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By post and email: k.norris@jcra.je

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Dear Kerstee

A Consultation on Proposed Amendments to the Merger Thresholds (the Consultation Paper)

Thank you for forwarding the Consultation Paper dated 12 May 2011 and for you and John agreeing to meet with us on 13 June 2011.

In preparing this response we are mindful of the obligations we owe to our existing and potential clients as potential applicants under Article 20(1) of the Competition (Jersey) Law 2005 (the **Law**). That said, we also wish to assist the JCRA in achieving the aims it has set out in paragraph 4 of the Consultation Paper.

1. **What constitutes an "undertaking involved in a merger or acquisition"?**

1.1 Further clarity is required as to which parties would be considered to be "an undertaking involved in a merger or acquisition" for the purposes of meeting any proposed threshold.

1.2 Paragraph 15 of the Consultation Paper refers to two parties which, in the context of that paragraph, we assume to be the target and the acquirer. Clarity however is required.

1.3 We consider that the "undertakings involved" should expressly exclude the following:

(a) The Vendor. We understand that most national merger control thresholds in Europe and under the EU Merger Regulation disregard the turnover of the vendor on the basis that the vendor's retained business will have no impact on the substantive Competition Law assessment of the transaction. See our further comments below.

(b) Financial Institutions. Arguably a financial institution providing finance to a purchaser is involved in the undertaking. However, this would be entirely inappropriate for the purposes of the merger thresholds.

(c) Guarantor. There has always been some ambiguity under the existing regime as to whether a guarantor is a party to a transaction or an undertaking in the transaction. We would argue that a person guaranteeing

the contractual obligations of either the vendor or the purchaser should not be considered to be an undertaking involved as by whatever measure it should not be taken into consideration for the purposes of determining whether a threshold has been met.

1.4 We assume that individuals could also constitute "undertakings involved" but again we would recommend that this be expressly clarified in the guidance and/or regulations.

2. Turnover Threshold

2.1 The Consultation Paper proposes to impose a turnover threshold set as follows:

"where, in the most recent financial year, total turnover in Jersey of all the undertakings involved in the merger or acquisition is at least £2,000,000."

2.2 We support the primary aim of introducing a turnover threshold; that is, to introduce a degree of objectivity to the merger thresholds with the aim of providing certainty for potential applicants as to whether or not the merger thresholds have been met.

2.3 We also note that a turnover test is consistent with the International Competition Network best practice.

2.4 As formulated, the proposed threshold would appear to catch transactions where a threshold is met by the acquiring party and/or the target party yet the transaction would not necessarily result in a substantially lessening competition in Jersey or any part of Jersey.

2.5 We note that the proposed figure of £2,000,000 is based upon an examination of the JCRA's own database of confidential information. We note further that in calculating the proposed turnover figure certain assumptions have been made.

2.6 **Observations/Comments**

(a) We consider, however, that the threshold should be set at a level which is appropriately correlated with the measure of commerce in Jersey.

(b) As proposed, the turnover threshold could be met by the acquirer alone. The fact that the acquirer may meet the turnover test should not be a reason of itself for the transaction to fall within the merger thresholds.

(c) There is a degree of subjectivity as to what constitutes "turnover". This might be more prevalent in Jersey than in other jurisdictions given that many business undertakings are not required to submit or prepare audited accounts. We do have some concern that potential applicants would be required to carry out additional financial due diligence on the other party and, possibly, themselves, to ascertain whether or not their turnovers meet the merger thresholds.

(d) Please see our comments below as to whether or not different turnover thresholds should apply for different competitive markets.

2.7 **Recommendations/Proposals**

(a) It seems to us therefore that an appropriate turnover threshold should be set by reference to a proportion of the level of turnover in Jersey - that is to take into account the size of the Jersey economy - for instance a proportion of the GDP expressed as a figure. Guidance could be had when comparing other jurisdictions' turnover thresholds to their current GDP.

(b) The turnover threshold should not be capable of being satisfied by the acquirer alone. The threshold should be set by reference to the target's turnover or on an aggregate basis (which we submit would entail a commensurately higher threshold).

(c) Guidance should be offered as to how turnover is determined for the purposes of meeting the threshold- for instance by operating a presumption that turnover be determined using generally accepted accounting policies. We acknowledge that this may impose an additional burden on the parties which would not have otherwise existed.

3. **Assets Threshold**

3.1 We note that the Consultation Paper does not propose a specific threshold.

3.2 We assume however that any assets threshold is to be considered in conjunction with the turnover test such that both the asset and turnover test must be satisfied in order for the merger threshold to be met.

3.3 **Observations/Comments**

(a) We understand that most merger control systems in the EU member states do not have an assets based test.

(b) An asset test will place an additional, and possibly onerous, burden on the parties to obtain data as to their assets. In our experience it is often difficult for our clients to determine the turnover attributable to Jersey let alone assets which may or may not be held in Jersey or which may be deemed to be in Jersey for the purposes of the merger threshold especially given the indication in the Consultation Paper of the wide definition of asset.

(c) Rather than encouraging an objective analysis, it will introduce a degree of subjectivity. The parties would have to determine the basis on which the assets should be valued, whether by market or book value, and what amortisation or depreciation policies should apply. The parties accounting policies could therefore have an impact as to whether or not a merger filing is required.

(d) Further, the three examples set out in paragraph 17 of the Consultation Paper already envisage a subjective test as to the level influence that can be exerted over the assets. This creates ambiguity and therefore a lack of certainty as to whether the assets test, as proposed, could be met for certain potential clients, particularly those that rely on third parties to sell their products in Jersey eg via distribution agreements.

(e) Again, we note that the asset test could be met by the acquirer alone and the same comments apply in this regard as are set out above in relation to the threshold test.

3.4 **Recommendations/Proposals**

(a) We consider that any benefits of introducing an asset test would be outweighed by the complexity and subjectivity that would be introduced by such a test.

As a general observation in relation to the proposals set out in the Consultation Paper, on a brief analysis of the merger filings of which we are aware and/or with which we have been involved, we are of the view that very few of them would be excluded from the merger control regime under the Competition Law by the introduction of the proposed new tests as currently outlined in the Consultation Paper.

4. **Transactions which could result in a substantial lessening of competition but fail to meet the merger thresholds**

4.1 We agree that by imposing objective merger threshold tests by reference to turnover and/or assets will increase the risk of transactions proceeding which (a) fall beneath the threshold yet (b) may have an appreciable effect on competition in Jersey or any part of Jersey

4.2 We also submit that such transactions are, in real terms, more likely to be of pubic interest, particularly on an intra-Jersey level.

4.3 We also recognise that in a market such as Jersey it is difficult to create a regime which captures those transactions which are likely to involve a substantial lessening of competition when the nature of transactions which may have such an impact is so diverse in nature and value.

4.4 **Observations/Comments**

(a) We believe that there are two possible solutions to capturing these transactions.

(b) First, to retain the existing vertical and horizontal share of supply tests for transactions that fall beneath the turnover and/or assets test. The conglomerate test would be dispensed with on the basis that transactions that were always anticipated to be captured by this test would be caught by the turnover and/or asset test. Whilst this is not our preferred option, it would, at least, provide potential applicants and their advisors consistency (if not objectivity) by maintaining a regime which is now both familiar and mature in terms of procedure and analysis.

(c) Alternatively, lower turnover and/or assets tests could be introduced to capture specific services and/or industries. For instance, the JCRA may think it appropriate to set a lower turnover test to any merger or acquisition involving two or more retail outlets in Jersey which supply substitutable goods - for instance sports equipment retailers, pharmacies, etc.

(d) For services which would deemed to be "essential" (for instance transportation links on and off the island, the provision of medical care, telecommunications and postal services), the JCRA might like to consider imposing significantly lower turnover and/or asset thresholds or indeed no threshold at all where the acquisition involves any incremental increase in

any vertical or horizontal share of supply of essential services. Care however would have to be taken to ensure that the JCRA does not become an arbiter of transactions that are of "public interest" or, possibly, have "homeland security" implications as these are not within the JCRA's mandate.

5. Exemptions that might be considered reasonable

5.1 The Consultation Paper proposes that certain types of transactions could be exempted from notification on the basis that they are unlikely to raise competition concerns. Paragraph 22 of the Consultation Paper sets out three example exemptions.

5.2 With regard to the first proposed exemption, it is not clear the circumstances in which a credit institution, a financial institution or an insurance company would acquire shares for the purposes of reselling the same without exercising voting rights within one year.

5.3 With regard to the proposal to exempt asset securitisation transactions, it is not clear to us how such transactions would, in any event, meet the turnover and/or asset threshold.

5.4 With regard to transfer of assets within the same group, we believe that further clarity is required in order for this exemption to be effective. In general terms, we believe that it would difficult to justify a purely intra-group transaction as being one that should be subject to JCRA scrutiny on the basis that there would be no change in the ultimate beneficial ownership, common influence or control over the target. On this basis, if this exemption is implemented, our recommendation should be that it should drafted as broadly as practicable and for instance would cover:

(a) direct and indirect ownership; and

(b) transactions between one company and any of its subsidiaries or any of its parent companies and any of their subsidiaries (subsidiaries for this purpose being defined by reference to the Companies (Jersey) Law 1991).

6. Any other suggested amendments to the Order

6.1 We consider that flexibility should be introduced by allowing for the setting of the thresholds within two years after adoption and on a regular interval thereafter, reflecting the GDP/trends then prevalent.

6.2 Whilst not specifically relevant to the Order itself, we would also encourage the JCRA to consider whether it would be appropriate to introduce a simplified merger application process for transactions which are already subject to an EU/OFT merger filing. Our recommendation in this regard would be to introduce two JCRA application forms, one in substantially the same form as present for non-EU merger transactions, and a second reduced format for EU/OFT merger transactions. The reduced format would constitute, in broad terms, a JCRA wrapper to the EU/OFT filing which would address Jersey's specific issues (as currently raised in the existing merger application form) with the ability to call to specific areas of the EU/OFT filing for the purposes of satisfying many of the requirements set out in Requirements 2, 3 and 4 of the merger application form to the extent appropriate.

We look forward to receiving any feedback from the JCRA to our response and would be happy to discuss with the JCRA any questions they may have.

For the avoidance of doubt, we consent to the JCRA making this letter publicly available in its entirety.

Yours sincerely

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Yours sincerely

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