Channel Islands Competition Laws

CICRA Guideline 6b - Mergers & Acquisitions

– Procedure

Issued July 2017

What this guideline is about

This guideline is one in a series of publications designed to inform businesses and consumers about how we, the Channel Islands Competition and Regulatory Authorities ('CICRA'), apply competition law in the Channel Islands. Details of these other publications, including how to obtain copies, are at the back of this guideline.

The purpose of this guideline is to explain to consumers, businesses and their advisers the provisions in the Jersey and Guernsey competition laws in respect of mergers and acquisitions. Specifically, this guideline has been prepared to explain Part 4 of the *Competition (Jersey) Law 2005* ('the Jersey Law') and Part III of *The Competition (Guernsey) Ordinance, 2012* ('the Guernsey Ordinance').

This guideline should not be relied on as a substitute for the laws themselves. If you have any doubts about your position under the laws, you should seek legal advice.

Contents

1 Introduction

Why is competition important?

Open and vigorous competition is good for consumers because it can result in lower prices, new products of a better quality and more choice. It is also good for fair-dealing businesses, which flourish when markets are competitive.

Competition law in the Channel Islands

In the Channel Islands, the Jersey Law and the Guernsey Ordinance prohibit anti-competitive behaviour, including anti-competitive agreements between businesses and the abuse of a dominant position in a market. They also require certain mergers and acquisitions to be notified to CICRA for approval.

What is CICRA?

The Jersey Competition Regulatory Authority ('JCRA') and the Guernsey Competition and Regulatory Authority ('GCRA') co-ordinate their activities with respect to competition law enforcement in the Channel Islands. For the purpose of this document, the JCRA and the GCRA are together referred to as CICRA, and all references in this document to CICRA should therefore be read as references to each of the JCRA and the GCRA, unless the context otherwise requires.

What powers does CICRA have?

Through the JCRA and GCRA, CICRA has a wide range of powers to investigate businesses suspected of breaching the law. We can order that offending agreements or conduct be stopped and levy financial penalties on businesses and individuals for the breach.

What types of organisation are considered a 'business'?

In this guide, we refer to a 'business'. This term (also referred to as an 'undertaking' in the laws) means any entity engaged in economic activity, irrespective of its legal status, including companies, partners, cooperatives, States' departments and individuals operating as sole traders.

A Note on European Union (EU) Competition Law

The competition laws in Guernsey and Jersey are modelled on the competition provisions in the Treaty on the Functioning of the EU. The Channel Islands' legislation places certain obligations on CICRA and the Royal Court in each island when applying the competition laws:

- In Jersey, Article 60 of the *Competition (Jersey) Law 2005* 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 law; and

- In Guernsey, Section 54 of *The Competition (Guernsey) Ordinance, 2012* provides that CICRA and the Royal Court must take into account the principles laid down by and any relevant decisions of the European courts in respect of corresponding questions arising under EU competition law.

As noted above, CICRA must endeavour to ensure that, as far as possible, competition matters arising in the Channel Islands are dealt with in a manner consistent with - or, at least, that takes account of - the treatment of corresponding questions under EU competition law. Relevant sources include judgments of the European Court of Justice or General Court, decisions taken and guidance published by the European Commission, and interpretations of EU competition law by courts and competition authorities in the EU Member States. Article 60 and Section 54, however, do not prevent us from departing from EU precedents where this is appropriate in light of the particular circumstances of the Channel Islands.

2 Purpose of this guideline

CICRA, through the GCRA and the JCRA, has previously put in place administrative procedures that help it to carry out its merger review function.

Based on its experience of merger notifications to date, and taking into account international best practice, CICRA revises its guideline from time to time. This revised guideline, which builds on existing CICRA procedures, sets out how parties and their advisors should notify mergers to CICRA. CICRA will apply this guideline to all future merger applications made to it.

This guideline should be read in conjunction with guideline 6a which addresses the substantive merger assessment carried out by CICRA.

3 When can I notify a merger?

The competition law prohibits parties completing a notifiable merger before they have obtained approval from CICRA. Mergers must therefore be notified to us prior to their implementation and following the announcement of the public bid, or the acquisition of a controlling interest. We therefore recommends that all sale and purchase agreements contain a condition precedent making the merger conditional upon receiving GCRA or JCRA approval, if required.

Notification may also be made where the parties demonstrate to us a good faith intention to conclude an agreement (as evidenced by, for example, adequate financing, heads of agreement or similar, or evidence of board level consideration) or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would lead to a notifiable merger.

Parties should note that the merger notification process in the Channel Islands involves public consultation. Therefore, when parties lodge applications for approval of a merger, the existence o a proposed transaction will be disclosed to the public.

If the form of a merger changes after we have issued an approval decision, then a further notification may be required. Insignificant modifications of the merger – for example, minor changes in the shareholding percentages which do not affect the change in control or the quality of that change, changes in the offer price in the case of public bids or changes in the corporate structure by which the merger is implemented – are considered as being covered by the approval decision.

4 Who should make the application?

It will normally be appropriate for an application to be submitted jointly by both or all parties, although they may appoint a joint representative, e.g. the acquiring business or its legal adviser, for this purpose. The obligation to apply for approval under Regulations 4 and 5 of the M&A Regulations in Guernsey falls on the acquiring undertaking, although this does not preclude all parties from submitting the application jointly.

We have the power to refuse approval of a merger if any information we have requested from the parties has not been provided within a reasonable time. It should also be noted that it is an offence under the laws to knowingly or recklessly provide material information that is false or misleading.

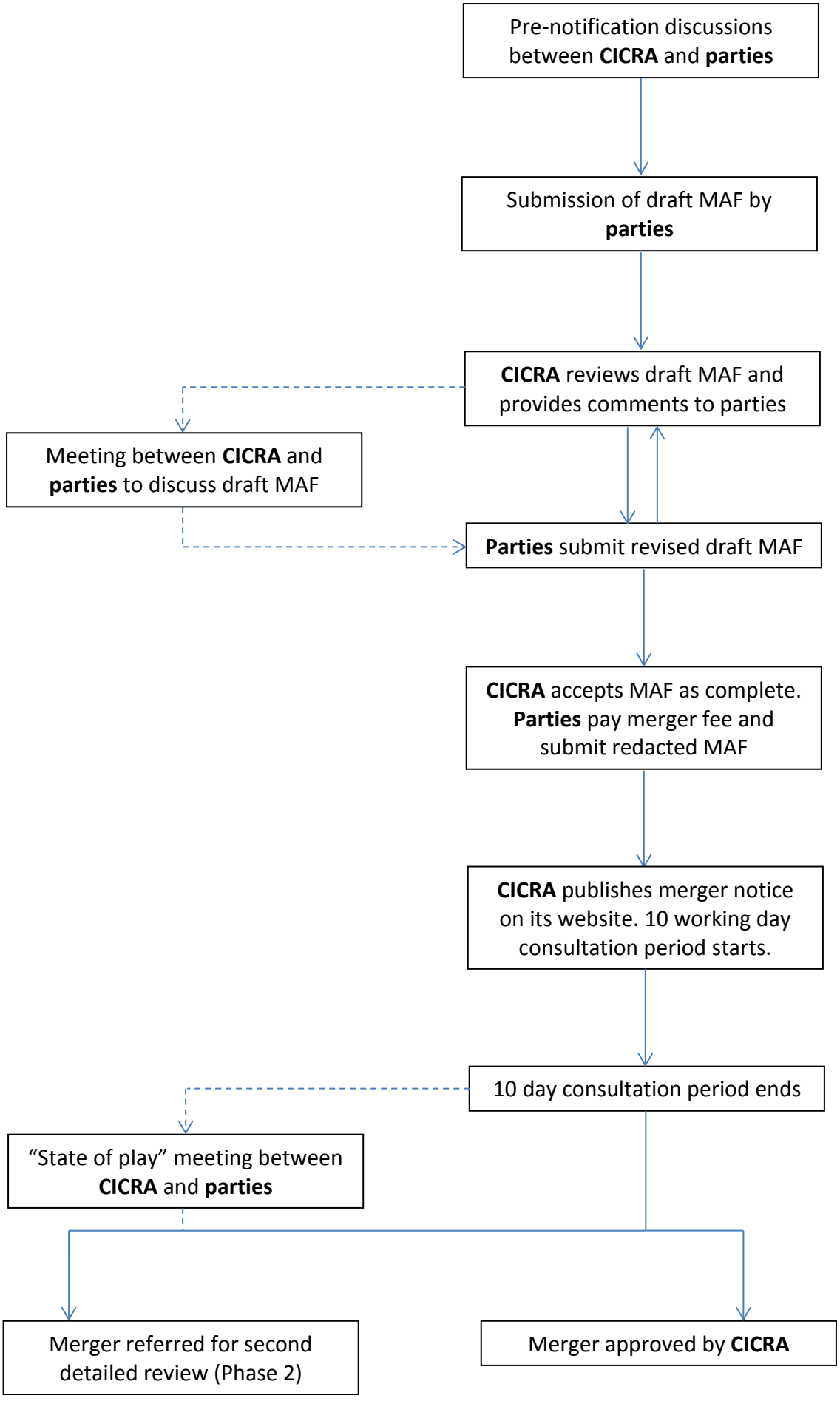
5 Procedure – overview

Except in the case of preliminary review (available in Guernsey only), CICRA's merger review process involves the following key stages:

- Pre-notification
- First detailed review
- (State of play meeting)
- (Second detailed review)
- Decision

The chart below shows the key stages of a first detailed review (sometime referred to as 'Phase 1' of an investigation), together with a high level summary of the actions that will usually be taken by the merging parties and by us at each stage:

Phase 1 - procedure



6 First detailed review

Pre-notification

Based on its experience of assessing notified mergers, CICRA's view is that the consultation and assessment that takes place at 'Phase 1' will generally progress much more efficiently where the merging parties and their advisers have engaged in pre-notification discussions with us and where a full draft Merger Application Form has been submitted.

Pre-notification has a number of specific benefits for the notifying parties, including:

- Allowing them to provide information to us on the markets involved in the merger;
- Enabling us to clarify the information that we require to for the Merger Application Form to be considered to be complete and so reducing the risk that we will be required to 'stop the clock' during Phase 1;
- Enabling us to identify areas where we do not require extensive information from the parties, which reduces the administrative burden.

For these reasons, we encourage notifying parties to contact us as soon as there is a good faith intention to proceed with a notifiable merger. We also require pre-notification of all notifiable mergers through the submission of a draft Merger Application Form.

Pre-notification discussions

Pre-notification discussions are available for all transactions, whether or not they are in the public domain, provided that there is a good faith intention to proceed with the transaction.

We encourage notifying parties to engage with us at an early stage, ideally before the submission of a draft Merger Application Form. Such early engagement enables both the parties and us to identify any particular areas of difficulty, to clarify any questions that the parties may have regarding our

process and timescales and allows us to allocate (a) case officer(s) to the merger before the submission of the draft Merger Application Form.

Draft Merger Application Form

Notifying parties must provide us with a draft Merger Application Form. There is a common Merger Application Form for Jersey and Guernsey, which is available on the CICRA website. If the merger is notifiable in both Jersey and Guernsey, then only one form needs to be submitted to CICRA (although separate application fees will be payable).

We will review the draft Merger Application Form and revert to the parties within a reasonable time frame; as a guide, this is generally expected to be within five working days of receipt of the draft Merger Application Form.

A Merger Application Form will only be accepted as complete when it contains all the information necessary for a first detailed review to be carried out and where that information is provided in a form that is sufficiently clear for us to be able to consult publicly on it. We may therefore ask the parties to provide further information and to resubmit the draft Merger Application Form if it is unclear or incomplete. If a pre-notification meeting to discuss the draft Merger Application Form is required, this will be arranged by us.

Redactions

As part of its public consultation on a notified merger, CICRA will make available to third parties on request a copy of the Merger Application Form. Notifying parties should therefore provide us with a copy of the Merger Application Form with any information in respect of which they wish to claim confidentiality clearly marked. We will agree a non-confidential version of the Merger Application Form with the notifying parties before it is made public.

Notification

Consultation

When a Merger Application Form has been accepted by us as complete and the merger filing fee has been received, we will publish a notice on our website, stating that the parties have submitted the application (and the sectors in which they are engaged) and inviting comments on the proposed merger. The public consultation period will run for 10 working days. We may also approach one or more of the parties' competitors, suppliers and/or customers, or third parties who might hold information regarding the markets in which the parties are active (e.g. other regulatory agencies).

"State of play" meeting

If, either following submission of the Merger Application Form or following the consultation period, we are of the view that there is a realistic possibility that the merger will not receive approval at the end of the first detailed review, or will only be approved with conditions, we will arrange a "state of play" meeting with the merging parties. The state of play meeting will generally take place after the consultation period has ended. The purpose of this meeting is to give the parties as much information as possible about any competition concerns, including feedback from our consultation, and to provide an update on the likely timetable for the case.

Conclusion of first detailed review

Our decision, either to approve the merger or to refer it for a second detailed review, will be published on our website.

There is no statutory deadline by which we must conclude a first detailed review. However, by way of administrative target, we aim to reach a decision within 25 working days of registration of an application. If we issue any requests for further information from the parties, then we will regard this as having "stopped the clock" with respect to this timetable, which

will only resume once we have received a satisfactory response to our information request.

7 Second detailed review

If during the investigation of the application, issues arise that may lead to refusal of approval for the merger or an approval with conditions, then CICRA will move to a second detailed review. The opening of a second detailed review will entail the payment of a further fee – see section on 'Fees' below.

As soon as practicable after the commencement of the second detailed review, the parties will be provided with a further information request from us, seeking information required to assess various "theories of harm" (i.e. the basis upon which the merger might substantially lessen competition, or, in Guernsey, operate against the public interest).

Once the analysis of "theories of harm" is complete, we will issue our provisional findings in respect of the merger. The provisional findings will state our provisional conclusion as to whether approval of the merger should be given or refused, and will set out the reasons for this provisional conclusion and the evidence upon which it is based.

The parties, and all third parties who have registered an interest in the merger, will be invited to respond to the provisional findings, and will also be given the opportunity to meet with us. Our final decision will be placed on our website.

There is no statutory deadline for the conclusion of a second detailed review. However, our practice by way of administrative target is that we will endeavour to reach a final decision within 6 months from the date of first registration of the application (i.e. commencement of the preliminary review or first detailed review). If we issue any requests for further information from the parties, then we will regard this as having "stopped the clock" with respect to this timetable. The timetable will only resume once we have received a satisfactory response to our information request from the parties.

8 Preliminary review (Guernsey only)

In Guernsey only, where an acquiring undertaking involved in a merger is a credit or financial institution (terms defined in Regulation 8 of the M&A Regulations), then it is entitled to apply for a preliminary review of the merger. An application for preliminary review is made using the Shortened Merger Application Form (which can be found on CICRA's website).

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 M&A 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.

We require the notifying parties to submit a draft Shortened Merger Application form. We will review the draft Shortened Merger Application Form and revert to the parties within a reasonable time frame; as a guide, this is generally expected to be within five working days of receipt of the draft Shortened Merger Application Form.

A Shortened Merger Application Form will be accepted as complete when it contains all the information necessary for a preliminary review to be carried out.

Upon receiving a complete Shortened Merger Application Form, a non-confidential version of that form and the appropriate filing fee, we will register the application and post a notice on

our website, stating that the parties have submitted the application (and the industries in which the parties are active) and inviting comments on the proposed merger. This consultation period will last for 7 days.

If no public comments are received, and we otherwise have no concerns regarding the merger, then on the working day after the expiry of 14 days since registration, we will issue a short-form decision, approving the merger. The decision will be published on our website, once we and the parties have discussed the redaction of any commercially-sensitive information.

If we have any concerns regarding a merger notified under the preliminary review, we will require the parties to prepare a standard Merger Application Form. This will be advised during the 14 day period after registration.

If a merger is notifiable in Jersey and Guernsey, but the parties are entitled to apply for preliminary review in Guernsey, then we will permit the parties to apply for preliminary review (and to pay the preliminary review fee in Guernsey) using the standard Merger Application Form. However, in such cases, we will apply the first detailed review process in both islands.

If a merger is eligible for preliminary review, but the parties consider that it is likely to require detailed analysis, they are entitled to apply for both preliminary review and a first detailed review by submitting a standard Merger Application Form, in order to shorten the time likely to be taken by to conduct its assessment.

9 Fees

The laws allow CICRA to impose fees in order to cover the cost of conducting merger reviews. The fee should be provided to us by bank transfer and account details will be provided on request.

If a merger is notifiable in both Jersey and Guernsey, then only one Merger Application Form need be submitted, but separate application fees will be payable.

We will not register an application for approval of a merger unless the relevant fee has been paid in full, and we will not proceed with a second detailed review until we receive any further fee payable.

Fees in Jersey

In Jersey, our fee for a first detailed review of a merger depends on the fair market value ('FMV') of the total consideration received by the seller(s) for the merger, including the assumption of any liabilities whether actual or contingent. An application must be accompanied by payment of the appropriate fee.

Transaction's FMV	Filing Fee
Under £10,000,000	£5,000
£10,000,000 or more	£10,000

It is the responsibility of the merging parties to determine the transaction's FMV. However, if we disagree with the parties' FMV calculation, this could delay review of the merger.

If a second detailed review is required, then a further fee is payable, regardless of the transaction's FMV. We will assess the resources likely to be required to conduct our review of the application, and will advise the parties of the estimated fee at the commencement of the second detailed review of our assessment, with a deduction for any fee paid for the first

detailed review in respect of the same matter. It will be invoiced separately and is payable in advance. We reserve the right to require payment of additional fees should our costs exceed our estimate.

Fees in Guernsey

In Guernsey, the fees payable for mergers are prescribed by *The Competition (Merger and Opinion Application Fees) (Guernsey) Regulations, 2012*, and are based on the combined applicable turnover of the undertakings involved in the merger arising in the Channel Islands, as calculated in accordance with regulations 1(2) and 1(3) of the M&A Regulations.

For a preliminary review, the fee is £500. For a first detailed review, the fee is £5,000 if the combined applicable turnover of the undertakings involved in the merger arising in the Channel Islands is less than £10 million and £10,000 if that turnover is more than £10 million.

If a second detailed review is required, then the relevant regulations entitle us to levy "*such fee calculated by the Authority to cover its reasonable costs, fees and expenses in connection with the determination of the application, less any fee paid for a first detailed review in respect of the same matter*". We will assess the resources likely to be required to conduct our review of the application, and will advise the parties of the approximate level of any further fee at the commencement of the second detailed review of our assessment. It will be invoiced separately and is payable in advance

10 Confidentiality and involvement of third parties

The laws require CICRA to keep confidential non-public information we receives during a merger investigation. However, this restriction does not apply to information where consent for disclosure has been obtained. When submitting an application form, parties must clearly identify the information over which they are claiming confidentiality[1].

Third parties may request a copy of the Merger Application Form in order to consider whether to make a submission to us regarding the merger. For this reason, we require the merging parties to produce a non-confidential version of the Merger Application Form, which must be submitted at the same time as the full Merger Application Form, for distribution to those third parties.

In the event that a merger review proceeds to a second detailed review, we will provide a copy of our provisional findings to all parties who have registered an interest in the review of that merger (e.g. responded to the public consultation). The parties will be invited to review the provisional findings prior to distribution so as to avoid commercially-sensitive information being disclosed.

Parties will also be invited to review our final decision and to highlight any information that they consider should be redacted from the public version of the decision for reasons of commercial confidentiality. In disclosing market share data, we will apply the European Commission's guidelines[2].

[1] In assessing claims for confidentiality, CICRA will apply the principles set out in section 1 of the European Commission's *Guidance on the preparation of public versions of Commission Decisions adopted under the Merger Regulation*: http://ec.europa.eu/competition/mergers/legislation/guidance_on_preparation_of_public_versions_mergers_26052015.pdf

[2] *Market Share Ranges In Non-Confidential Versions of Merger Decisions*, see http://ec.europa.eu/competition/mergers/legislation/market_share_ranges.pdf

11 How can I find out more?

Please contact us if you have a question about the laws in either island, or if you suspect that a business is breaching the law and wish to complain or discuss your concerns.

2nd Floor Salisbury House
1-9 Union Street
St Helier
Jersey
JE2 3RF

T: +44 (0) 1534 514990
E: info@cicra.je

Suite 4, 1st floor
Plaiderie Chambers
La Plaiderie
St Peter Port
Guernsey
GY1 1WG

T: +44 (0) 1481 711120
E: info@cicra.gg

Publications

All our publications, including the detailed guidelines we publish covering specific areas of the law, can be downloaded from our website: www.cicra.je and www.cicra.gg.