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CICRA
CHANNEL ISLANDS COMPETITION & REGULATORY AUTHORITIES

MERGER CONTROL LAW – A SIMPLIFIED PROCEDURE FOR THE CHANNEL ISLANDS?

INTRODUCTION

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Many jurisdictions around the world, including those of the Channel Islands, operate a system of merger control. Although Guernsey and Jersey are separate jurisdictions and each has its own distinct framework of merger control rules, both are enforced by CICRA[1] (the "Competition Authority"), which is a pan-Channel Island competition body.

Merger control rules typically require transactions that meet certain filing thresholds, which vary from jurisdiction to jurisdiction, to be notified to the national or pan-national competition authority for clearance before completion. The reviewing competition authority will assess whether the notified transaction is likely to restrict competition to an unacceptable extent. If it concludes that competition is likely to be harmed, it will often require the merging parties to offer remedies such as divestment of another part of their business in return for obtaining merger clearance. Where remedies cannot offset the likely harm to competition, a merger may ultimately be blocked.

All systems of merger control face the dilemma of how to balance two common errors, namely the unnecessary review of transactions that present little or no risk of detriment to competition and the failure to review those that do. Legislatures and competition authorities have sought to strike this balance in a number of different ways, ranging from the use of legally defined jurisdictional thresholds with mandatory filing for even non-problematic transactions to a highly flexible approach which allows a competition authority to call in for review any transaction that may lead to a significant loss of competition within its jurisdiction.

Those jurisdictions that use mandatory filing thresholds have often sought to offset the criticism that mergers are being called in for review unnecessarily by the use of legislative or administrative "simplified" or "fast track" merger procedures. These allow mergers that can be defined at the outset as being low risk (usually by reference to a pre-defined set of criteria) to be processed quickly, thus reducing the administrative burden on both the notifying parties and the competition authority carrying out the review.

Jurisdictions that use the simplified procedure have generally either developed their fast track criteria organically based on their own experience of dealing with mergers that have proven to be generally unproblematic or more commonly[2] have sought to use a system already in place in another jurisdiction as a starting point for their own fast track.

UPDATE ARTICLES:

Raising awareness of Competition Law

CICRA clears Randalls / Boat House merger following second detailed review

The Commission fines GUESS €40 million for blocking cross border sales

In the Channel Islands, there is currently a limited statutory fast track for certain financial institution mergers in Guernsey and no statutory provision for any type of simplified procedure in Jersey, where all mergers follow the standard administrative approval procedure common to both islands. The majority of these mergers raise no competition concerns and are cleared well within the administrative target of twenty-five days. Given the unproblematic nature of the majority of notified mergers and the burden placed on businesses and the Competition Authority in notifying, reviewing and approving these, a question arises as to whether an administrative fast track procedure for mergers notifiable in the Channel Islands should be developed.

This article looks at the way in which the European Commission (the "Commission") has developed its simplified merger procedure and considers how this might be used in the development of an appropriate simplified merger approval procedure for the Channel Islands.

1 The Channel Islands Competition and Regulatory Authorities ("CICRA") comprises the Jersey Competition Regulatory Authority ("JCRA") and the Guernsey Competition and Regulatory Authority ("GCRA").
2 In the EU context, the majority of EU member states have simplified merger procedures based on the EU model, adapted to fit their local circumstances. Most recently, the Irish Competition Authority (CCPC) has launched a consultation seeking views on whether Ireland should adopt a simplified merger approval procedure.

SIMPLIFIED PROCEDURE UNDER THE EU MERGER REGULATION

The Commission has a well-established simplified merger approval process, which came into effect some ten years after the entry into force of the first EU merger regulation in 1990. It established categories of merger which, in the Commission's experience, were unlikely to give rise to competition problems and so could be dealt with more quickly and simply than standard mergers. Such mergers would be cleared by way of a short form decision and the notifying parties would generally be required to provide less information in their notification than would be the case for a standard merger.

In line with the balancing approach described above and by drawing on its experience of assessing such mergers over an extended period, the Commission has developed the simplified procedure gradually and cautiously with the most recent amendments coming into force in 2014.

It has expanded the categories of merger that qualify for simplified treatment and has also raised the applicable market share thresholds for simplified horizontal and vertical mergers. Thus, the acquisition of control over a joint venture that has very limited EU activity, "pure" conglomerate mergers and changes from joint to sole control qualify for fast track treatment, as do horizontal mergers where the combined market shares of the merging parties do not exceed 20% and vertical mergers where the market share of any merging party on a relevant market does not exceed 30%. Finally, mergers that give rise to only a very small increase in the merging parties' combined market share may also be fast tracked.

Crucially, despite the expansion of the simplified procedure, the Commission retains the ability to move a merger from the simplified to the standard track should the particular circumstances of a case require it. This demonstrates that the simplified procedure can be a highly flexible tool in which the balancing principle can be applied on a case-by-case basis if necessary.

DEVELOPING A SIMPLIFIED PROCEDURE FOR THE CHANNEL ISLANDS

The potential usefulness of some aspects of the Commission's approach in the Channel Islands context will be immediately obvious to legal practitioners and businesses familiar with local merger control procedures. A number of recent cases neatly illustrate the parallels between issues faced in the Channel Islands and the problems the EU fast track system is designed to solve; in 2018 alone the Competition Authority has considered and rapidly cleared mergers where the incremental increase in combined market shares was negligible[3], where the merger was purely conglomerate[4] and where the merger related to the creation of a joint venture that would have no activities in the Channel Islands[5]. Requiring a full notification for such mergers places an administrative burden on businesses and legal advisers, diverts Competition Authority resources which might be better focused elsewhere and may delay completion of transactions.

Nevertheless, due to various features of the Channel Islands' merger control systems, the fit between the EU simplified procedure and the local context is not a perfect one. A number of distinct issues arise. First, the Channel Islands operates not one set of merger control rules but

two. The Competition Authority has recommended to both governments that the regimes be aligned but in the absence of harmonisation, careful thought will need to be given to whether and how a single simplified procedure might accommodate two regimes which operate on the basis of very different jurisdictional tests. So for example, simplified criteria based on a turnover test might be appropriate in the context of Guernsey but would have no relevance in Jersey, which operates a share of supply based jurisdictional threshold[6].

Second, particular business structures that are used in the Channel Islands, such as protected cell companies, are elsewhere much less usual or do not exist at all. Mergers involving protected cell companies may trigger a filing requirement (particularly in Guernsey) but rarely give rise to substantive competition law concerns[7]. The extent to which, and the conditions under which, such mergers could qualify for a fast track procedure would therefore need to be considered by the Competition Authority on the basis of its own experience in handling these transactions.

Third, the question of how to assess mergers that are also being filed with the Commission for clearance is an issue that is, at least until the UK's departure from the European Union, peculiar to the Channel Islands. EU merger control operates on the basis of a "one stop shop", which means that where the Commission takes jurisdiction over a merger, national authorities in the Member States are not able to review it under their domestic merger control regimes. Although EU mergers often produce local effects, the one stop shop does not extend to the Channel Islands, which do not form part of the European Union. This means that, not infrequently, transactions that are notified to the Commission under the EU merger regulation must also be notified for clearance in the Channel Islands. In practical terms, the Competition Authority takes the view that such notifications serve little useful purpose. Although in technical terms it would be possible for it to do so, if the Commission clears a transaction, the Competition Authority has little real power to block it. Conversely, if the Commission prohibits a transaction, that transaction will not proceed, irrespective of whether or not it is cleared in the Channel Islands[8]. How such transactions could be fast tracked would be an issue that the Competition Authority would have to consider on a stand-alone basis.

[3] Case M1424J – SandpiperCI / Laura Ashley
[4] Case M1397J – JT/Tenura
[5] Case M1438G – Lloyds Bank / Schroders
[6] In 2016, CICRA recommended to the governments of both Guernsey and Jersey that each should make changes to its merger control framework. These changes would have harmonised the merger rules. To date, these changes have not been adopted.
[7] Case M1428G - Marsh Management Services Guernsey Limited / Patrick Murrin
[8] See, for example, Case M1279J – TopCo / Deutsche Börse / London Stock Exchange Group, which was notified in Jersey but withdrawn following indications from the Commission that the transaction was unlikely to be approved under the EU merger regulation.

CONCLUSION

The EU simplified merger procedure may provide a good starting point for the design of a future fast track merger procedure in the Channel Islands. However, as discussed above, a simple "read across" of the EU simplified procedure, even with adjusted thresholds, would not offer a complete answer to the question of which mergers should qualify for simplified assessment. Furthermore, it would be necessary to assess whether an initial Channel Islands fast track should, in line with the EU procedure, adopt a conservative approach to the categories of qualifying merger and expand these gradually as appropriate, or whether it should attempt to capture all known issues at the outset and make more extensive use of a power to transfer to the standard track on a case-by-case basis. Finally, the question of what information parties would be required to provide as part of a simplified merger application process, which lies outside the scope of this article, would require in-depth consideration.

The Competition Authority continues to consider ways in which the merger control regimes in the Channel Islands can be improved to ensure that transactions that have the potential to harm competition for goods and services in the Channel Islands are reviewed, whilst reducing the burden on businesses by requiring only a light touch review of unproblematic transactions. During 2019, we intend to look at administrative changes that can help to achieve this, which will complement the proposed changes to legislation put forward by the Competition Authority.

RAISING AWARENESS OF COMPETITION LAW

In a recent blog post, the UK Competition and Markets Authority ("CMA") published the highlights of its research into whether UK businesses understand competition law. The results show that the majority (77%) do not understand this area well with only 6% providing competition law training for their employees. Combine this lack of training and knowledge with the fact that over two thirds of respondents (79%) regularly meet with competitors and the risks of non-compliance begin to look significant.

The post goes on to note some common misunderstandings about competition law that could land businesses in trouble with the CMA. For example:

- 41% of businesses don't know that attending a meeting where competitors agree prices is illegal

- Over half (59%) don't know that agreeing to share out customers with competitors is illegal

- Just under half (48%) don't know that bid-rigging is illegal

The Competition Authority has also identified low levels of competition law awareness as a significant risk factor for the Channel Islands' economies, businesses and consumers. Its 2019 work programme builds on the advocacy work undertaken in 2018 to raise awareness of competition law in key stakeholder groups through a mixture of face-to-face training and publication of literature and information designed to improve understanding of and compliance with competition law.

Two quick guides to competition law recently produced by the Competition Authority are available here. The Competition Authority is also able to provide formal, written advice to parties who are unsure whether their arrangements are anti-competitive.

CICRA CLEARS RANDALLS / BOAT HOUSE MERGER FOLLOWING SECOND DETAILED REVIEW

In September, following a Phase 2 investigation, the Competition Authority approved the acquisition by Randalls of the Boat House and the Farm House in Jersey. This case was one of the few that has been put into Phase 2 by the Competition Authority and was also the first in which the Competition Authority used diversion ratio evidence to test the closeness of competition between the merging parties. The issue in this case was whether, post-merger, there would be sufficient consumer choice in St John and St Aubin in the provision of pubs. Using the methodology recommended by the UK CMA, a questionnaire was developed by Frontier Economics which tested the preferences of customers who visited pubs in St John and in St Aubin and the results were used to define the relevant markets and also to carry out a closeness of competition analysis. Following this case, the Competition Authority will consider how best to use this type of economic evidence in future decisions – including the stage in its proceedings where it would be appropriate to use such evidence – so as to ensure that its approach continues to be in line with international best practice.

THE COMMISSION FINES GUESS €40 MILLION FOR BLOCKING CROSS BORDER SALES

In December 2018, the Commission fined clothing company GUESS almost €40 million for stopping its distributors from cross border selling and advertising online. The fine would have been twice as high had GUESS not applied to the Commission for leniency and co-operated fully with the Commission's investigation. GUESS, whose trademarks include "GUESS?" and "MARCIANO", designs, distributes and licenses clothing in Europe by means of a selective distribution system. Selective distribution describes a distribution network in which a supplier chooses distributors on the basis of specified criteria, such as the distributor's maintenance of suitable premises, holding stocks of the products, displaying the product appropriately and providing customers with advice and after sales services.

A key element of selective distribution systems is that authorised distributors are not allowed to sell to unauthorised distributors but rather may only sell to end users or to each other. This is an exception to the general competition law rule that a supplier may not restrict the customers to whom its distributors resell products.

Because this restriction on selling outside of the selective distribution network is likely to restrict intra-brand competition -- competition between distributors selling the same branded product -- by limiting the number of distributors permitted to sell that branded product, suppliers operating selective distribution systems are not allowed to further restrict such intra-brand competition by preventing distributors from selling into each other's territories. Rather, as the Commission explains in its press release: "Consumers must be free to purchase from any retailer authorised by a manufacturer, including across national borders. At the same time, authorised retailers must be free to offer the products covered by the distribution contract online, to advertise and sell them across borders, and to set their resales prices." In other words, in a selective distribution system, all authorised distributors must be allowed to sell everywhere without restriction, both inside their own territory and outside of it and both actively and passively.

This case will be of interest to legal practitioners and businesses who operate selective distribution systems or franchising arrangements (which frequently include selective elements) in the Channel Islands. It explains clearly how EU law – to which the Competition Authority must have regard when applying competition law in the Channel Islands – applies to particular restrictions in selective distribution agreements and the level of fines the Commission may consider it appropriate to impose where EU competition law is broken in this regard.

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