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Competition Guideline 8: Mergers & Acquisitions

JCRA
JERSEY COMPETITION REGULATORY AUTHORITY

What this guideline is about

This guideline is one in a series of publications designed to inform businesses and consumers about how we, the Jersey Competition Regulatory Authority (the **Authority**), applies competition law in Jersey.

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

The Authority has administrative procedures in place that help it to carry out its merger review function. Based on its experience of merger notifications to date, and taking into account international best practice, the Authority revises its guideline from time to time. This revised guideline sets out how parties and their advisors should notify mergers to the Authority.

Article 7 of the *Competition Law* provides that the Authority may publish guidelines on any aspect of that Law. Proof that a person has failed to comply with a guideline is not proof that the person has failed to comply with a requirement of the Competition Law. However, in proceedings where it is alleged that a person has failed to comply with a requirement of the Law:

(a) Proof of a failure to comply with a guideline published by the Authority in respect of the requirement may be relied upon as tending to establish non-compliance with the requirement; and
(b) Proof of compliance with the guideline may be relied upon as tending to establish compliance with the requirement.

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

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1. Introduction

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

In Jersey, the Competition Law prohibits anticompetitive behaviour, including anti-competitive agreements between businesses and the abuse of a dominant position in a market. They also require certain mergers and acquisitions to be notified to the Authority for approval.

What powers does the JCRA have?

The Authority has a wide range of powers to investigate businesses suspected of breaching the law. It can order that offending agreements or conduct be stopped and levy financial penalties on businesses and individuals for the breach.

What types of organisation are considered a 'business'?

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

A Note on European Union (EU) Competition Law

The competition law in Jersey is modelled on the competition provisions in the Treaty on the Functioning of the EU. Jersey legislation places certain obligations on the Authority and the Royal Court when applying the competition laws. Article 60 of the Competition 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.

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

2. What is a Merger or an Acquisition?

Mergers and acquisitions 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, concerns around mergers arise to the extent that they lessen competition. In these circumstances, there are risks that prices may increase or output may decrease, which requires some assessment to gauge the seriousness of those concerns and their effect on the competitiveness of the market.

In the interests of brevity, mergers and acquisitions are referred to as 'mergers' in the remainder of this guideline.

What constitutes a merger under the laws?

The Competition Law contains a comprehensive definition of the concept of a "merger or acquisition". In general, the following transactions will be considered to be mergers under the Law:

- Direct or indirect acquisition of control by one undertaking (or a person who controls an undertaking) of another undertaking, or the business of another undertaking, or the substantial parts of the assets of another undertaking;
- A statutory merger, amalgamation or combination of two or more undertakings; and
- The creation of a joint venture, by partnership or otherwise.

"Control" is defined as arising when decisive influence is capable of being exercised in respect of the business or undertaking. The law also provides that when determining whether decisive influence exists, the Authority and the Royal Court must take into account all relevant facts and circumstances, and not merely the legal effect of acts or agreements. The concept of "decisive influence" is also used in the EU Merger Regulation (EUMR)[1] to identify when a notifiable merger should take place. There is a great deal of precedent of the European courts[2] and guidance of the European Commission[3] regarding the interpretation of this phrase, and the Authority will have close regard to that precedent when applying the merger provisions in the Jersey.

As noted above, competition law in Jersey includes the creation of a joint venture within the definition of a merger or acquisition. In summary, the competition law defines a joint venture to be a business carried on jointly by two or more persons, regardless of the legal form that the joint venture takes. The EUMR also applies to joint ventures, provided they

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[1] *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations* between undertakings, Article 3(2)

[2] Case T-282/02 *Cementbouw v Commission* [2006] ECR II-319

[3] *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*, 2008/C95/01, 16 April 2008, at paragraphs 11-90

are "performing on a lasting basis all the functions of an autonomous economic entity"[4] (also known as 'full function joint ventures').

While the text of the Jersey competition law and the EUMR relating to joint ventures is somewhat different, the Authority takes the view that the use of the term "business" in the definition of joint venture in the Jersey Law means that the merger notification processes in Jersey are also intended to apply only to full-function joint ventures. As such, in applying the merger control provisions of the competition law to joint ventures, the Authority will have close regard to the extensive discussion of the concept of full function joint ventures in the European Commission's guidance[5].

Types of merger

Mergers can be categorised as horizontal, vertical or conglomerate. Horizontal mergers involve a merger between parties at the same level in the supply chain; for example, between two retailers, or several producers of the same good or service in the same geographic market. Vertical mergers typically involve either a merger between a business and its supplier or a business and its customer. Conglomerate mergers cover all other types of mergers, although in practice, the focus of the Authority will usually be on mergers between businesses that are active in closely-related markets (e.g. suppliers of complementary products, or suppliers of products that are generally purchased by the same set of customers for the same end use).

3. Why might a Merger or Acquisition give rise to concerns?

Concerns that arise in respect of horizontal mergers relate to the elimination of competition between rival firms which, depending on their size, can be significant. Issues that come under consideration in such mergers are whether there is a material reduction in the level of competition, and the implications of that for consumers; the market power the merged business is likely to enjoy following the merger; and the degree to which any increase in concentration in the relevant market may strengthen the ability of the market's remaining participants to coordinate pricing & output decisions.

In the case of vertical mergers, concerns tend to be about possible changes to the pattern of industry behaviour following the merger, rather than the reduction in the number of rivals in a given market. For example, the merger may increase the likelihood that competitors to the new merged business may no longer have access to inputs they require to compete in the market, or suppliers will no longer be in a position to sell their goods or

[4] *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations* between undertakings, Article 3(4)

[5] *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*, 2008/C95/01, 16 April 2008, at paragraphs 91-109

services to a customer that forms part of a merged entity. Whether such developments are detrimental to effective competition is at the core of any examination of such transactions.

As with vertical mergers, conglomerate mergers do not lead to any reduction in the number of competitors in a market. Typically, the focus will be on the ability and incentive of the merged entity to leverage a position of market power from one market to another by means of tying, bundling or other exclusionary practices.

4. Is the Merger or Acquisition notifiable?

Part 4 of the Competition Law deals with mergers and acquisitions. Article 20(1) provides that a person must not execute a merger of a type prescribed in an Order without the approval of the Authority. The Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the '**Jersey Order**') specifies the mergers that are subject to the requirement for prior approval. The notification criteria in the Jersey Order are based on share of supply/purchase tests.

It should be emphasised that these thresholds are purely jurisdictional tests, and the fact that a merger must be notified to the Authority does not imply in any way that it is problematic from a competition point of view. The Authority can reach such a conclusion only after a full assessment as to whether the merger would substantially lessen competition.

Share of Supply

When making assessments of shares of supply or purchase, as a general guide the parties should look at the various possible alternative descriptions of products or services. If any of them result in the relevant threshold being exceeded, on the basis of information that is available, the parties should apply for approval. Where more than one measure is available, for example, turnover, volumes, floor space etc, and any of them results in the threshold being exceeded, the parties should apply for approval. In any event, if in doubt, the parties may contact us for an informal discussion prior to deciding whether to apply.

The Jersey Order requires a merger to be approved by the Authority before being executed where the 'share of supply or purchase' of one or more parties to the merger in any product or service exceeds one or more of the following thresholds:

- **Horizontal Mergers** (Article 2 of the Order) - Where it results in a share of supply or purchase of 25% or more being achieved, or increased. This threshold is intended to apply where the parties are competitors, and their combined shares of supply or purchase equal or exceed 25%. So, for example, where one competitor has 24% and the other has 1%, the parties to the merger would need to apply for approval. Equally, where one party has 15% and the other has 10%, the parties would need to apply.

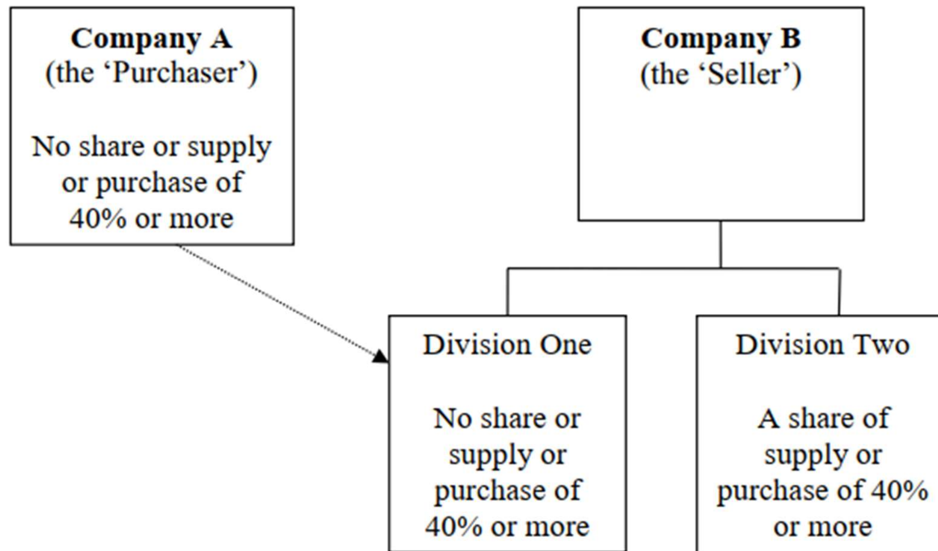
- **Vertical Mergers** (Article 3 of the Order) - Where one party has a share of supply or purchase of 25% or more, and the other is active up or downstream of that share of supply (irrespective of whether this up or downstream activity takes place in Jersey or elsewhere or of whether the parties are in an existing supply and purchase relationship). So for example, if a company with a 25% or more share of supply of bricks in Jersey was to merge with a house builder, this would require an application for approval. Equally, if a company with a retail share of 25% of potatoes was to merge with a potato producer, this would also require an application.
- **Conglomerate Mergers** (Article 4 of the Order) - Where one party has a share of supply or purchase of 40% or more and there is no horizontal or vertical relationship, the merger will require prior approval, unless it qualifies for either one of the two exemptions to Article 4, contained in Articles 4(a) and 4(b), discussed below. This is designed to deal with a situation where there is no horizontal or vertical relationship between the parties, but where the merger may nevertheless raise competition concerns. An example might be if a major electricity supplier was to merge with a major telecommunications supplier.

Exemptions in Article 4 of the Jersey Order

The Jersey Order has two exemptions to the notification threshold contained in Article 4 of the Order. If a merger that would otherwise meet the threshold of Article 4, but where either exemption is applicable, notification and approval is not required under the Jersey Law. These exemptions are discussed below.

- Article 4(a) exempts the acquisition of undertakings located outside Jersey, and with no Jersey assets or sales, by undertakings with a current share of supply or purchase of 40% or more in Jersey. Thus, for example, if a company has a 40% share of supply in Jersey of say, bicycles, and it intends to acquire a supplier of bicycles in another country with no share of supply or purchase in Jersey and no assets located in Jersey, that merger would fall under the exemption of Article 4(a) and hence does not require notification to, or approval by, the Authority. Note that the thresholds contained in Articles 2 and 3 of the Order are not applicable in this example. The term ‘assets’ as used in this exemption includes both tangible and intangible assets, meaning that the acquired undertaking must not hold any assets, tangible or intangible, in Jersey at the time of the merger for the exemption to apply.
- Article 4(b) exempts a merger in situations where the seller has a share of supply or purchase of 40% or more in a product or service, but where that share is not subject to the merger and where any non-competition, non-solicitation or confidentiality clauses included do not exceed a period of three years and are strictly limited to the products or services supplied by the undertaking being acquired.

Article 4 Exemptions – Example



In this example, Companies A and B are active in the supply and purchase of different goods and the thresholds of Articles 2 and 3 of the Order are not applicable. Company A has no share of supply or purchase of 40% or more in Jersey and proposes to purchase Division One of Company B. Division One has no share of supply or purchase of 40% or more in Jersey; however, another part of Company B (Division Two) does. By operation of the Order and the exemption contained in Article 4(b), Company A's acquisition of Division One from Company B would not require notification to, and approval by, the Authority so long as any non-competition, non-solicitation or confidentiality clauses agreed between Companies A and B do not exceed a period of three years and are strictly limited to the products or services supplied by Division One.

The three-year limitation for non-competition and similar clauses is based on the maximum period generally allowed for such clauses under relevant EU guidelines.

Parties may propose non-competition or similar clauses for a period of longer than three years; however, the inclusion of such a clause in an agreement means that the merger cannot qualify for the exemption contained in Article 4(b) of the Jersey Order, and the merger must be notified to, and approved by, the Authority for the parties to proceed. The inclusion of other ancillary agreements within the merger (that is, agreements other than noncompetition, non-solicitation or confidentiality clauses) does not affect the potential application of the exemption however such agreements may be captured by Article 8(1) of the Jersey Law.

As with the share of supply test generally, if parties have questions concerning the potential application of the exemptions contained in Articles 4(a) and 4(b), they are encouraged to contact the Authority for an informal discussion prior to deciding whether to apply.

5. When Can I Notify a Merger?

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

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

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

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

6. Who Should Make The Application?

It will normally be appropriate for an application to be submitted jointly by both or all parties, although they may appoint a joint representative, e.g. the acquiring business or its legal adviser, for this purpose.

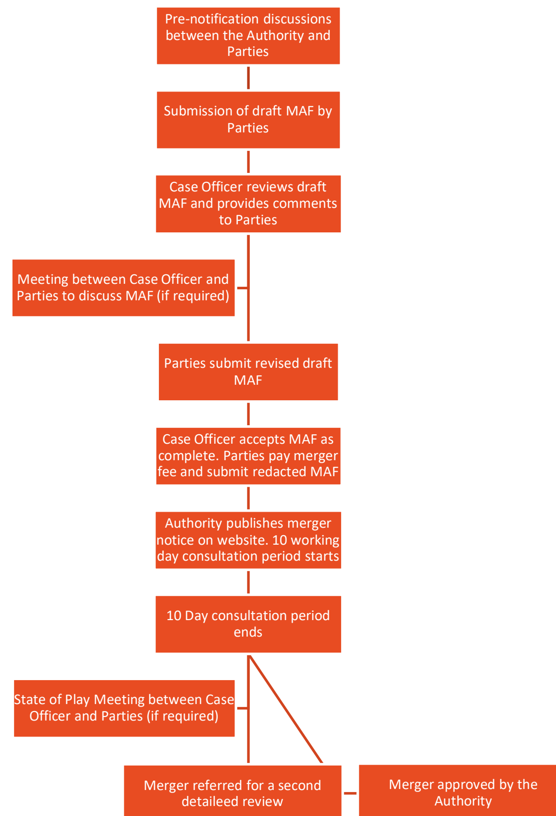
The Authority may refuse approval of a merger if any information we have requested from the parties has not been provided within a reasonable time. It should also be noted that it is an offence under the laws to knowingly or recklessly provide material information that is false or misleading.

7. Procedure – Overview

The Authority's merger review process involves the following key stages:

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

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



8. Pre-Notification

All notifiable mergers require pre-notification through the submission of a draft Merger Application Form.

Pre-notification Discussions

Based on its experience of assessing notified mergers, the Authority's view is that the consultation and assessment that takes place at 'Phase 1' will generally progress much

more efficiently where the merging parties and their advisers have engaged in pre-notification discussions with Case Officers and where a full draft Merger Application Form has been submitted.

Notifying parties are encouraged to engage at an early stage, ideally before the submission of a draft Merger Application Form. Pre-notification has a number of specific benefits for the notifying parties, including:

- Allowing them to provide information on the markets involved in the merger;
- Enabling us to clarify the information that is required for the Merger Application Form to be considered to be complete and so reducing the risk that there will be a requirement to 'stop the clock' during Phase 1;
- To identify areas where extensive information is not required from the parties, which reduces the administrative burden.
- to identify any particular areas of difficulty, to clarify any questions that the parties may have regarding our process and timescales
- Allows the allocation of a Case Officer to the merger before the submission of the draft Merger Application Form

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

Draft Merger Application Form

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

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

9. First Detailed Review ('Phase 1')

Notification

Consultation

When a Merger Application Form has been accepted by the Authority as complete and the merger filing fee has been received, a notice will be published on the website, stating

that the parties have submitted the application (and the sectors in which they are engaged) and inviting comments on the proposed merger.

The public consultation period will run for 10 working days. The Authority may also approach one or more of the parties' competitors, suppliers and/or customers, or third parties who might hold information regarding the markets in which the parties are active (e.g. other regulatory agencies).

Redactions

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

"State of Play" Meeting

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

Conclusion of first detailed review

There is no statutory deadline by which we must conclude a first detailed review. However, by way of administrative target, the Authority aims to reach a decision within 25 working days of registration of an application.

If there are any requests for further information from the parties, this will "stop the clock" with respect to this timetable, which will only resume once a satisfactory response to the information request has been received.

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

10. Second Detailed Review

If during the investigation of the application, issues arise that may lead to refusal of approval for the merger or an approval with conditions, then the Authority will move to a

second detailed review. The opening of a second detailed review will entail the payment of a further fee – see section on 'Fees' below.

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

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

The parties, and all third parties who have registered an interest in the merger, will be invited to respond to the provisional findings, and will also be given the opportunity to meet with Case Officers.

There is no statutory deadline for the conclusion of a second detailed review. However, our practice by way of administrative target is that we will endeavour to reach a final decision within 6 months from the date of first registration of the application (i.e. commencement of the preliminary review or first detailed review).

If there are any requests for further information from the parties, this will "stop the clock" with respect to this timetable, which will only resume once a satisfactory response to the information request has been received.

The final decision will be published on the website.

11. Fees

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

An application for approval of a merger will not be registered unless the relevant fee has been paid in full, and a second detailed review will not commence until receipt of any further fee payable.

The fee for a first detailed review of a merger depends on the fair market value ('FMV') of the total consideration received by the seller(s) for the merger, including the assumption of any liabilities whether actual or contingent. The Authority may also recover any

additional reasonable fees or costs in connection with the application, whether or not it is successful.

Fair Market Value	**Minimum Filing Fee**
Under £10,000,000	£7,500
£10,000,000 or more	£15,000

It is the responsibility of the merging parties to determine the transaction's FMV. However, any disagreement with the parties' FMV calculation could delay review of the merger.

If a second detailed review is required, then a further fee is payable, regardless of the transaction's FMV. The resources required to conduct our review of the application will be assessed, and will advise the parties of the estimated fee at the commencement of the second detailed review of the assessment, with a deduction for any fee paid for the first detailed review in respect of the same matter. It will be invoiced separately and is payable in advance. The Authority reserves the right to require payment of additional fees should our costs exceed the initial estimate.

12. Confidentiality and Involvement of Third Parties

The law requires the Authority to keep confidential non-public information we receives during a merger investigation. However, this restriction does not apply to information where consent for disclosure has been obtained. When submitting an application form, parties must clearly identify the information over which they are claiming confidentiality[6]. Third parties may request a copy of the Merger Application Form in order to consider whether to make a submission to the Authority regarding the merger. For this reason, the merging parties are required to produce a non-confidential version of the Merger Application Form, which must be submitted at the same time as the full Merger Application Form, for distribution to those third parties.

In the event that a merger review proceeds to a second detailed review, a copy of our provisional findings will be provided to all parties who have registered an interest in the review of that merger (e.g. responded to the public consultation). The parties will be

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

invited to review the provisional findings prior to distribution so as to avoid commercially-sensitive information being disclosed.

Parties will also be invited to review our final decision and to highlight any information that they consider should be redacted from the public version of the decision for reasons of commercial confidentiality. In disclosing market share data, the European Commission's guidelines will be applied[7].

13. Merger Assessment

Where the Authority receives applications for approval of mergers, it is required to consider whether the merger will substantially lessen competition within any market.

Substantial lessening of competition test

An analysis of whether a merger is likely to substantially lessen competition will involve the following steps:

- defining the affected relevant market(s). Further details on the Authority's approach to market definition can be found in Guideline XX – Market Definition;
- assessing concentration levels in the affected markets – identifying the competitors in the market/s and their relative share/s of that market;
- assessing whether the merger creates or enhances the merged firm's ability or incentives to exercise market power, either unilaterally or in coordination with competitors;
- assessing whether other market forces, such as the entry of new competitors or the countervailing power of customers, eliminate the risk of a substantial lessening of competition; and
- assessing any pro-competitive effects or efficiencies that may result from the merger. We will seek evidence that the benefits will arise in a short time period, would not otherwise have been realised and that they directly arose from the merger.

For horizontal mergers, the Authority can assess two potential types of anticompetitive effects: unilateral effects (i.e., the ability of the merged entity to raise prices unilaterally) and coordinated effects (i.e., the ability of the merged entity to raise prices with either the implicit or explicit cooperation of other competitors).

For vertical or conglomerate mergers, the Authority's focus will be on assessing whether the merged entity would have the ability or incentive to foreclose the market to competitors, either by denying access to important inputs upstream, or by denying access to "routes to market" downstream.

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

Throughout this analysis, the Authority compares the merger's 'factual' and 'counterfactual.' That is, in reaching a conclusion about whether a merger is likely to substantially lessen competition, the Authority makes a 'with and without' comparison rather than a 'before and after' comparison. The comparison is between two hypothetical future situations, one with the merger (the factual) and one without (the counterfactual). The difference in competition between these two scenarios is then able to be attributed to the impact of the merger.

In framing a suitable counterfactual, the Authority bases its view on a pragmatic and commercial assessment of what is likely to occur in the absence of the proposed merger. The status quo cannot necessarily be assumed to continue in the absence of the merger, although that may often be the case. It may be, for example, that a merger is expected to extinguish the prospect for greater competition through the elimination of a vigorous recent entrant, or the merger may involve a business that would not otherwise continue in the market.

When assessing horizontal mergers[8] and non-horizontal (i.e. vertical and conglomerate) mergers[9], the Authority will have regard to the guidelines produced by the European Commission. We may also consider the substantive merger guidelines applied by the Competition and Markets Authority in the UK, as well as those of other competition authorities.

If the merger raises material concerns following the above process of analysis, we will not grant approval, or will grant approval subject to conditions. If we are satisfied that the merger will not result in a substantial lessening of competition, we will grant approval for the merger.

14. Conditional Approval

Under Article 22(1) of the Jersey Law, the Authority may attach conditions to its approval of a merger. The attachment of conditions would be appropriate where the Authority is satisfied that, without conditions, the merger could not be approved, but, if one or more conditions were fulfilled, the merger would not substantially lessen competition.

Examples of situations where the attachment of conditions may be appropriate include the following:

- Where a horizontal merger involving two retail competitors would substantially lessen competition in only one area, or in a limited number of products. In the first case, a condition that the merger can proceed as long as retail outlets in particular geographical areas are

[8] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 2004/C31/03, 5 February 2004
[9] *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 2008/C265/07, 18 October 2004

excluded, or subsequently sold off, may allow the merger to proceed. In the second, again the exclusion or sale to a third party of a particular product range may allow the merger to proceed. For an example of this type of condition in practice, see JCRA Decision M005/05 – Ferryspeed (CI) Limited and Channel Express (CI) Limited.

- In a vertical merger that involves one company acquiring a critical source of supply for it and its competitors, a condition assuring continued supplies to competitors on reasonable commercial terms may be appropriate. For an example of this type of condition in practice, see JCRA Decision M171/08 – Jersey Royal (Potato Marketing) Limited and EC Le Feuvre Agricultural Machinery Limited.
- In a conglomerate merger, where it may be appropriate in certain circumstances to require, as a condition of the approval, that the merged enterprise does not grant discounts for bundled products or services, at such a level that suppliers of individual components of the bundle cannot compete profitably.

For mergers that raise concerns, parties are encouraged to raise with the Authority at the earliest opportunity any conditions that may allow the merger to proceed without substantially lessening competition. The obligation will be on the notifying parties to propose conditions to the Authority. In a first detailed review, the parties may choose to offer conditions at any time in order to expedite approval. If the investigation proceeds to a second detailed review, then the parties should consider whether there are conditions that they consider would address the concerns highlighted by the Authority in its provisional findings.

If parties offer conditions, the Authority will engage in a process of 'market-testing', under which it will consult competitors, customers and/or suppliers of the merged entity, in order to assess the practicability of the remedies, and whether they adequately address the Authority's concerns.

Any conditions imposed by the Authority as part of a merger approval decision can be of a continuing nature. Those conditions can bind a range of parties, including the parties to the merger, the merged entity, or directors or officers of those parties. In addition, the Authority can impose financial penalties in respect of any subsequent breach of those conditions.

When assessing proposals for conditions, the Authority will take account of guidance published by other competition authorities, including the European Commission[10] and the UK competition authorities[11].

[10] *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004*, 2008/C267/01, 22 October 2008
[11] Competition Commission, *CC8 – Merger Remedies* (November 2008)

15. How can I find out more?

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

Jersey Competition Regulatory Authority
2nd Floor, Salisbury House
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