Memorandum

To	CICRA
From	Ogier Guernsey (Andrew Munro and Frances Watson) and Ogier Jersey (Matt Shaxson and Sara Johns)
Date	15 January 2016
Reference	33308218 V2
Subject	CIRCA M&A Regime Consultation

Introduction

We refer to "The Consultation on amendments to the Jersey/Guernsey Mergers and Acquisitions Regime" (CICRA reference 15/43 and 15/44) (the **Consultation Paper**). This comprises Ogier's response from both a Guernsey and a Jersey perspective to the Consultation Paper.

We agree that there are a number of areas where the competition regime in each of the Channel Islands can be improved to provide a better experience for clients of Guernsey/Jersey plc whilst still enabling CICRA to achieve its purposes and are grateful for the effort which CICRA has put into producing the Consultation Paper as well as for the opportunity to feed into the consultation process.

We have the following specific comments in relation to the proposals (for ease of reference we have only mentioned "mergers" but these references should be taken as including "acquisitions" as well).

A. "Local" turnover notification

We agree to the proposal to adopt a consistent, objective turnover based jurisdictional test for both Islands to demonstrate cross-Island observance of the International Competition Network best practice.

We agree that anything which can be done to simplify the existing turnover calculation process for implementation in both Islands is welcome. We agree that there should be a single threshold for all industries irrespective of the nature of the merger in terms of determining whether CICRA takes jurisdiction. Please see our further comments against paragraph D in relation to the relevant turnover thresholds.

We understand that the consultation is also suggesting that examination be limited to "undertakings concerned" in the merger and that the need to consider the wider group as is required under the current regulations would be removed. Clarity in this regard will significantly improve the ease with which a determination can be made by the parties and we strongly support such a move.

As such we generally agree with the proposed definition of "Undertakings Concerned" in paragraph 31 of the Consultation Document. That being said, to address perceived weaknesses in the current legislative framework in both Islands however we recommend that suitable provisions are provided to capture (a) acquisitions of part of an undertaking, (b) staggered acquisitions of an undertaking, (c) change from joint to sole control, (d) acquisition of joint control, (e) changes of controlling shareholders where joint control already exists and (f) acquisition of control by a joint venture (as discussed in paragraphs 136 – 147 of the EC Jurisdictional Notice

(as defined in the Consultation Paper). To the extent possible/practicable, we suggest that the necessary revisions be made through new orders rather than through amendments to CICRA's M&A guidelines.

Separately, we would also recommend that each of the Competition (Guernsey) Ordinance 2012 and the Competition (Jersey) Law 2005 is amended to the effect that transactions are not automatically ineffective to pass title if they meet the relevant jurisdictional tests but are not approved by CICRA but that they can be made so if CICRA concludes that the transaction substantially lessens competition and structural and/or behavioural remedies are not adequate.

B. Definition of "Financial Institution"

We support aligning the definition of "Financial Institution" with the EU Regulations (as defined in the Consultation Paper) for the reasons set out in paragraphs 35 and 36. Given increasing international interest in the financial sector in Jersey and Guernsey, we consider that such an alignment will be welcomed by the international advisor community.

C. Exemptions

We support establishing a list of certain types of transactions (i.e. mergers or acquisitions) that would not be notifiable to CICRA.

We generally agree with the list in paragraph 40 save that in relation to the exemption set out in the first bullet point we would comment that consideration would need to be given as to what would happen if a sale did not occur within a year in the first bullet point to ensure that such an eventuality is legislated for.

In addition, we would put forward the following for consideration:

1 Any merger or acquisition where the principal purpose of the business or undertaking being acquired is the holding of real estate or other assets outside of the Bailiwicks of Guernsey or Jersey.

2 Any merger or acquisition the effect of which is limited to internal restructuring and in respect of which the relevant change of control does not introduce new ultimate beneficial owners.

3 Any merger or acquisition which is the result of the creation of a joint venture where the undertakings involved do not perform in or from within the Bailiwicks of Guernsey or Jersey on a lasting basis all the functions of an autonomous economic entity.

D. Share of Supply/Purchase

We note CICRA's concern that by narrowing the jurisdictional test to one limited to local turnover could result in transactions which have the potential to substantially affect competition not being notified to CICRA.

We would not however support any proposal to the introduction of a separate voluntary share of supply or purchase test regime in relation to determining whether CICRA takes jurisdiction. In our view this would mean that both tests would need to be considered in each case and this will add cost, complexity and delay for clients of Guernsey/Jersey plc. We also consider that it would defeat the two main advantages of the turnover test: objectivity and certainty.

Whilst we would generally agree to the retention of the current turnover test threshold in Guernsey and the imposition of the same thresholds in Jersey, to address CICRA's concern in relation to significant but otherwise non-notifiable transactions, we would propose the following:

- Increasing the cross island/island specific thresholds for the turnover test from £5 million and £2 million respectively for the mandatory notification requirement – perhaps to £10 million and £5 million; and

- Introducing a voluntary regime whereby parties could choose to submit a preliminary review application (with such an application being made available to any parties to a transaction and removing the current limitations on its availability) in relation to mergers or acquisitions which meet a lower island specific turnover test (for instance, £500,000 in any one Island) (the **Voluntary Turnover Threshold**).

We believe that the above could help to give parties a degree of certainty and allow CICRA to keep an overview whilst keeping the regime simple and user-friendly.

E. "Preliminary Review" Process

As mentioned above, we would support the introduction of a voluntary submission available to any contracting parties where the Voluntary Turnover Threshold is met.

We also strongly support maintaining the availability in Guernsey/introducing the availability in Jersey of a preliminary review process for financial institution for the reasons set out in paragraph 51. We consider, from a Jersey perspective, that the introduction of a turnover based threshold will result in many more mergers or acquisitions in the financial sector being required to mandatorily notify CICRA than the incumbent share of supply or purchase test and therefore having the availability of the preliminary review process for such transactions would be of some comfort to this important sector to the economy of Jersey without constraining CICRA's ability to consider the competitive effects of relevant transactions.

F. European Competition Law

We agree that it makes sense to take advantage of section 54 of the Merger Regulations and Article 60 of the Competition (Jersey) Law 2005 and the huge body of EU jurisprudence as much as possible.

In our view this should be kept as simple as possible and we would not see the need to introduce additional regulations simply mirroring EU provisions (which may be amended and become out of kilter with Guernsey or Jersey law or regulations).

We would expect that it would be sufficient for CICRA to makes statements in its M&A guidelines as to which provisions it considers apply in Guernsey and Jersey and where it believes there are differences in the regimes such that EU provisions should not be applied.

Ogier