation.

2. The Proposed Local Assets Test

The incorporation of a local asset test is also a welcome development and, to ensure a local nexus of notifiable mergers and acquisitions, it is advisable that the revised Order should

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[2] *Id.* ¶ I.C, Comment 3.
[3] *Id.*

require that the transaction in question satisfy both the local turnover test and the local asset test for Jersey's notification and approval requirements to apply.

As proposed in the Consultation, however, the local asset threshold would be satisfied if "one or more of the parties" met the criteria.[4] This contributes to the potential problems identified above concerning the local asset test -- resulting in a situation where if a company had turnover in Jersey of £2 million and satisfied one or more of the local asset tests, then any merger or acquisition it would wish to undertake would require notification and approval by the JCRA, regardless of the other party's operations. Such a result would actually expand the JCRA's merger responsibilities, for currently under the Order an undertaking with an existing 40% share of supply in Jersey does not require the JCRA's approval when the acquired party has no existing sales or assets in Jersey.[5] Such an outcome would be contrary to the Consultation's overall goal of reducing merger compliance burdens in Jersey.

In addition, a potentially problematic factor on which to satisfy the local asset test is that "parties to the merger hold a level of influence over local agents or facilities that equate to a local asset." According to Footnote 3 in the Consultation, such a "level of influence" could be satisfied by a long-term exclusivity arrangement. Such a requirement is problematic in several respects:

- First, Footnote 3's suggestion that a long-term exclusivity arrangement with a third-party could satisfy the local asset requirement appears to directly contradict the view stated in Paragraph 17 of the Consultation, under which "selling into Jersey through independent agents" should not be equated with having a local presence.

- Second, the proposed language of "hold[ing] a level of influence over local agents or facilities that equate to a local asset" is inherently ambiguous, and is not "based on objectively quantifiable criteria," as recommended by the ICN.[6]

- Third and finally, an undertaking may lack the information available to determine whether it holds a level of influence over local agents or facilities that equate to a local asset. For example, a company involved in a merger may have a long-term exclusive agreement with a distributor located in the UK that sells into Jersey. The extent of the distributor's operations into Jersey may not be readily available to the company, and the company may have no legal means to compel the production of that information from the distributor. Such a situation would not

[4] As drafted in the Consultation, the local asset test would apply to the assets of the "parties", whereas the local turnover test would apply to the "undertakings involved." The final proposed amendments to the Order should use consistent terminology for both the local turnover and local asset tests.
[5] *See* Order Art. 4(a).
[6] *See ICN Recommended Practices*, ¶ II.B.

satisfy the ICN's recommended practice that "[n]otification thresholds should be based on information that is readily accessible to the merging parties."[7]

It is therefore strongly recommended that the revised Order not include a threshold based on holding a level of influence over local agents or facilities that equate to a local asset. As an alternative, the JCRA may want to consider incorporating a threshold based on whether the undertaking in question holds a licence under the Regulation of Undertakings & Development (Jersey) Law 1973, which is required for an undertaking to carry on a business in Jersey.

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

This proposal, as set out in Paragraph 18 of the Consultation, is problematic from a legal point of view. This is because under the Competition (Jersey) Law 2005 (the "Law") the JCRA has no power over mergers or acquisitions that do not satisfy a threshold set out in the Order.

Article 20(1) of the Law states the fundamental requirement of merger control in Jersey -- that "[a] person must not execute a merger or acquisition of a type prescribed by [the Order] except with an in accordance with the approval of the Authority."[8] Thus, the fundamental legal requirement in Jersey under Part 4 of the Law is to notify and obtain the JCRA's approval for mergers and acquisitions falling under one or more of the Order's thresholds. Failing to do so can subject merging parties to directions,[9] fines,[10] or civil action in Royal Court.[11]

Conversely, if a merger or acquisition does not satisfy a threshold set out in the Order, the Law gives the JCRA no authority to act against it. The obligation created by Article 20(1) of the Law is a procedural obligation to file, if the transaction satisfies a threshold, and the remedies available to the JCRA and private persons under Articles 37, 39 and 51 of the Law are based a failure to file or await the JCRA's approval after filing.

Of course, once the procedural obligation to file is satisfied, the JCRA's must then assess the substantive question of whether the merger or acquisition "would substantially lessen competition in Jersey or any part of Jersey."[12] If, upon review, the JCRA is satisfied that the transaction in question would substantially lessen competition in Jersey or any part of Jersey, it can refuse to approve the merger or acquisition (meaning, by definition, the parties cannot legally execute it under Article 20(1)) or it can approve it based on conditions.[13]

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[7] *Id.* ¶ II.C.
[8] Competition (Jersey) Law 2005 Art. 20(1).
[9] *See id.* Art 37.
[10] *See id.* Art 39.
[11] *See id.* Art 51.
[12] *See id.* Art. 22(4).
[13] *See id.* Art. 22(3).

Nowhere in the Law; however, is there a stand-alone legal requirement that prohibits parties from concluding mergers or acquisitions that would substantially lessen competition in Jersey or any part of Jersey. Such an outcome provides the JCRA with grounds to refuse to approve a merger or acquisition notified for approval under the Order, but the Law itself does not prohibit the consummation of such transactions when JCRA approval is not required. There are no remedies available under the Law for mergers, not requiring notification and approval, that substantially lessen competition. As noted above, all of the Law's remedies contained in Articles 37, 39, and 51 are based on the *procedural* infringement of failing to obtain the JCRA's approval when approval was required, and not on a *substantive* violation of the merger's effect on competition in Jersey. This situation is contrasted with that in the United States, for example, where government agencies or private parties may seek to judicially challenge mergers or acquisitions based on their effects on competition, notwithstanding whether the transaction required notification and approval under the Hart-Scott-Rodino Act.

The JCRA thus has no jurisdiction under the Law to take action against mergers or acquisitions that are not subject to notification and approval through satisfaction of one or more of the Order's thresholds. Presumably, therefore, the only way the JCRA could target mergers and acquisitions involving services considered to be "essential" would be to create additional, targeted thresholds in the Order specifically concerning such services. Such an approach not only would increase the Order's complexity, but would discriminatory in terms of the industries involved (which, presumably, would always require the JCRA's approval for mergers and acquisitions, notwithstanding their turnover or assets) and not in accordance with international best practice.

c) Comments on the type of exemptions that might be considered reasonable

The exemptions proposed in Paragraph 22 of the Consultation appear justified. In addition, the JCRA may want to consider incorporating one or more of the exemptions under the Hart-Scott-Rodino Act in the United States, such as:

- Acquisitions resulting from stock splits or reorganizations; [14]
- Certain acquisitions by creditor or insurers;[15]
- Acquisitions of voting securities by certain institutional investors (such as banks, trust companies, finance companies, and insurance companies);[16]
- Acquisition of non-corporate interests in financing transactions;[17] or
- Acquisitions by gift, intestate succession or devise, or by irrevocable trust.[18]

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[14] 18 C.F.R. § 802.10 (June 7, 2011).
[15] *See id.* § 802.63.
[16] *See id.* § 802.64.
[17] *See id.* § 802.65.
[18] *See id.* § 802.71. In addition, the Hart-Scott-Rodino Act contains other exemptions the JCRA may want to consider. *See generally* 18 C.F.R. § 802 (June 7, 2011).

As noted in the Consultation, the JCRA has an interest in avoiding unnecessary application of the merger control rules to Jersey's financial services sector, in circumstances where the transaction in question has little to no jurisdictional nexus to Jersey and no ability to substantially lessen competition within the Island. Therefore, it is recommended that the JCRA consult with the Jersey Financial Services Commission, the authority best placed to advise on the sort of routine financial services transactions that may arise in Jersey, and the exemptions that should cover them.

d) Any other suggested amendments to the Order

While not a suggested amendment to the Order, the only additional suggestion made in this response is to ensure that whatever merger thresholds are adopted in Jersey, corresponding thresholds should be adopted in Guernsey, when Guernsey's competition law comes into effect. To this end, it was welcome to see a statement of this intention contained in the JCRA's 2010 Annual Report.

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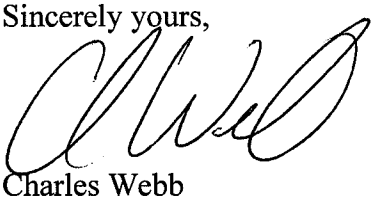
Please note that there is no confidential or commercially sensitive information contained in these comments. Thank you for your consideration of these comments, and I remain available if they raise any issues or questions that require further discussion.

Sincerely yours,



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