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15 January 2016

Dear Sirs

Response to the Jersey Mergers and Acquisitions Consultation Document

We refer to CICRA document no. CICRA 15/44 dated 13 November 2015 entitled *Consultation on amendments to the Jersey Mergers and Acquisitions Regime* (the "**Consultation Document**").

Unless the context otherwise requires, capitalised terms used in this letter shall have the meanings given to them in the Consultation Document.

Many thanks for giving us and other interested parties the opportunity to comment on the proposed changes to the Jersey mergers and acquisitions competition notification and consent regime.

Our responses to the issues set out in the Consultation Document are set out below.

1. **ISSUE 1(A): COMMENTS ON MERITS OF "LOCAL" TURNOVER NOTIFICATION TEST**

1.1 **General**

The imposition of a mandatory "local" turnover-based notification test in Jersey in place of the existing mandatory share of supply / purchasing power-based notification test would recognise the disproportionate time and financial resources required (both in respect of CICRA and the parties involved in relevant transactions) in having to seek competition clearance for smaller transactions, where consumer protection can primarily be achieved through the existing prohibitions on anti-competitive arrangements and abuse of dominant position.

We are therefore supportive of the imposition of a mandatory "local" turnover-based notification test in Jersey in place of the existing mandatory share of supply / purchasing power-based notification test.

1.2 **Request for formal CICRA guidance**

If the result of the current consultation is that CICRA recommends that the Jersey competition regime should be changed in a manner that requires the amendment or replacement of primary or secondary legislation, we would encourage CICRA to issue guidance to assist with the interpretation and implementation of the current mandatory share of supply / purchasing power-based test pending such amendment or replacement coming into force.

Our suggestions in respect of the subject matter of such guidance are set out at paragraphs 1.4 (*Definition of "undertakings concerned" and related matters*), 6 (*Issue 4(b): information relevant to appropriate "share of supply/purchase" test*) and 9.3 (*Clarification on who is required to make merger notifications*) below.

We would further encourage CICRA to issue such guidance in any event, since:

(a) if the Jersey regime moves to a position where, together with a mandatory "local" turnover-based notification test, there is a power for CICRA to call in mergers or acquisitions, and a right for the parties to a merger or acquisition to seek voluntary clearance from CICRA, on the basis of a share of supply / purchasing power-based test (discussed below at paragraph 5 (*Issue 4(a): merits of a "share of supply/purchase" test*)), it would be relevant to the application of the share of supply / purchasing power-based test; and

(b) it is likely to be relevant to the assessment of the competition effects of a merger or acquisition that requires a notification to be made following the application of the mandatory "local" turnover-based notification test.

1.3 **The "local" turnover-based notification test**

If a mandatory "local" turnover-based notification test were imposed in Jersey in place of the existing mandatory share of supply / purchasing power-based notification test, as identified by CICRA in paragraph 19 of the Consultation Document it will be important to clearly define what constitutes "local" and non-"local" turnover, with the experience of CICRA and practitioners in Guernsey being used to inform that process.

In particular, to the extent reasonably possible, the mandatory "local" turnover-based notification test should be designed so as not to include within its scope turnover generated by what are essentially Jersey's export markets, including financial services turnover where the underlying clients are not resident in Jersey. However, it is recognised (as stated by CICRA in paragraph 22 of the Consultation Document) that this can be difficult to achieve, particularly where revenues are billed and paid "locally", notwithstanding underlying clients being resident outside Jersey.

We agree with the detailed comments of the members of the Commercial Bar Association in Guernsey (the "**Guernsey Commercial Bar Association**") in response to the Guernsey mergers and acquisitions consultation document (CICRA document no. CICRA 15/43 dated 13 November 2015 entitled *Consultation on amendments to the Guernsey Mergers and Acquisitions Regime* (the "**Guernsey Consultation Document**")) in this regard, and would additionally refer CICRA to our comments below at paragraph 4 (*Issue 3: exemptions*).

We would also refer CICRA to the observations made in the *Response of the European Competition Lawyers Forum to the JCRA Consultation on Reform of the Jersey Merger Control Regime* in relation to the application of a turnover-based notification test.

1.4 **Definition of "undertakings concerned" and related matters**

To the extent that "undertakings concerned" and similar terminology is used in relation to a mandatory "local" turnover-based notification test in Jersey, we agree in general terms with CICRA's assessment as set out in paragraphs 31 to 33 of the Consultation Document that the use of terminology consistent with that used in the European Union would be helpful to create certainty, particularly if accompanied by clarificatory guidance from CICRA that such terminology should be interpreted in a manner consistent with existing resources, such as the EC Jurisdictional Notice (as suggested in paragraph 33 of the Consultation Document).

We agree with the detailed comments of the Guernsey Commercial Bar Association in response to the Guernsey Consultation Document in relation to CICRA's suggested definition of "undertakings concerned" as set out in paragraph 32 of the Consultation Document.

We would in addition make the following comments, which are relevant to the extent that an "undertakings concerned" definition is used in a form similar to that which has been proposed in the Consultation Document, taking into account the associated definitions set out in the Law:

(a) We consider that the proposed definition of "undertakings concerned" may give rise to uncertainty due to the potential overlap between the use of the terms "merging parties", "Target", "Acquirer" and "joint venture" within that definition, and the proposed definitions of "Target" and "Acquirer", meaning that it may not be clear in any particular case what are the "undertakings concerned". To reduce such uncertainty, we would suggest that CICRA should consider whether the terms "merging parties" and "joint venture" should be defined, and whether the definitions of the terms "Target" and "Acquirer" should be revised.

(b) Given that Article 2 of the Law does not differentiate between a "merger" and an "acquisition", the term "merging parties" appears to have the widest potential scope, and therefore we would suggest that it is defined so as to apply in circumstances where a "merger or acquisition" as defined in Article 2 of the Law does not involve a "Target" and an "Acquirer" and is not a "joint venture".

(c) We would suggest that the terms "Target" and "Acquirer" are defined such as to apply to a "merger or acquisition" as defined in Article 2 of the Law where an undertaking (ie the "Acquirer") that was previously independent of a second undertaking (ie the "Target") acquires *sole* control of the second undertaking, with "control" being

determined by reference to the EC Jurisdictional Notice. It may also be helpful to clarify that an undertaking can be an "Acquirer" even where it does not propose acquiring the entire or a majority ownership interest in the Target (which is consistent with the concept of "sole control" under the EC Jurisdictional Notice), and that both an "Acquirer" and a "Target" can be a joint venture, which is again is consistent with the EC Jurisdictional Notice.

(d) In relation to the definition of a "joint venture", we would suggest that this should be defined such as to cover a "merger or acquisition" as defined in Article 2 of the Law:

(i) that does not involve a "Target" and "Acquirer" (as defined); and

(ii) pursuant to which two or more undertakings that are (and will remain) independent of one another form a new joint undertaking,

with:

(1) the reference to "the business to be established" being replaced with a reference to that new joint undertaking; and

(2) the reference to "control" being prefixed by either "sole" or "sole or joint", depending on CICRA's intention in this regard (noting that we assume, from CICRA's proposed definition of "undertakings concerned", that this should be a reference to "sole or joint" control).

Further, we consider that it would be helpful for CICRA to provide guidance on the meaning of "party" for the purposes of the definition of "undertakings concerned" and its related sub-definitions, in particular whether "party":

(A) is limited to the legal persons party to a merger or acquisition (which we presume CICRA would consider to be overly-narrow, as it may permit the circumvention of the notification requirement through the use of special purpose vehicles); or

(B) includes the legal persons party to a merger or acquisition together with any person(s) who has/have *sole* control of such legal person(s), as determined in accordance with the EC Jurisdictional Notice; or

(C) includes the legal persons party to a merger or acquisition together with any person(s) who has/have *sole or joint* control of such legal person(s), as determined in accordance with the EC Jurisdictional Notice (noting that we consider this to be too broad a definition in this context; where no person has sole control of a legal person, we would submit that the applicable "local" turnover should be that of the legal person, not those persons who have joint control of it); or

(D) has some other defined meaning.

We would encourage CICRA to issue formal guidance on the meaning of "party" in any event for the reasons set out at paragraph 1.2 (*Request for formal CICRA guidance*) above and paragraph 9.3 (*Clarification on who is required to make merger notifications*) below.

2. **ISSUE 1(B): INFORMATION RELEVANT TO APPROPRIATE LEVEL OF TURNOVER TEST**

We have no objection to the "local" turnover-based notification test thresholds suggested in paragraph 26 of the Consultation Document.

At present, a significant number of pan-Channel Island mergers and acquisitions require competition consent to be obtained in Jersey but not Guernsey and *vice versa*, even where the businesses of the relevant parties are reasonably similar in size or market share in both islands.

If Jersey moves to a mandatory "local" turnover-based notification test, we would encourage a position where the turnover tests in both Jersey and Guernsey, including the notification threshold levels, are the same, in order to remove this inconsistency as far as possible.

3. **ISSUE 2: DEFINITION OF "FINANCIAL INSTITUTION"**

We agree with the detailed comments of the Guernsey Commercial Bar Association in response to the Guernsey Consultation Document in this regard, and would additionally refer CICRA to our comments at paragraph 4 (*Issue 3: exemptions*) below.

4. **ISSUE 3: EXEMPTIONS**

As stated above, we would welcome a competition regime pursuant to which mergers and acquisitions involving Jersey's export markets, including financial services where the underlying clients are not resident in Jersey, are not subject to a mandatory competition notification requirement.

The creation of exemptions for certain types of mergers and acquisitions would be a useful tool, in conjunction with appropriate definitions of what constitutes "local" turnover, to achieve this, with the effect of reducing the time and resources deployed by CICRA in considering transactions that have little or no competition effects in Jersey.

We agree with the detailed comments of the Guernsey Commercial Bar Association in response to the Guernsey Consultation Document in this regard.

In addition to the possible exemptions set out in paragraph 42 of the Consultation Document and the additional exemptions suggested by the Guernsey Commercial Bar Association, we would suggest that CICRA considers the following additional exemptions:

(a) In the case of a "merger or acquisition" as defined in Article 2 of the Law involving a "Target" and an "Acquirer", an exemption where the "local" turnover of the Target derived from persons in Jersey whose ultimate beneficial owners are individuals resident in Jersey is below a stated threshold. This exemption would be intended to cover mergers or acquisitions involving trust company businesses, investment businesses etc whose turnover may technically be "local" due to services being

provided to Jersey companies, limited liability partnerships, foundations etc, but which are not providing a material volume of services to individuals resident in Jersey, and as a consequence such mergers or acquisitions could not substantially lessen competition in Jersey or any part thereof.

(b) An equivalent exemption to that set out in paragraph (a) above where a merger or acquisition involves the creation of a "joint venture", based on the "local" turnover of the new joint undertaking to be established by the joint venture.

The suggestions above assume that an "undertakings concerned" definition is used in a form similar to that which has been proposed in the Consultation Document, but we would note that we would be supportive of equivalent exemptions if a different definition or concept is used.

5. ISSUE 4(A): MERITS OF A "SHARE OF SUPPLY/PURCHASE" TEST

5.1 General

We consider that the current share of supply / purchasing power-based notification test applicable in Jersey is not fit for purpose.

There is often significant legal uncertainty as to whether any particular merger or acquisition falls within the scope of the regime. That uncertainty is caused by a variety of issues, including a lack of clarity in the wording of the Order, a lack of legal and regulatory guidance and precedent to enable a proper analysis of what are the relevant product and service markets by which to assess share of supply / purchasing power, and a lack of publicly available information from which share of supply / purchasing power in any given product or services market can be assessed.

Such uncertainty is unacceptable when the consequences of failing to seek CICRA's consent, when required, are very serious (specifically transfers of Jersey *situs* property (including shares) are void by operation of law, and there is the potential for significant fines).

Further, we consider that, even if the uncertainty above were dealt with, the conglomerate merger test currently applicable in Jersey is inappropriate. Our reasons for this are set out at paragraph 6.1.4 (*Conglomerate mergers and acquisitions*) below.

That uncertainty, the scope of the conglomerate mergers and acquisitions test and the draconian consequences of "getting it wrong" are precisely what has caused the present situation where a disproportionate number of transactions, many of which have little or no competition or consumer effect on the island, require CICRA approval, which is both a drain on CICRA's resources, represents a significant cost to commercial parties and is a disincentive to commercial activity in the island.

Accordingly, we strongly oppose the introduction of a right for CICRA to call in mergers or acquisitions for assessment after-the-event on the basis of a share of supply / purchasing power-based test.

Further, we agree with the detailed comments of the Guernsey Commercial Bar Association in response to the Guernsey Consultation Document in this regard.

We would reiterate the sentiment expressed by the Guernsey Commercial Bar Association that, in many cases, it is likely that the parties to a merger or acquisition transaction that may be subject to assessment on the basis of share of supply / purchasing power would seek to pre-agree with CICRA whether or not CICRA had the power to call for that transaction to be assessed on that basis, or make a formal voluntary clearance application, in order to mitigate the risk that undertakings are sought by CICRA after the event.

As a consequence, we would submit that giving CICRA a power to call in such mergers and acquisitions for assessment:

(a) would not lead to any material reduction in CICRA's mergers and acquisitions caseload, albeit the number for formal merger applications may be reduced; and

(b) would *increase* the time and cost of assessing whether a competition notification is required,

the effect of which would be to discourage external investment into, and to discourage entrepreneurial activities within, Jersey, to the detriment of the local economy and consumers.

5.2 **Suggestions if a share of supply / purchasing power-based test is retained**

As stated in paragraph 5.1 above, we strongly oppose the introduction of a right for CICRA to call in mergers or acquisitions for assessment after-the-event on the basis of a share of supply / purchasing power-based test.

However, if such a test is retained in the manner contemplated by the Consultation Document, we would make the following comments:

(a) We would suggest that, in order to minimise both the costs connected with and the input required from CICRA responding to queries relating to relevant transactions, the share of supply / purchasing power-based tests giving rise to CICRA's right should be carefully considered to ensure that their scope is reasonably certain and not unnecessarily broad (bearing in mind CICRA's overall aims in terms of assessing the competition effect on mergers and acquisitions in Jersey).

(b) We would strongly suggest that CICRA's right to call in mergers or acquisitions for assessment on the basis of a share of supply / purchasing power:

(i) is limited to a reasonable period following completion of the transaction (for example six months); and

(ii) can only be exercised where CICRA has been asked to exercise such power by a *bona fide* consumer (in the case of the test being met on a share of supply basis) or supplier (in the case of the test being met on a share of purchasing power basis) of relevant products or services, and then only where CICRA

considers that the merger or acquisition raises genuine competition concerns and the costs of the assessment to CICRA and the relevant parties is proportionate in all circumstances.

We would also note that, if the time period elapsed and it subsequently became apparent that a transaction had given rise to competition concerns, CICRA would still have recourse to its powers in relation to anti-competitive agreements and abuse of a dominant position that exist under the Law outside of the mergers and acquisitions regime.

(c) Proper consideration must be given to what constitutes "control" for the purposes of assessing share of supply / purchasing power, which may necessarily be different to the meaning of "control" and/or the concept of "undertakings concerned" for the purposes of determining "local" turnover.

We would note that the EU Regulations effectively contain two definitions of "control": the jurisdictional test for calculating turnover at Article 5(4) of the EU Regulations and the notion of "control" when assessing a merger set out in Article 3(2) of the EU Regulations. We would strongly suggest that any new merger regime in Jersey clarifies which of these concepts will be applied if CICRA exercises its power to assess a transaction on a share of supply / purchasing power basis, particularly given that there may be a feeling that this question should not be addressed as it goes against the general sentiment of harmonising Jersey's competition regime with that of the EU as closely as possible. However, reliance on sources such as the EC Jurisdictional Notice in this context would not be satisfactory, as the words chosen by CICRA in the definition of "undertakings concerned", when read in conjunction with the EC Jurisdictional Notice, leave undefined concepts such as what constitutes an "undertaking", which would lead to considerable legal uncertainty.

(d) We would reiterate the general sentiment expressed in paragraph 1.2 (*Request for formal CICRA guidance*) above that clear guidance should be issued by CICRA to assist commercial parties and practitioners in assessing whether or not CICRA's right exists as a matter of law.

5.3 **CICRA's proposed powers**

As stated in paragraph 5.1 (*General*) above, we strongly oppose the introduction of a right for CICRA to call in mergers or acquisitions for assessment after-the-event on the basis of a share of supply / purchasing power-based test.

However, if such a test is retained in the manner contemplated by the Consultation Document:

(a) We would strongly resist any suggestion that CICRA's powers in such circumstances would extent to requiring the parties to a merger or acquisition to unwind the relevant transaction. Any such power would only serve to exacerbate the issues highlighted in paragraph 5.1 (*General*) above.

(b) Subject to paragraph (c) below, we would encourage a formal, published policy where CICRA's preferred approach is to agree undertakings with the parties to a merger or acquisition which regulate their business dealings in Jersey that raise the competition concerns identified by CICRA, rather than requiring the parties to divest companies, businesses or parts of businesses.

(c) CICRA's power to impose undertakings should be strictly limited to undertakings which directly address its competition concerns. Undertakings should not be capable of being used to impose regulation of certain businesses or sectors "through the back door"; any such regulation is a matter for the States of Jersey to determine on the basis of primary legislation.

6. ISSUE 4(B): INFORMATION RELEVANT TO APPROPRIATE "SHARE OF SUPPLY/PURCHASE" TEST

As stated in paragraph 5.1 (*General*) above, we strongly oppose the introduction of a right for CICRA to call in mergers or acquisitions for assessment after-the-event on the basis of a share of supply / purchasing power-based test.

However, if such a test is retained in the manner contemplated by the Consultation Document, having worked with the current Jersey competition regime set out in the Law and the Order (which is consistent with the proposed share of supply/purchasing power-based tests set out in paragraph 47 of the Consultation Document), we have the comments and observations set out below. If it is ultimately decided to retain some form of share of supply / purchasing power-based test in Jersey, we would ask CICRA to take these observations into consideration in terms of the wording of any Ministerial Order made to replace the Order and in considering whether to issue guidance to assist with the interpretation and application of any new regime which is reliant on equivalent concepts.

6.1 Observations in relation to the current supply/purchasing power-based test

6.1.1 *Use of terminology generally*

In order to promote legal certainty, we would welcome supply/purchasing power-based tests where the use of terminology such as "undertaking" and "parties" is consistent throughout. Where a legislative provision uses different terms, there is an interpretive presumption that such differences in terminology are intended to be operative, but it is not readily apparent in the Order, for example, what was intended by the use of the term "undertaking" in certain provisions and to "parties" in others.

To the extent that different terms (such as "parties", "undertakings", "business" etc) are used, we would encourage these terms to be defined, or for CICRA to issue guidance as to their proper interpretation (to the extent appropriate and possible in the context, by reference to existing resources such as the EC Jurisdictional Notice and other European Commission guidelines).

We have highlighted at paragraph 1.4 above (in the context of the definition of "undertakings concerned") particular uncertainties that can arise as a consequence of the use of the term "parties" without further definition or guidance. The term

"undertaking" can also create uncertainty without further definition or guidance, given the differing meanings given to that term under EU competition law depending on its context (see for example at paragraph 5.2(c) above).

6.1.2 *Horizontal mergers and acquisitions*

We are aware that some practitioners in the island take the view that an undertaking (or equivalent) with a share of supply / purchasing power above the stated threshold can be created through the acquisition of such an undertaking by a person who has no existing share of supply / purchasing power in the applicable product or services market.

We are of the view that such an interpretation is incorrect, and understand that all of the larger law firms in the island share the same view. Our view is also consistent with CICRA's summary of the horizontal merger test set out in paragraph 47a) of the Consultation Document. However, we would nevertheless encourage CICRA to clarify this point.

6.1.3 *Vertical mergers and acquisitions*

We are aware that some practitioners in the island take the view that a relationship where one undertaking which is party to a merger or acquisition (the "first party") is a customer or potential customer of another undertaking which is party to that transaction (the "second party") may fall within the scope of the vertical mergers regime even where the products or services supplied to the first party by the second party are not strictly upstream of the first party in the supply chain.

We are of the view that a merger or acquisition can only constitute a vertical merger or acquisition where:

(a) the second party (ie the upstream entity) has market power because the product it supplies is worth more to first party (ie the downstream entity) than to others due to being complimentary with its own product; or

(b) the first party (ie the downstream entity) has market power because it is one of a defined group who will buy the products / services of the second party (ie the upstream entity),

and understand that CICRA does not disagree with this analysis, but would encourage CICRA to clarify this point.

6.1.4 *Conglomerate mergers and acquisitions*

As stated in paragraph 5.1 (*General*) above, this is a test that has caused particular issues in the context of an island with a relatively small economy, where economies of scale mean that many businesses, which may not be large in real terms, have a significant share of supply in particular product or services markets.

Notably, the conglomerate mergers and acquisitions test does not fit well with European competition law concepts as applied to the Jersey horizontal and vertical merger regimes, particularly where the appropriate product or services market can be very small (ie not whole-island), meaning that conceivably there are businesses in Jersey that could have very low turnover, and supply products and/or services to a very small number of consumers, that could theoretically require CICRA consent.

As a consequence, we consider that the competition effects of mergers and acquisition should be dealt with through horizontal and vertical merger tests only, and so we strongly oppose any share of supply / purchaser power-based test that includes a concept of conglomerate mergers.

If, however, a share of supply / purchaser power-based test is proposed that includes a concept of conglomerate mergers, we would encourage clarification on the following:

(a) Whether the supply or purchase to / from "persons in Jersey" is to be determined on an island-side basis or on the basis of the established smaller geographic markets that apply to certain products and services. We are not aware of a current consensus on this point by practitioners in the island.

(b) Whether it is relevant where the products or services are supplied, or where the persons to whom those products or services are supplied are located; in other words, is share of supply / purchasing power to be determined by reference to a supply / purchase of products or services that takes place "in Jersey", or by reference to a supply / purchase of products or services wherever it takes place by "persons in Jersey" (which could include individuals resident and legal entities established in Jersey, even where the supply / purchase takes place entirely outside the island). Whilst both of these are reasonable interpretations of the relevant provision of the Order, in our view the former is the correct interpretation as, by the latter interpretation, transactions that could have no competition effect in Jersey would nevertheless be subject to notification (or the right of CICRA to call the transaction in for assessment under the proposed new regime). This is particularly important to the application of the exemption in Article 4(a) of the Order.

(c) Whether a target business is a "party" to a merger or acquisition. We understand that practitioners have generally proceeded, in an abundance of caution, on the basis that a target business is a "party" to a merger or acquisition, although in many cases that may not strictly be correct.

6.1.5 *Reference to product / services markets for the purpose of determining whether the jurisdictional test is met*

We are aware of differing view amongst practitioners as to whether it is necessary to determine the applicable products / services markets in order to assess whether a merger or acquisition falls within the scope of any of the supply / purchasing power

tests (ie as opposed to determining those products / services markets in order to assess whether a transaction has any competition effect).

Our view, which we understand is shared by some of the larger law firms in the island, is that it *is* necessary to determine the applicable products / services markets in order to assess whether a merger or acquisition falls within the scope of any of the supply / purchasing power tests, and would welcome clarification on this point.

6.1.6 *General guidance on supply / product markets*

We would welcome CICRA publishing general guidance on what it considers to be appropriate product / services markets for the purposes of the application of supply / purchasing power-based tests. Such guidance could include both industry- or product-specific guidance and generic guidance.

Examples would include:

(a) Making determinations, whether in CICRA decisions or by way of guidance following submissions being made to CICRA for particular mergers or acquisitions, as to the appropriate geographic and/or product / services market for a particular industry. Frequently, in an abundance of caution (for the reasons set out at paragraph 5.1 (*General*) above), the parties to a transaction assess it on the basis of the narrowest possible product / services market, and unless CICRA publicly states whether or not such a narrow market definitions are appropriate, other market participants are forced to apply the same market definitions when assessing subsequent transactions.

(b) Where consumers of a product or service have a choice as to whether to purchase that product / service from within or outside of Jersey (including via internet sales), whether the product / services markets should be limited to Jersey only, or to the wider economic market in which the relevant business operates.

6.2 **Other comments / observations**

We note in paragraph 48 of the Consultation Document that CICRA is considering whether the 25% share of supply / purchasing power thresholds should be set at a higher level, for example 40%. We are supportive of such an increase in thresholds.

We note in paragraph 49 of the Consultation Document that CICRA is considering whether the share of supply / purchasing power thresholds should be by reference to the entire Channel Islands market, rather than Jersey only. Whilst this would serve to reduce the number of mergers and acquisitions that would fall within the scope of a share of supply / purchasing power-based test (of which we are supportive), we would query whether this is the appropriate method to be used to achieve that aim given that the share of supply / purchasing power of a business in Jersey may differ materially from its equivalent share in Guernsey.

7. ISSUE 5: PRELIMINARY REVIEW PROCESS

We would favour a system where, through the competition regime itself (including exemptions) and guidance issued by CICRA, the number and type of mergers and acquisitions that require notification is limited.

However, on the basis that certain transactions will fall within the scope of the Jersey mergers and acquisitions regime notwithstanding that there are clear reasons to conclude that it would not cause competitive issues for local consumers, we are supportive of the introduction of a preliminary or shortened application process for all types of transactions, and agree with the detailed comments of the Guernsey Commercial Bar Association in response to the Guernsey Consultation Document in this regard.

8. ISSUE 6: EUROPEAN COMPETITION LAW

We would welcome greater alignment with, and reference to, European competition law in the Jersey merger control regime, as the significant sources of information and guidance and the significant volume of European competition jurisprudence available is likely to lead to greater certainty.

9. OTHER OBSERVATIONS

9.1 Effect of failure to obtain CICRA consent and retrospective approval

We would ask CICRA to consider whether the Jersey mergers and acquisitions regime should move to a system where notifiable transactions which are not approved by CICRA before their completion can be subject to retrospective approval, and would strongly encourage such a system be put in place.

This would serve to mitigate the draconian effect of a failure to obtain CICRA consent when it is required under a mandatory notification test, particularly where there are legal uncertainties around that test's scope and application (as is the case under the current Jersey regime, see above).

We would propose that the substance of such a system would be as follows:

(a) a failure to obtain CICRA consent to a merger or acquisition in advance of its completion would cause such a transaction (so far as it relates to the transfer of Jersey *situs* assets) to be voidable at the option of CICRA (rather than void); and

(b) CICRA has a right to call such merger or acquisition in for assessment (on the basis of the mandatory notification test), and to determine whether:

(i) such transaction should be void (so far as it relates to the transfer of Jersey *situs* assets);

(ii) such transaction should be retrospectively approved (with or without conditions or the imposition of undertakings on the parties); and

(iii) irrespective of whether or not such transaction is retrospectively approved, a fine should be imposed on the parties.

9.2 **Introduction of a private merger and acquisition approval process**

The requirement for CICRA approval to a merger or acquisition can create significant uncertainty, as the public nature of the process means (in effect) that legally binding documentation has to be entered into and public announcements made before CICRA consent has been obtained, with a potentially significant period then passing before the transaction can complete. This uncertainty can impact on a target business, including its relationship with customers and suppliers, as well as on its employees.

Irrespective of whether a preliminary or shortened application process is introduced in Jersey, we would ask CICRA to consider introducing a private notification regime, with notification being possible before legally binding documentation has been entered into.

We would propose that the substance of such a regime would be as follows:

(a) a private application would be made to CICRA including a submission by the parties that they do not consider that the merger or acquisition would have any material effect on consumers in Jersey and consequentially it is not appropriate for such transaction to be subject of a public consultation;

(b) if CICRA accepts such a submission, the transaction would not be subject to a public consultation or otherwise made public by CICRA until it has completed, at which time CICRA would make its decision public in the usual way; and

(c) if CICRA does not accept such a submission, the parties to the merger or acquisition would be required to make a public application for consent in the normal way.

We would suggest that such a private notification regime could be accompanied by guidance as to the circumstances in which CICRA considers it appropriate for a public consultation to take place (or not to take place), by reference to general criteria or certain business sectors.

9.3 **Clarification on who is required to make merger notifications**

In our view the Law only requires the legal persons who are party to a merger or acquisition to make a formal application to CICRA for consent to it (ie the reference in Article 20(1) of the Law to a "person" who is to "execute" a merger or acquisition must be to the legal persons who are party to it).

However, we are aware that CICRA takes the view that persons who control legal persons who are party to a merger or acquisition may also be required to make a formal application to CICRA for consent to the relevant transaction. We do not consider this to be correct, and would therefore encourage CICRA to consider its position further.

We would note that taking a restrictive view on who is legally required to seek consent does not mean that CICRA would be unable to request information on persons who control legal

persons who are party to a merger or acquisition, or make its assessment of the competition effect of a merger or acquisition by reference to such information. It is, on the contrary, a question of promoting legal certainty around the application process.

We would be pleased to discuss any aspect of this letter further with CICRA if you wish, in which case please contact James Willmott (tel +44 (0)1534 822 307, email james.willmott@careyolsen.com) in the first instance.

Yours faithfully

Carey Olsen