Amendments to Jersey Mergers and Acquisitions Legislation

Recommendations

Jersey Competition Regulatory Authority

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Introduction

1. In November 2015, the Channel Islands Competition and Regulatory Authorities (**CICRA**) – comprising the Jersey Competition Regulatory Authority (**JCRA**) and the Guernsey Competition and Regulatory Authority (**GCRA**) – consulted on possible amendments to legislation and other aspects of the framework relating to mergers and acquisitions in both jurisdictions; in particular, the types of transactions which must be notified to, and approved by, the relevant Authority prior to their execution by the parties. For brevity, mergers and acquisitions are referred to as 'mergers' throughout this paper.

2. Both the JCRA and the GCRA as well as the respondents to the consultation are of the view that it would be beneficial to have a common set of merger control rules in Jersey and Guernsey. The JCRA would therefore strongly support legislative amendments that resulted in an aligned merger control regime throughout the Channel Islands.

3. Five consultation responses were received (Ogier, Carey Olsen, Mourant Ozannes, the Guernsey Commercial Bar Association, Sure (Jersey and Guernsey)). The JCRA held meetings with some of the respondents as well as with other stakeholders to present the main outcomes of the consultation and to ask for further input on a number of issues. Following this further engagement, the JCRA considered all the issues raised and, as a result, revised some of its original proposals for change. The JCRA wishes to record its sincere thanks to all respondents, whose contributions have been of great assistance in reaching these recommendations.

Executive summary

4. In summary, the recommendations for change to the current regime are:

Changes to the Competition (Jersey) Law 2005

- Definition of 'merger and acquisition'
  - Amend the definition of 'undertaking'
  - Amend the definition of 'joint venture' qualifying as a merger
  - Create exemptions from the definition of 'merger and acquisition' itself
- Amend the circumstances for automatic voidness for failure to notify.
- Introduce the concept of voluntary filing for certain mergers.

New Competition (Jersey) Order

- Replace the current 'share of supply or purchase' test with a mandatory local turnover threshold test.
- Adoption of an ability to call in mergers between parties whose turnover falls below this threshold based on a share of supply test.
- In order to prevent a merger being carried out in stages to avoid the mandatory notification requirement, provide that (as is currently the case under the Guernsey system) a merger may be effected by a single transaction or by a series of two or more transactions
- Provide that where a merger consists of the acquisition of a part of a business, only the turnover of that part (and not the turnover of the entire seller's group) is relevant for the calculation of turnover.
- Introduce the ability for a short form merger application process for transactions which are very unlikely to have any discernible impact on local competition.

New CICRA Guidance and Procedures

- Introduce a short form notification for transactions with no discernible impact on local competition (if not introduced by Order).
- Introduce a formal pre-notification process for all transactions whether the filing is being made on a mandatory or voluntary basis.

5. The JCRA's view is that the above amendments would enable it to focus its resources on those mergers that are most likely to give rise to a substantial lessening of competition in Jersey and better balance the common errors of any merger regime, namely the unnecessary review of transactions that present no risk of detriment and the failure to review those transactions that do.

6. The changes which are being proposed, if accepted, will require amendments to both primary and secondary legislation. It will also be necessary for the JCRA to issue new detailed guidance.

7. The recommended changes are set out in more detail in Annex A to this Paper. The JCRA is fully committed to supporting this process both with the appropriate department and Law Draftsmen.

Merger control in Jersey – rationale, current rules & consultation

8. Mergers can bring many benefits to an economy, introducing new management skills and investment and, in many cases, improvements in efficiency through economies of scope and scale. However, mergers may also give rise to a lessening of competition in the market through – for example – increased prices or decreased output. The merger control regime plays a role in that it limits the ability of firms to avoid competition by gaining control of their competitors.

9. Many merger control regimes – including the Jersey merger control regime – therefore seek to filter out and examine those mergers that are most likely to give rise to a substantial lessening of competition. Mergers that are found to pose a serious risk to competition in the market may be subject to conditions or, ultimately, blocked.

10. In common with many other developed systems of merger control, the current Jersey regime applies a two-stage assessment process. First, it provides that those mergers which fulfil certain threshold conditions require notification for clearance (the "jurisdictional threshold test"). Second, it provides that the JCRA has the power to prohibit a notified merger if such a merger can be expected to give rise to a substantial lessening of competition (the "substantive test").

11. In putting in place the legal framework for a system of merger control, the issue of where to "set the bar" for the jurisdictional threshold test is key. If the bar is set too low, the risk is that many transactions which do not give rise to substantive competition law issues will trigger filing requirements. By contrast, if the bar is set too high, transactions that may be harmful to competition will not be notifiable. Framing an appropriate jurisdictional threshold test is particularly challenging in the context of the economies of the Channel Islands, where there are large (often financial) institutions with high turnover but whose consumer base is not "local" in contrast to smaller businesses with relatively low turnover but potentially significant local market shares.

12. The Jersey regime is out of line with best practice, in that the jurisdictional threshold test is currently based on the parties' so-called "share of supply" of particular goods or services in Jersey. The share of supply test is generally intended to be a flexible test, more commonly used in systems (such as the UK) that operate a voluntary merger filing system[1].

13. The use of the share of supply threshold test in Jersey in combination with the provisions of Competition (Jersey) Law 2005 (the **Law**), which provide that a merger that fulfils the jurisdictional threshold conditions but is not notified to the JCRA for clearance is void, has led to a number of practical issues for merging parties, their advisers and the JCRA.

14. First, given that the failure to file leads to voidness of the entire transaction, parties and their advisers are understandably keen to determine, with a high degree of confidence, whether or not the jurisdictional threshold test has been met. This is not possible under the current regime, as the flexible nature of the share of supply test by its nature creates considerable uncertainty as to whether the filing requirement is triggered in any given case.

15. Second, this uncertainly inevitably leads to many requests for guidance being made to the JCRA by the parties and their advisers, which can be resource intensive and may in any event not give the parties the degree of legal certainty they are seeking.

16. Third, the share of supply test itself is broadly drafted – catching horizontal, vertical and conglomerate mergers[2]. This means that the JCRA receives a number of applications for clearance in respect of transactions which clearly present no substantive competition law issues.

17. In the JCRA's view, a narrower and more objective mandatory jurisdictional threshold test would provide greater confidence to businesses, reduce the need for informal guidance and reduce the number of notifications, allowing the JCRA to focus its time and resources on the most problematic cases.

18. In November 2015, the JCRA launched a consultation[3] on a number of proposed amendments to the mergers and acquisitions regime in Jersey. These proposals sought

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1 According to the international best practice guidelines (ICN Recommended Practice for Merger Notification and Review Procedures) an objective jurisdictional threshold test based on the parties' turnover is likely to be more appropriate in the context of a mandatory notification regime.

2 Under the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the **Order**), horizontal mergers (Article 2), vertical mergers (Article 3) and conglomerate mergers (Article 4) may all trigger the obligation to file.

3 CICRA 15/44 http://www.cicra.gg/_files/Jsy%20Merger%20consultation%201544.pdf

to address both the challenges raised by the share of supply test as well as a number of other issues with the regime that had become evident over several years of practical application of the rules by the JCRA and legal practitioners. At the same time, a parallel review was undertaken by the GCRA in Guernsey. The two consultations have thus proceeded simultaneously.

19. In carrying out the consultation, the JCRA has also been mindful of Oxera's report 'A review of Jersey regulatory and competition framework[4]' published in November 2015 by the Government of Jersey, which stated that:

'The merger regime should be changed so that only mergers that affect the local economy, and which the JCRA can actually do something about, are investigated. It should be possible to move straight to phase 2 with the agreement of the parties. The thresholds and processes should be clear and easy to understand in order to reduce uncertainty for business.'

20. Five responses were received to the consultation, each of which addressed the position in Jersey as well as Guernsey. Further input and discussions took place at a series of meetings held between CICRA and a number of stakeholders in both islands. In general, the respondents were in agreement that there were a number of areas that could be improved and various proposals were also put forward as to how these improvements could be achieved. We have addressed these responses below.

21. CICRA and the respondents were also of the view that it would be beneficial to have the same regime in both Jersey and Guernsey. The JCRA and GCRA therefore propose to recommend that any legislative amendments made in light of the consultations result in an alignment of the regimes across these two islands.

Proposed Amendments

22. For the reasons explained above, the JCRA suggests that the current *mandatory* 'share of supply' test should be replaced by a jurisdictional threshold test based on the parties' turnover in the Channel Islands and in Jersey.

23. In addition, the JCRA proposes that an optional review is available to the JCRA based on a 'share of supply' test to mitigate risks presented by a turnover test in a small island economy based on our experience of such a threshold in Guernsey. This combination of a mandatory turnover test and a voluntary share of supply test would, in the JCRA's

[4] http://www.oxera.com/getmedia/17401ec0-3dba-44f0-8b7e-cbc83208042e/A-review-of-the-Jersey-regulatory-and-competition-framework.pdf.aspx?ext=.pdf

view, best capture those mergers with the greatest likelihood of substantially lessening competition in Jersey.

24. The recommended changes to the merger control regime are outlined in detail below. No attempt has been made at this stage to describe definitively what changes to legislation are required to achieve these; however a suggested approach has been outlined in Annex A.

A: EUROPEAN COMPETITION LAW

25. Jersey merger control rules draw heavily on concepts contained in the EU Merger Regulation[5] (**EUMR)** and accompanying guideline[6] (the **Consolidated Jurisdictional Notice**).

26. Article 60 of the Law 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. Article 60 does not however prevent the JCRA from departing from EU law principles where this is appropriate in light of the particular circumstances in Jersey; EU jurisprudence is therefore treated as persuasive but not binding.

27. If the proposals put forward by the JCRA are introduced, the Jersey merger regime will become aligned to a greater degree with the EUMR than is currently the case. The JCRA therefore consulted on whether sections of the EUMR and/or the Consolidated Jurisdictional Notice should be incorporated into either legislation or revised Guidelines.

28. All respondents were of the opinion that, where appropriate, sections of the Consolidated Jurisdictional Notice should be incorporated into revised CICRA Guidelines and that where there are differences in language between the EUMR and legislation in Jersey, CICRA should clarify its position in the Guidelines.

29. CICRA therefore proposes to issue a new merger control guideline. This will refer to the Consolidated Jurisdictional Notice where appropriate but will also highlight where there are differences between the EU and Jersey regimes, for example, with regard to certain local financial structures where there is no European equivalent.

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5 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24/1, 29.01.2004.

6 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95/1, 16.4.2008.

B: 'UNDERTAKING'

30. Unlike in Jersey (and Guernsey), the term 'undertaking' is not defined in European legislation. EU case law has defined an "undertaking" as: *'every entity engaged in economic activity, regardless of its legal status or the way in which it is financed'*[7].

31. The purpose of a regime of merger control rules is to regulate, in advance, the impact of mergers on the competitive structure of markets[8]. Mergers involving a business that is not a legal person (e.g. a "going concern" or a collection of assets, personnel and goodwill to which turnover can be attributed) may affect the competitive structure of markets irrespective of legal form, in the same way as can mergers between legal persons. Using a purposive, flexible definition of "undertaking", as is applied under the EUMR[9], allows a competition authority to review mergers between businesses, irrespective of the legal form of the undertakings involved.

32. Under the Jersey Law, 'undertaking' is defined as: *'a person who is carrying on a business and includes an association, whether or not incorporated, that consists of or includes such persons'.*

33. Respondents to the consultation stated that defining an "undertaking" as a "person" may lead to an unnecessarily narrow interpretation of the concept of "undertaking", which does not adequately capture all mergers that may affect the competitive structure of markets. CICRA notes that it has received numerous requests for informal guidance on this point.

34. The JCRA therefore proposes the definition of undertaking as set out in the Law is changed. This may be achieved by amending the current definition to bring it into line with the EU case law definition or by removing the definition from the Law and leaving CICRA to develop the point in a new guidance document. This position was generally accepted by all respondents to the consultation.

C: 'UNDERTAKINGS CONCERNED'

35. The Competition (Mergers and Acquisitions)(Jersey) Order 2010 (the **Jersey Order**) refers to both the "undertakings involved in the proposed merger or acquisition" (Article 3(1)) and "the parties to the proposed merger or acquisition" (Article 4). This creates uncertainty when determining the share of supply, as it is not clear exactly which

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7 Case C-41/90*Höfner and Elser* v *Macrotron GmbH* [1991] ECR I-1979.

8 See, for example, paragraph 4 of the judgment of the Supreme Court in *Société Coopérative de Production SeaFrance SA* v. *The Competition and Markets Authority et al* [2015] UKSC 75.

9 And the Enterprise Act 2002 in the UK, which uses the parallel term "enterprise", which is defined in a way very similar to "undertaking" under the EU rules.

"undertakings" are relevant for the purposes of the assessment. These terms may be expected to give rise to similar problems if the turnover test is adopted.

36. The JCRA proposes that the term "undertakings concerned", should be used consistently throughout the rules instead of the above terms. The concept of "undertakings concerned" is well developed under the EUMR. Adopting this concept into Jersey law will make clear that third parties who are "involved" in the transaction (e.g. a company financing the acquisition) but which are not "concerned" with the transaction will be excluded from the share of supply/turnover calculations.

37. The Consolidated Jurisdictional Notice contains further detail regarding the concept of "undertaking concerned". It is proposed that the new CICRA Guidelines will incorporate or refer to this section of the Consolidated Jurisdictional Notice[10], developing it as necessary for the particular circumstances of Jersey. This approach was supported by respondents to the consultation.

D: JOINT VENTURES

38. Article 2(5) of the Law provides that a merger or acquisition occurs, for the purposes of the Law, on the creation of a joint venture. A joint venture is defined as a business activity carried on jointly by two or more persons, or by a company controlled by two or more persons and set up to carry on that joint activity.

39. This wide definition of "joint venture" is capable of catching joint ventures that are no more than contractual arrangements between two parties to co-operate (e.g. research and development agreements; joint production agreements)[11]. Such contractual joint ventures do not bring about a lasting change in the structure of the market, which is generally considered to be the essence of a merger.

40. The JCRA therefore recommends that the definition in Article 2(5) is amended so that only joint ventures bringing about a lasting change in the structure of the market fall within its scope. One way of achieving this would be to adopt the concept of the "full function joint venture", which is a developed concept under the EUMR encompassing the creation of a joint venture that performs "on a lasting basis all the functions of an autonomous economic entity". The JCRA would favour the adoption of this definition[12].

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[10] Paragraphs 132-156.

[11] Concerns about the wide definition given to "joint venture" have been raised with CICRA in respect of the equivalent provisions in Guernsey (the Competition (Guernsey) Ordinance, 2012 (the **Ordinance**) s.61(3)(b), (4)).

[12] At least one respondent to the consultation stated that if the concept of the full function joint venture were to be adopted, the rules should also provide that only the creation of a jointly controlled full function joint venture would amount to a merger. The JCRA considers that the requirement of joint control is (at least) implicit in the existing Law, but this point could be clarified if this was considered to be necessary.

E: EXCEPTIONS

41. The consultation asked respondents to comment on the types of transactions which might be exempted from the definition of 'mergers and acquisitions' for the purposes of merger control. In addition to those proposed by the JCRA, a wide range of suggestions were made. Many of these suggestions are based on concerns which have been addressed in other parts of the JCRA proposals, such as the creation of a joint venture which is not "full function". Another suggestion, which was to exempt mergers that affect only Jersey's export markets, can be adequately dealt with through guidance that makes clear that the turnover/share of supply test applies only to turnover through sales to/supplies made to persons in Jersey.

42. The JCRA however proposes that three exceptions to the definition of a merger are included, reflecting those in Article 3 of the EUMR, namely:

    a. *Credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the [JCRA] on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;*

    b. *Where control is acquired by an office-holder according to [Jersey law] relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings;*

    c. *Where the operations are carried out by the financial holding companies… provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.*

43. The exceptions listed would be excluded from the scope of application of the merger rules altogether. The ability of the JCRA to grant Exemptions under Article 9 and that of

the Minister to grant Exemptions under Article 23 of the Jersey Law would remain unchanged.

44. The categories identified above could be the subject of a Block Exemption as an interim position given that the recommendation itself requires a change to primary legislation.

F: Adoption of a Local Turnover Test

45. The most significant change proposed to the Jersey merger control regime is the introduction of a local turnover test as the criterion for when JCRA approval for a merger is required. The use of local turnover offers to some extent a proxy for the significance of a merger to the local economy. Given this, the JCRA consider that the introduction of a local turnover test, which reflects the joint and individual turnover of all the undertakings concerned is an appropriate approach for Jersey.

46. Transactions involving businesses with smaller local turnover do not generally present a material threat to competition as the entry barriers for such businesses are usually low. However, in order to ensure that any potentially problematic mergers below the turnover threshold would be reviewable, in those instances where concentration in the affected market/s might present risks, but the mandatory notification thresholds are not reached, an additional voluntary notification regime, which the JCRA envisages being applied on an exceptional basis only, is recommended and described in a subsection below.

47. Respondents to the consultation were supportive of the turnover thresholds proposed.

Local Turnover

48. The JCRA considers that adopting a local turnover test is consistent with international best practice, is more appropriate for a mandatory filing regime such as Jersey's and addresses issues in relation to an absence of objectively quantifiable criteria, making it easier for merging parties to know whether they should notify. This approach was supported by all respondents to the consultation.

49. There is extensive discussion in the EC Merger Regulation and Consolidated Jurisdictional Notice regarding the concept of 'turnover'. In particular, the Consolidated Jurisdictional Notice makes clear that turnover arises in the place where an undertaking's customer is located, thereby ensuring that a competition authority only has jurisdiction to review a merger to the extent that it has a local economic impact. So, for example, if a Jersey company makes a sale to a UK consumer, the turnover generated through that sale would be deemed to be UK turnover rather than Jersey turnover. The JCRA would propose to make reference to the Consolidated Jurisdictional

Notice[13] in its revised Guidelines, as well as giving practical examples based on its experience of applying the turnover rules in Guernsey.

50. If this proposal is adopted, in order to prevent a merger being carried out in stages to avoid the mandatory notification requirement, the Order would need to include provisions specifying that two or more transactions between the same undertakings which took place within a two year period would be treated as a single transaction. A provision making clear that where a merger consisted of the acquisition of parts of a business, only the turnover relating to the part of the business being acquired should be taken into account, would also be required[14].

FINANCIAL INSTITUTIONS, CREDIT INSTITUTIONS, AND INSURANCE UNDERTAKINGS

51. As an exception to the above principle, namely that the turnover of a business arises where its customer is located, the turnover of financial institutions, credit institutions and insurance undertakings is deemed to arise (in broad terms) in the location where the supplier is based. This is international practice and this approach is taken because these undertakings do not make "sales" to "customers" in the same way that normal trading entities do[15] and so it is not possible to attribute turnover to customers' location in any meaningful way. The location of the business entity is therefore used.

52. The experience of the GCRA in Guernsey is pertinent to any changes to the Jersey framework in this regard: While the Guernsey merger regime follows the EU approach in determining the turnover of the above mentioned institutions, the definition that has been given to the term "financial institution" is different to that used under the EU rules. It is extremely broad, encompassing a wide range of providers of financial services not generally treated as financial institutions in merger regimes. This has led to transactions becoming notifiable to the GCRA on the basis of turnover generated by these financial service providers from sales made to customers outside of Guernsey where there is no possibility of the transaction having any impact on competition in Guernsey. CICRA has consulted on these provisions in its parallel review of Guernsey merger control rules and respondents in Guernsey strongly supported narrowing the definition of "financial institution" used under the Guernsey rules.

53. The JCRA therefore proposes that, should the turnover jurisdictional threshold test be adopted in Jersey, that the turnover of financial, credit and insurance institutions should

[13] In particular, paragraphs 157 – 202.
[14] A similar provision is contained in Article 5(2) of the EUMR.
[15] For example, a bank earns revenue from the spread between deposit rates and lending rates, rather than from the sale of products to customers.

be calculated in the same way as under the EUMR and the EUMR definitions of these institutions adopted. This proposal was supported by respondents to the consultation.

THRESHOLDS

54. The consultation expressed a provisional view, which was supported by all respondents to the consultation, that the Jersey Order should be amended to provide that a merger or acquisition would be subject to mandatory notification if:

    a. The combined aggregated annual turnover in the Channel Islands of the 'undertakings concerned' in a transaction exceeds £5 million; and
    b. The annual 'local' turnover in Jersey of each of at least two 'undertakings concerned' exceeds £2 million.

55. The proposed notification test has two limbs: one based on the combined turnover of the 'undertakings concerned' in the Channel Islands[16] and the other based on at least two of the 'undertakings concerned in Jersey'. This format is used in merger control regimes in many other jurisdictions and was supported by all respondents to the consultation.

56. In moving to a 'dual limb' turnover threshold, the JCRA has considered whether the reference to the total Channel Islands turnover should be removed. However, on balance, the JCRA's recommendation is that the dual limb test is appropriate for three reasons. First, the individual turnover limb ensures that only transactions between parties that each achieve a significant degree of local turnover will be notifiable. Second, the Channel Islands wide turnover element ensures that transactions involving very small businesses are not captured inappropriately by the regime. Third, whilst the Channel Islands do not form a common market from a legal standpoint, their geographic proximity, significant transport and communication links and historic ties increasingly mean that the next closest competitors to many firms based in one Bailiwick are likely to be those in the other. Certainly the tendency for firms to operate across the Channel Islands means that entities with a significant presence in Guernsey are often more credible potential competitors than those based further afield.

G: ADOPTION OF AN ABILITY TO REVIEW BASED ON A SHARE OF SUPPLY TEST

57. Based on CICRA's experience of applying the merger control rules in both Jersey and Guernsey, it notes that there may, exceptionally, be transactions in small but concentrated markets which would not be caught by the turnover provisions described above but which might nevertheless have the potential to substantially lessen

[16] I.e. the whole of the Bailiwicks of Guernsey and of Jersey.

competition in Jersey. To address this issue, the JCRA proposes that it should retain the ability to review such transactions even though the mandatory turnover thresholds are not met.

58. The JCRA's power to call such transactions in for review, which it would expect to exercise only rarely, would be based on a share of supply test, which would complement the mandatory turnover threshold test. This would provide that, for transactions which do not meet the turnover threshold, the JCRA would have a short period of time[17] during which it could call the transaction in for review if specified share of supply thresholds were met.

59. Law firm respondents were not generally supportive of this proposal. In particular, it was considered that parties to transactions would have to consider two tests instead of just one, which in turn could create cost, complexity and delay. Further, it was considered that the introduction of such a test would defeat the two main objectives of the turnover test, namely objectivity and certainty.

60. The JCRA has taken account of these concerns, and discussed them further with respondents. In the JCRA's view, a voluntary share of supply test, alongside a mandatory turnover test is particularly well suited to the circumstances of the Channel Islands. This is because it allows the JCRA to call in for review transactions in low value but concentrated markets, without the mandatory filing threshold being lowered to a level that would lead to an unacceptably large number of transactions becoming notifiable. As a means of balancing the advantages and disadvantages of any notification threshold, it is the JCRA's view that this approach strikes the appropriate balance and complements a mandatory turnover based merger regime. As mentioned above, the JCRA would only expect to use this power in exceptional circumstances. The JCRA therefore recommends this change.

I: Introduction of a Preliminary Review Process

61. The current Guernsey merger control regime provides a 'fast track' for transactions which are merely 'technical' filings and where there are clearly no substantive issues to be considered. This process is known as preliminary review. The Guernsey consultation asked for respondents' views on whether the preliminary review should be made available in respect of transactions other than those involving financial, credit and insurance undertakings. Respondents were strongly in favour of this approach.

[17] Similar provisions in the UK's Enterprise Act 2002 give the Competition and Markets Authority a period of four months from when it knew or reasonably should have known of the transaction to open an investigation.

62. Initially, the consultation proposed extending the current system in Guernsey to a wider range of sectors, and introducing the same regime in Jersey. However, as a result of the consultation and other discussions, the JCRA is now proposing an alternative solution. This has been generally very well received in discussions with those who responded to the consultation.

63. The JCRA therefore proposes the introduction of a new 'short form' merger application in Jersey[18]. This would be available for all submissions, regardless of the sector involved, where it is clear that the JCRA is unlikely to have concerns with the transaction. The appropriateness of this type of submission would be assessed during pre-notification (see below).

64. A short form notification would be subject to a shorter timetable for approval, and at a lower cost than a full submission. The JCRA would reserve the right to require a full submission should concerns arise during the assessment of the short form.

65. This will not necessarily require a change to legislation as the procedure for notification of a merger falls within the remit of the JCRA under Article 21 of the Jersey Law. Alternatively, since the preliminary review process is provided for in secondary legislation in Guernsey, similar provision could be made in a new Order in Jersey.

J: Pre Notification Requirement

66. In order to support the changes above, the JCRA proposes to introduce a formal pre-notification requirement for all notifiable transactions requiring the merging parties to submit a draft merger application form to the JCRA in all cases. The JCRA would review this to assess whether any further information or clarification was required. Once the JCRA deemed the merger application form to be complete, the merging parties would be informed, a formal notification would be made, and the consultation and assessment period would begin to run. The JCRA anticipates that this would help the notification process to run more smoothly and efficiently, since the need to 'stop the clock' during the assessment period in order to request further information from the merger parties would be greatly reduced or removed as would the amount of time taken up with theoretical merger scenarios.

67. Introducing formal pre-notification does not require a change to legislation, but is included in this paper for completeness.

[18] A parallel change would be made to the Guernsey regime.

K: Failure to Obtain Prior Clearance

68. As the Law stands in Jersey, transactions are automatically ineffective to pass title (i.e. void) if they meet the conditions of the jurisdictional threshold test but are not notified to and approved by the JCRA. There is no provision for retrospective approval by the JCRA in the event that, after completion of a transaction, it is found that it should have been notified. This is so even where the transaction gives rise to no substantive competition law issues.

69. Respondents to the consultation indicated that this automatic voidness provision is a significant issue for merging parties and their legal advisers, particularly in the context of a regime that uses a flexible share of supply test as its jurisdictional threshold. Providing that un-notified mergers are void, irrespective of their substantive impact on competition, may be perceived as a disproportionately harsh sanction, which understandably gives rise to an extremely cautious approach by parties and their legal advisers who may prefer to make "failsafe" notifications rather than running the risk of their transaction being declared void. In turn, this increases the burden placed on the JCRA which has, in a number of cases, been asked to provide advice on whether substantively unproblematic transactions are likely to require notification and to assess such transactions if they are notified.

70. For the mandatory notification regime (whether or not the proposal to adopt a turnover based test is accepted), the JCRA proposes the 'automatically void' provision is removed where a failure to notify is found and the consequent first detailed review finds no second detailed review is necessary. Otherwise the void provision should remain. But, the JCRA recommends that it should have the power to call in un-notified transactions for review and seek remedies in lieu of a referral to a second detailed review. The JCRA also proposes that it should have the power to impose fines on parties that fail to notify transactions that are subject to mandatory notification requirements, including in the event that a failure to notify is found and the consequent first detailed review finds no second detailed review is necessary.

71. The JCRA's view is that a sanction of voidness for failure to notify would not be appropriate in the context of a voluntary notification regime. Therefore, if its proposal to introduce a voluntary, share of supply test is adopted, the JCRA proposes that it should instead have the power to call in transactions for review and to require remedies should the transaction give rise to a substantial lessening of competition. Given the nature of this proposed regime, the power to impose a financial penalty in the case of a failure to notify would not be appropriate.

72. These proposals require a change to primary law, and are crucial to the implementation of the structural changes to the merger control regime in Jersey. At least one respondent to the consultation identified this change as the most important modification that could be made to the Jersey regime.

L: Information Requests and Interim Measures

73. The JCRA considers that additional powers are likely to be required to support its ability effectively to call in unnotified transactions and transactions that fulfil the thresholds set down in the voluntary share of supply test. The JCRA proposes that it should have powers:

    a. To require the provision of information by parties to a transaction that was not notified but which either:
        i. Was subject to the mandatory notification requirement; or
        ii. May fulfil the thresholds set down in the voluntary share of supply test.
    b. To require undertakings from parties to an unnotified merger as described above that they will not take pre-emptive action in respect of the merger (e.g. that they will hold the merged business separate; that they will not integrate them further).
    c. To make an enforcement order to prevent the taking of pre-emptive action in respect of the transaction.

M: Private Merger Approval

74. A small number of respondents proposed the introduction of a 'private' merger approval process, under which parties could notify and receive approval for a transaction without the proposed transaction becoming public.

75. The JCRA has considered this suggestion. However, it does not believe that this would be appropriate since the JCRA needs to maintain the ability to contact competitors, customers and suppliers to obtain their views on any notified transaction and to test the claims being made by the notifying parties.

76. The JCRA believes that the proposed formal pre-notification and short form notification are in any event likely to address the concerns behind the suggestion of a private merger approval procedure. Furthermore, it is already possible for confidential discussions to take place in advance of formal notification (which is to be encouraged), which should enable the parties to gauge the JCRA's likely views of the transaction.

N:TRANSPARENCY

77. One respondent expressed concerns about the transparency of the merger review process and the opportunities for third parties to provide comments on notified transactions.

78. The JCRA notes that the respondent's concerns relate primary to one particular transaction, in respect of which there were specific issues that may have affected the degree to which the JCRA may have been able to provide information to third parties (including the respondent). The JCRA confirms that it is fully committed to acting transparently and recognises the important role that third parties play in merger investigations. The JCRA and the GCRA will together consider whether it might be appropriate to issue more detailed formal guidance on this point.

Next Steps

79. In the event that the relevant Minister accepts the recommendations contained in this Paper, the JCRA is available to CMD and Law Draftsmen to assist, as appropriate, with the process of drafting the necessary amendments to the Law and new Order.

80. The JCRA will carry out a parallel process to consult on detailed guidance on the revised concepts included, and be in a position to issue new Guidelines alongside the legislative changes.

81. If possible, it is highly desirable that the legislative changes described are implemented at the same time as changes are introduced in Guernsey. The JCRA is happy to assist with this process in whatever way it can.

Annex A: Proposed Changes to Legislation and Guidelines

The table below indicates where each of the proposed changes will need to be implemented.

Proposed Change	Legislation	CICRA Guideline
European Competition Law	No change required	New/interim guidelines
'Undertaking'	Amendment to Competition (Jersey) Law	New guidelines
'Undertakings Concerned'	New Mergers Order	New guidelines
Joint Ventures	Amendment to Competition (Jersey) Law	New guidelines
Exceptions	Amendment to Competition (Jersey) Law	New/interim guidelines
Adoption of a Local Turnover Test	New Mergers Order	New guidelines
Acquisition in stages	New Mergers Order	New guidelines
Exclusion of seller's group turnover	New Mergers Order	New guidelines
Adoption of a Voluntary Share of Supply Test	New Mergers Order	New guidelines
Preliminary Review Process	No change required, but possibly New Mergers Order to ensure consistency with Guernsey	New guidelines
Pre Notification Requirement	No change required	New guidelines
Failure to Obtain Prior Clearance	Amendment to Competition (Jersey) Law	New guidelines
Private Merger Approval	n/a	n/a
Transparency and Consultation	n/a	New guidlines

GUIDELINES

CICRA will issue two sets of guidelines through this process; one to clarify certain existing areas of concern to provide clarity for an interim period, the second (should the above proposals be accepted) on implementation of the new regime.

INTERIM POSITION

Once timelines can be established, it may be desirable to give effect, at least in part, to some of the proposed amendments through existing mechanisms such as a new Block Exemption and more detailed interim guidance.