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By Email

Ms Kerstee Norris
Case Officer
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Dear Kerstee

Consultation Paper concerning proposed amendments to the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the "Order")

The purpose of this letter is to respond to the Consultation Paper published by the Jersey Competition Regulatory Authority (the "**JCRA**") on 12 May 2011 in relation to certain proposed amendments to the Order.

Taking each of the Questions for Discussion set out in paragraph 24 of the Consultation Paper in turn:

(a) Turnover and Asset Test

We agree that there is a need to re-assess the Order with a view to:

- reducing the number of mergers and acquisitions that are notified to the JCRA;

- at the same time, ensuring that those transactions which have the greatest likelihood of substantially lessening competition in Jersey continue to be assessed by the JCRA;

- increasing the objectivity of the criteria by which the parties involved in a merger or acquisition must determine whether it is notifiable, particularly in view of Jersey's mandatory notification regime and the relatively low level of information which has in some instances been available publicly for the purpose of assessing merger parties' respective shares of supply under the current notification thresholds; and

- removing the need to notify large international transactions where some turnover may be generated locally but there is no other active Jersey nexus.

In broad terms, therefore, we favour the proposed move towards revised notification criteria based on a combined turnover and asset test. However, we suggest that further consideration is required by the JCRA in relation to the following aspects of the current proposals.

In relation to turnover:

(i) we note that the new turnover test refers to the turnover in Jersey of all the undertakings involved in a proposed merger or acquisition. We suggest that the seller's turnover in Jersey is irrelevant for this purpose, save in the case of a business sale to the extent attributable to the target business in Jersey itself;

(ii) a related point to (i) above is that it is not clear from the Consultation Paper whether it is intended that the total turnover in Jersey of all the undertakings involved combined, or all the undertakings involved individually, must be at least £2 million for the threshold to be met.

However, if (as we think is likely) the former is intended, this would mean that any proposed merger or acquisition involving a Jersey buyer which itself already has relevant assets in Jersey and a turnover in Jersey of at least £2 million would be caught by the new turnover and asset test, even if all the other undertakings involved in the transaction (including the target) had no Jersey turnover or assets.

On the assumption that this is not the desired outcome, we suggest that the notification thresholds should be supplemented with an additional criterion linked to the local turnover and/or assets of the target, so as to ensure that only transactions with a material nexus to the Jersey market are notifiable;

(iii) we assume that, in the same way as the current Order refers to shares of supply to persons in Jersey, the proposed new threshold linked to "turnover in Jersey" is intended to capture only turnover derived from the supply of goods and services to persons in the Island. However, "turnover in Jersey" could also be interpreted much more widely to cover, for example, turnover generated in Jersey through supplies to persons outside Jersey. Again, we suggest this requires clarification; and

(iv) the proposed £2 million turnover threshold seems very low, although we are unable to comment meaningfully on this without access to relevant data on the turnover of local businesses generally. In any event, in the interests of certainty and objectivity, we consider that the required method and basis of calculating relevant turnover should be clearly set out, including for example whether GST, sales rebates and intra-group revenues are to be excluded for this purpose.

In relation to assets:

(i) again, we do not believe that the seller's asset position is relevant, save to the extent that the assets in question pertain to the target business;

(ii) in terms of what qualifies as "assets" for this limb of the test, it may be preferable to refer specifically to the holding of a licence to carry on business and employ staff pursuant to the Regulation of Undertakings legislation, instead of referring to "an undertaking where employees work in Jersey";

(iii) the fact that a party to the merger or acquisition has a subsidiary, representative office or branch office in Jersey is presumably only relevant from the JCRA's perspective if the subsidiary or office in question carries on business and employs staff in the Island. Otherwise, an international transaction involving Jersey turnover but no other Jersey assets would be notifiable if one of the parties had a Jersey subsidiary incorporated only to act as a holding company. Again, we assume this is not a desired outcome;

(iv) we suggest that further clarity is required as to:

- the level of, and means of assessing, the influence required over local agents to meet the proposed asset test (we have in mind terms somewhat akin to the "decisive influence" provisions in Articles 2(2) and 2(3) of the Competition (Jersey) Law 2005);

- the meaning of "facilities that equate to a local asset", which could potentially be very widely interpreted; and

- the extent to which long term supply or similar arrangements are considered relevant for this purpose.

(b) Essential Services

We believe that a merger or acquisition involving one of the Island's essential services is likely to be caught by the combined turnover and asset test, particularly if the turnover threshold remains at its currently proposed level of £2 million.

However, if this is not the case and there is a political desire for the ownership / control of any smaller essential services to be subject to further oversight or regulation, it is not necessarily appropriate in our view for this oversight or regulation to fall within the remit of the JCRA. This is because it might reasonably be expected that a merger or acquisition which is effectively too small to meet the notification thresholds is unlikely to have a substantial effect on competition in the island such as to be of concern to the competition authority.

(c) Exemptions

We do not purport to comment on all the exemptions that may potentially be relevant for consideration by the JCRA, as these will depend to a large extent on the way in which the issues outlined above are addressed and the eventual remit of the revised Order. However:

- as a general comment, we suggest that the exemptions should be structured in such a way as to limit as far as possible any scope for an otherwise notifiable transaction to be broken down into a series of individual exempt transactions, thus avoiding the need to notify; and

- as regards your reference to the possibility of exempting intra-group transfers of assets, we suggest that all internal restructurings not involving an ultimate change of control should be subject to an express exemption.

Please do not hesitate to contact me if you wish to discuss any of the above in more detail.

Kind regards

Yours sincerely

Sara Johns