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Dear Elaine

Consultation on Proposed Amendments to Merger Thresholds

I am writing with reference to the Jersey Competition Regulatory Authority's ("**JCRA**") Consultation Paper dated 1 June 2009 in which it set out proposed amendments to the merger thresholds presently contained in the Competition (Mergers and Acquisitions) (Jersey) Order 2005 (the "**Order**").

We welcome the proposals from the JCRA to reduce the number of mergers or acquisitions that require notification to and approval by the JCRA, as well as its recent announcement of a revised fee structure for transactions which are referred to it.

In terms of the proposed amendments to the merger thresholds as set out in Article 1(4) of the Order, we have the following comments:-

1) **<u>Acquisition of Undertakings Outside Jersey</u>**

We agree with the need to exclude from the merger criteria transactions by a Jersey entity which involve the acquisition of an undertaking in another jurisdiction which has no share of supply or purchase of goods or services in Jersey. Firstly, it does not seem appropriate that the JCRA's authority should extend to transactions which have no foreseeable impact on competition in Jersey as they affect only another jurisdiction and secondly, in our view, the majority of the sanctions which apply under the Competition (Jersey) Law 2005 (the "**Law**" for breach of Article 20 of the Law would appear to have very limited impact in the context of a foreign acquisition.

In terms of the specific drafting of the proposed exemption, however, we do not agree that it should be a condition of the exemption that the target business should neither own nor control tangible or intangible assets located in the Island. It appears to us that the key point to be considered is whether the target conducts business operations and has any share of supply or purchase of any goods or services in Jersey.

The fact that the undertaking in question may own an asset (for example, a bank account) in Jersey should not, of itself, increase any potentially anti-competitive effect of the transaction. Indeed, this provision could, in some cases, make the exemption sufficiently ambiguous that it becomes ineffective in relation to some transactions. For example, if a Jersey business decides to buy a business which operates and has customers only in the United Kingdom or mainland Europe and does not provide or purchase any goods or services in Jersey, there would appear to be no reason why this transaction should be

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caught by the Order, even if the purchaser has a 40% share of supply of any goods or services in Jersey. If, however, the target business owns an asset such as a small private plane which is used by the directors of the target business in the United Kingdom or Europe but which is registered in Jersey, the target's ownership of that one asset would mean that the exemption would not be available to this transaction.

We suggest, therefore, that the wording at the end of the proposed amendment to Article 1(4)(a) reading "and otherwise owns no tangible or intangible assets located in Jersey" should be deleted.

2) **Sale of an Undertaking with Less than a 40% Share of Supply or Purchase**

We also agree with the JCRA's proposal that a sale by a business, which has a 40% or more share of supply in respect of certain products or services, of a discrete part of its business which has a share of supply of less than 40%, should be exempt from the requirement to obtain JCRA approval.

This firm has been involved in several transactions where JCRA approval has been required only because the vendor has had a 40% share of supply in its retained business but neither the purchaser nor the target had significant shares of supply and the transaction did not create any concentration issues under either Article 1(1) or 1(2) of the Order. It is difficult to see circumstances in which the vendor's shares of supply are relevant to future competition in the Island in such circumstances and our understanding is that most jurisdictions with merger control rules focus only on the position or market shares of the purchaser and the target undertaking and not on those of the vendor. This exemption is, therefore, very welcome.

Again, however, the qualification to the exemption, that there be no "ancillary restraints" between the parties concerning the proposed merger or acquisition, means that this exemption will, in the vast majority of cases, not be available and will render the exemption virtually worthless in practice.

In our experience it would be extremely rare for a purchaser to buy a business from a vendor which continues to have business operations in the jurisdiction without seeking a degree of protection for the goodwill of its customers and the target business by some form of protective covenant from the vendor, for example, requiring the vendor not to compete with the target business for a short period, not to solicit its customers and not to solicit its employees.

The European Commission accepts that non-competition obligations which are imposed on the vendor in the context of a transfer of an undertaking or of part of it can be directly related and necessary to the implementation of the relevant transaction and that, in order to obtain the full value of the assets transferred, the purchaser must be able to benefit from some protection against competition from the vendor in order to gain the loyalty of customers and to assimilate and exploit the knowhow. Such non-competition clauses are not only directly related to the concentration but are also necessary to its implementation because, without them, there would be reasonable grounds to expect that the sale of the undertaking or a part of it could not be accomplished (OJ/C56/24, 5.3.2005). The Commission accepts that non-competition clauses may be justifiable for periods of between two and three years.

The qualification to the proposed exemption would deny a purchaser the ability to seek any form of covenant from the vendor if it wished to rely on the exemption. We would expect that most purchasers would rather require some form of protective covenant and seek the JCRA's approval under Article 1(4) than proceed with no protective covenant at all. It appears to us that the proposed exemption as drafted would not be consistent with the treatment afforded to ancillary restraints in Europe, as required by Article 60 of the Law.

If, as set out above, it is accepted that the vendor's share of supply is largely irrelevant to future competition and any ancillary restraints are within the terms of the Commission's

guidance referred to above, we believe that there is no reason to include this qualification in the exemption and it should be deleted.

One alternative to exemption (b) would be to delete paragraph (b) in its entirety and to amend Article 1(4) itself to read as follows:

"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 either the purchaser or the undertaking(s) which is the subject of the proposed merger or acquisition has an existing share of 40% or more of the supply or purchaser of goods or services of any description supplied to or purchased from persons in Jersey."

Exemption (a) as discussed above would still be required.

We trust that the foregoing comments are helpful and would be very happy to meet with you to discuss in more detail if you would find that useful.

With kind regards.

Yours sincerely
For and on behalf of Mourant du Feu & Jeune

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