Consultation on amendments to the Guernsey Mergers and Acquisitions Regime

Consultation Document

Channel Islands Competition and Regulatory Authorities

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1. Introduction

1. In this Consultation Paper, the Channel Islands Competition and Regulatory Authorities (**CICRA**) consult on possible amendments to The Competition (Prescribed Mergers and Acquisition) (Guernsey) Regulations 2012 (the **Regulations**). The Regulations prescribe the types of mergers and acquisitions that must be notified to, and approved by, the Guernsey Competition and Regulatory Authority (the **GCRA**) under Section 13(1) of the Competition (Guernsey) Ordinance 2012 (the **Ordinance**) prior to their execution by the parties (a mandatory notification regime).

2. The review of the mergers and acquisitions regime considers the market in Guernsey. The Jersey Competition Regulatory Authority (the **JCRA**) is undertaking a parallel review in Jersey, and the consultations will proceed simultaneously. The GCRA and JCRA together comprise CICRA. For the purpose of this Consultation Paper, reference to CICRA shall include reference to the GCRA.

3. Guernsey is expected to continue to operate a mandatory notification regime, not least because it is enshrined in the Ordinance and helps to ensure that in a small jurisdiction such as Guernsey, CICRA can assess the potential for a substantial lessening of competition, as a result of a merger or acquisition, before it negatively impacts on the local economy.

4. Since the introduction of the Ordinance and Regulations in 2012, various concerns have been raised in relation to the notification test under the mergers and acquisitions regime. What is at the heart of the concern is that the broad nature of the notification test results in transactions being captured even where they have no discernible anti-competitive effect in the Channel Islands. In those circumstances, parties are nevertheless required to comply with the notification requirements, thereby incurring further costs and time, whilst CICRA is also required to dedicate its time and resources on such applications. There is a common concern that the regulatory regime in its existing form could, in certain circumstances, have a negative impact on business in Guernsey.

5. The purpose of the amendments discussed in this Consultation Paper is to address these concerns by proposing a narrower category of mergers and acquisitions that are notifiable under the Regulations, with the result being that only those mergers which might have an impact on the local market are referred to CICRA.

6. One way to achieve this goal is to redefine the existing turnover test so that only genuine "*local*" turnover of the entities engaged in the merger is taken into account. Such an amendment could be extended to all types of business rather than being limited to specific sectors. In order to simplify the notification regime further, the same turnover threshold could also be applied to both financial service business and non-financial service business sectors.

7. There may also be cases where a transaction falls below the turnover threshold, and is thus not caught by the merger notification regime, but where there is nevertheless a concern that such a transaction might have an anti-competitive effect. One potential way to address such a scenario is to enable CICRA to identify and call in those mergers and acquisitions which fall into this category. In order to assess whether such mergers and acquisitions need to be investigated by CICRA, a "share of supply or purchase" test could be applied to the transaction. The result is that those transactions which fall below the turnover threshold but which have the potential to significantly lessen local competition could also be considered further.

8. The advantage of introducing this additional layer of protection is that it will compensate for the weaknesses of the turnover test, which exist in a small market such as Guernsey.

9. The goal of the amendments is to simplify and reduce compliance burdens in Guernsey, as well as allowing CICRA to focus its resources on prohibiting those mergers and acquisitions which would substantially lessen competition in Guernsey or any part thereof. As a result of the proposed amendments, the number of mergers and acquisitions that require notification to, and approval by, CICRA should reduce.

10. The Regulations' content is within the discretion of the States of Guernsey, upon consultation with CICRA. The results of this Consultation will therefore form CICRA's advice to the Commerce and Employment Department in this regard. The ultimate decision on whether or not to proceed to amend the Regulations and, if so, in what form, remains with the Commerce and Employment Board.

11. CICRA is aware that the amendments considered in this Consultation Paper may result in changes being made to primary legislation as well as secondary legislation. Although changes to secondary legislation are more easily undertaken, proposals which will require amendments to primary legislation are also welcomed.

2. Structure of the Consultation Paper

This paper is structured as follows:

Section 1	Introduction
Section 2	Structure of the Consultation Paper
Section 3	Background to the Regulations and possible amendments
Section 4	Amendments to the Regulations
Section 5	Next steps in amending the Regulations

This Consultation Paper invites comments and suggestions as follows:

A. Adopting a "*local*" turnover test in respect of the existing mandatory notification regime, and the turnover figure itself;
B. Amending the definition of "financial institution";
C. The type of exemptions that might be considered reasonable under the mandatory notification regime;
D. Introducing a "share of supply/purchase" test as a new voluntary notification regime, and the percentage figure for the share of supply/purchase test;
E. Retaining the "preliminary review" process;
F. Clarifying corresponding questions under EU law; and
G. Any other suggested amendments to the Regulations.

Jersey is also looking to amend its mergers and acquisitions regime and a parallel consultation is therefore being carried out in Jersey by the JCRA. CICRA would welcome comments on both Consultation Papers which can be submitted as a single response.

CICRA encourages the submission of responses by e-mail to info@cicra.gg. Alternatively, responses to this consultation document should be submitted in writing to CICRA's office:

Channel Islands Competition and Regulatory Authorities
Suite 4, 1st Floor
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The deadline for responses is **5.00pm** on 15th January 2016.

All comments should be clearly marked '**Comments on the Mergers and Acquisitions Consultation Document**'. CICRA's normal practice is to publish all responses to consultations on its website. If you do not want your response to be published in part or in

full, the relevant sections should be clearly marked as confidential, and the response should explain why those parts of the response should be treated as confidential.

Finally, please note that it is an offence under Section 48 of the Ordinance to knowingly or recklessly (i) make a false, deceptive or misleading statement and (ii) produce or furnish or cause or permit to be produced or furnished false, deceptive or misleading information or documents, to CICRA in response to this Consultation.

3. Background

12. Under the Regulations, the thresholds for determining whether a merger must be notified to CICRA are based on turnover of the undertakings involved in the merger. **Annex A** to this Consultation contains a copy of the Regulations, as currently in force.

13. Regulation 1 provides that a merger will be notifiable if:

    a. "*The combined applicable turnover of the undertakings involved in the merger or acquisition arising in the Channel Islands exceeds £5 million; and*

    b. *Two or more of the undertakings involved in the merger or acquisition each have an applicable turnover arising in Guernsey which exceeds £2 million.*"

14. Regulation 2 sets out a list of the undertakings that will be taken to be "involved in a merger" for the purposes of Regulation 1. In summary, the undertakings involved will be the acquirer and the target, or, in the case of a joint venture, the parties establishing the joint venture together with the joint venture itself. An undertaking is also included if it is involved in an amalgamation or other combination with another undertaking.

15. Since the Ordinance and Regulations came into force, various concerns have been raised in relation to the wide application of notification requirements under the mergers and acquisitions regime. In particular, given the nature of the financial services industry in Guernsey, it is considered that a large proportion of the transactions between local businesses will have little or no impact on Guernsey consumers. Nevertheless, as a result of their size, transactions carried out by such businesses will be caught by the notification regime. Conversely, there may be circumstances where a merger which will impact upon truly local consumers will not be caught by the notification regime as a result of its falling below the notification threshold. Accordingly, the existing regime might be considered to be disadvantaging the financial services industry whilst not fully protecting the interests of the Guernsey consumers.

16. One proposal for addressing these concerns is to redefine the existing turnover test under the mandatory notification regime and also introduce a new share of supply/purchase test under a voluntary notification regime. The rationale for this change follows a comprehensive review of international best practice and merger notification regimes in other jurisdictions, including small island economies. Adopting a *local* turnover test as a pre-notification regime complemented by a share of supply/purchase test that is not part of a pre-notification regime may appropriately capture the mergers and acquisitions with the greatest likelihood of substantially lessening competition in Guernsey.

4. Amendments to the Mergers and Acquisitions Regime

A. Local Turnover Test

Issue 1

(a) Comments on the merits, as well as the practical implications, of a "local" turnover notification test are welcomed.

(b) Where respondents have information that might further contribute to informing the appropriate level of the turnover threshold, CICRA would welcome receiving such data.

Applicable Turnover

17. The current practice in Guernsey of using a turnover threshold test is consistent with International Competition Network (**ICN**) best practice. The ICN best practice guidelines[1] state that merger notification thresholds should apply only to transactions with a material nexus in the reviewing jurisdiction, based on objectively quantifiable criteria such as assets or turnover that reflect domestic activity. A test based on turnover is considered more appropriate to a mandatory notification regime.

18. The advantage of the turnover threshold test is that it provides the parties to the transaction with an objective criterion as to whether to notify CICRA. However, experiences in Guernsey over the last few years have shown that are improvements that can be made to the process and it is appropriate in light of CICRA's experience in Guernsey of implementing the merger regime since 2012 to consider those as part of this review. This is primarily because in some sectors the method of calculating turnover requires both local and non-local turnover to be included. The result is that the finance industry (in which these concerns have mainly arisen) is being negatively impacted as the transactions are required to follow the mandatory notification regime (requiring both cost and time) even where there is no discernable anti-competitive effect.

19. Further, the "preliminary review" process, which is discussed in further detail below, may not adequately relieve these concerns as the parties to the transaction are still required to engage in the notification regime (which again costs time and money, and still leaves parties with an element of uncertainty). In addition, from CICRA's perspective, it too is required to dedicate time and resources to what are potentially unnecessary applications.

20. A potential remedy to these concerns is to introduce a test which only requires local turnover to be taken into account. Such a test would ensure continued compliance

[1] ICN Recommended Practice for Merger Notification and Review Procedures

with current international best practice for the mandatory filing regime whilst only capturing those transactions where the genuine local turnover exceeds the thresholds.

21. CICRA appreciates that it will not be clear in every case what is to be considered as "local turnover". As is considered further below, in relation to the concept of turnover, regard could be had to the treatment of corresponding questions under EU law. Where respondents have information that might further contribute to the assessment of "local" turnover for the purposes of this test, CICRA would welcome receiving such data.

Threshold Levels

22. A turnover threshold offers to some extent a proxy for the significance of a merger or acquisition to the Guernsey economy. Given this, there is an argument that the total local turnover of all the parties involved in a merger or acquisition is the appropriate approach for Guernsey and a local turnover threshold should therefore take account of this. The level of publicly available information on which to assess an appropriate turnover threshold for Guernsey is limited. However, it is anticipated that the smallest Guernsey businesses do not generally present a material threat to competition since the entry barriers for such businesses are generally expected to be low. Further, and as considered below, a separate "voluntary" notification regime could be introduced for those mergers which have turnover below the prescribed levels but which nevertheless have the potential to significantly effect competition in their markets.

23. CICRA has been involved in considering mergers in Guernsey for several years and has acquired its own database of confidential information. This source provides the best available indicator as to the appropriate turnover threshold, given the objectives set out in the introduction to this paper.

24. The format of the existing thresholds – with one limb based on the combined turnover of the parties in the local territory, and the other based on the turnover of each of at least 2 of the parties in the local territory – is used in the merger control regimes in many other jurisdictions.

25. CICRA's provisional view is that both the format of the existing thresholds and the threshold levels should remain unchanged i.e. that mergers and acquisitions would need to be notified to CICRA where:

    a. The combined aggregated annual "local" turnover in the Channel Islands of the "Undertakings Concerned" in a transaction (i.e. the purchaser and the target, or all parties to a joint venture) exceeds £5 million; and
    b. The annual "local" turnover in Guernsey of each of at least 2 "Undertakings Concerned" exceeds £2 million.

26. The notification test therefore has two limbs: one based on the combined turnover of the "Undertakings Concerned" in the Channel Islands, and the other based on the

turnover of at least 2 of the "Undertakings Concerned" in Guernsey. The term "Undertakings Concerned" is discussed further below.

27. To keep the test simple, one option is to set the same turnover threshold for all transactions, irrespective of whether the undertakings involved are financial service businesses or non-financial service businesses. Further, the proposed turnover threshold levels could also be the same irrespective of the type of merger involved (i.e. horizontal, vertical or conglomerate).

28. Where respondents have information that might further contribute to informing the appropriate level of the turnover threshold and to whom it should apply, CICRA would welcome receiving such data.

"Undertakings Concerned"

29. The current Regulations refer to "the undertakings involved in the merger or acquisition" (Section 1(1)).

30. A proposed use of the concept "Undertakings Concerned" would follow the approach in the EU Council Regulation (EC) No 139/2004 (the **EU Regulations**). By using this concept, third parties which are "involved" in the transaction but which are not "concerned" by the transaction will be excluded e.g. a company financing the acquisition.

31. A potential definition for "Undertakings Concerned" is as follows: "the merging parties, or the Target and the Acquirer, or, in the case of a joint venture, all parties acquiring control as well as the business to be established". The terms "Acquirer" and "Target" could also be along the following lines - "Acquirer": "the undertaking that is acquiring control, or, if the merger or acquisition is a joint venture, the undertaking concerned with the larger turnover in Guernsey"; and "Target": "the undertaking that is being acquired, or, if the merger or acquisition is a joint venture, the undertaking concerned with the smaller turnover in Guernsey."

32. The European Commission Consolidated Jurisdictional Notice under the EU Regulations (the **EC Jurisdictional Notice**) contains further detail regarding the concept of "undertakings concerned": see paragraphs 132-156. Amendments to the regime could incorporate portions of the EC Jurisdictional Notice, where appropriate, into either a new order or revised Guidelines for Mergers and Acquisitions (**M&A Guidelines**).

B. Definition of "Financial Institution"

Issue 2

CICRA would welcome comments on the merits, as well as the practical implications, of applying a definition of "financial institution" which reflects the wording adopted in the EU Regulations.

33. The Regulations distinguish between credit institutions, financial institutions and insurance undertakings, and all other "standard" businesses. This distinction is relevant in two areas. First, in calculating turnover and in considering the geographic attribution of an undertaking's turnover, special rules exist for credit institutions, financial institutions and insurance undertakings. Secondly, the preliminary review process is only available to credit and financial institutions.

34. The provisions in the Regulations regarding "financial institutions" closely follow the equivalent provisions in the EU Regulations. Financial institutions are therefore generally treated in the same way under the local Regulations as they are under the EU Regulations. There is however one key difference between the two regulations, in that the definition of "financial institution" is much broader under the local Regulations than it is under the EU Regulations.

35. Under the EU Regulations, the term "financial institution" is aimed at banking and finance businesses. The EC Jurisdictional Notice explains that, in order to define the term "financial institution", the Commission in its practice has consistently adopted the definitions provided in the applicable European regulation in the banking sector.[2] The Guernsey Regulations in comparison are much broader and capture service providers (not just providers of finance or brokers dealing in financial instruments). Given the nature of the financial services industry in Guernsey, a large proportion of local businesses are therefore caught by the definition of "financial institution" under the Regulations (whereas they would not be so under the EU Regulations).

36. The result is that there are two very different meanings of the term "financial institution" under the EU and local merger regulations. Despite the difference in meaning, the treatment of a "financial institution" is the same under both regulations. This has given rise to various issues. By way of example and as noted above, special rules exist for the calculation of turnover for a "financial institutions". The Competition (Calculation of Turnover) (Guernsey) Regulations 2010 Regulations have incorporated the categories of income listed in the EU Regulations for calculating turnover for a "financial institution". However, these categories have not been amended to reflect the differing meaning of financial institution i.e. that the term "financial institution" under the EU Regulations is aimed at the banking sector as opposed to the local

[2] Paragraph 207 of the EC Jurisdictional Notice

Regulations which targets service providers. The description of "income" does not therefore appear to be appropriate for the type of businesses caught under the Regulations.

37. The pool of "financial institutions" in Guernsey is therefore potentially bigger than might have been anticipated. Given that the EU Regulations wording has been tracked in large part, it might be considered more helpful to use the definition of "financial institution" as contained in the EU Regulations.

38. As also noted above, the "preliminary review" process is available to "finance institutions". If it is considered appropriate that the EU Regulation definition be adopted, this will result in the service providers being excluded from the preliminary review process. One option to remedy this issue would be to widen the category of businesses for which the preliminary review process can be used. Alternatively, it may be considered that the addition of further categories is not necessary should a "*local*" turnover test be adopted.

39. CICRA would welcome comments on the merits, as well as the practical implications, of amending the definition of "financial institution" to reflect the wording adopted in the EU Regulations.

C. Exemptions

Issue 3

CICRA would welcome comments on the type of exemptions that might be considered reasonable, without compromising the Ordinance's goal of prohibiting those mergers and acquisitions which would substantially lessen competition in Guernsey or any part thereof.

40. Given the nature of the Guernsey market and, in particular, given the role of financial services in the local economy, certain types of transactions might be exempted from notification, given they are unlikely to raise competitive concerns. The exemptions provided for in other jurisdictions include:

    - Where credit institutions, financial institutions or insurance companies acquire shares in another company for the purpose of resale where voting rights are not exercised and resale occurs within one year.
    - Asset securitisation transactions.
    - Transactions which do not result in a change of ultimate control.
    - Transactions which do not result in a lasting change in "control" or in the quality of "control" of the undertakings concerned.
    - Where "control" is acquired by an office-holder relating to liquidation, winding up, cessation of payments, compositions or analogous proceedings.

41. CICRA would welcome comments on the type of exemptions that might be considered reasonable, without compromising the Ordinance's goal of prohibiting those mergers and acquisitions which would substantially lessen competition in Guernsey or any part thereof.

D. Share of Supply/Purchase

Issue 4

(a) Comments on the merits, as well as the practical implications, of a "share of supply/purchase" test are welcomed.

(b) Where respondents have information that might further contribute to informing the appropriate level of the share of supply/purchase threshold, CICRA would welcome receiving such data.

Share of Supply/Purchase - Assessment

42. Given the level of resources available to CICRA it is important to ensure that resources are focused on those mergers with the greatest likelihood of substantially lessening competition in Guernsey and narrowing the turnover test to local turnover only will assist in that regard. However, there is a concern that there may be transactions which are not be caught by the turnover provisions but which might nevertheless have the potential to significantly affect competition in their markets. One possible way to address this issue is to afford CICRA the ability to call in those transactions where CICRA believes there to be a realistic prospect of a substantial lessening of competition. The assessment of such matters would be based on a "share of supply/purchase" test. The potential application of this test would be as follows.

43. Based on information gained through market intelligence, CICRA would identify those mergers and acquisitions not required to follow the notification regime but which might give rise to a substantial lessening of competition. If CICRA is of the opinion that there are competition concerns, the parties to the merger will be asked by CICRA to confirm their share of supply or purchase. Only if, on the application of the share of supply/purchase test (which is discussed further below), the transaction exceeds the prescribed thresholds of that test, will CICRA launch an assessment into the merger.

44. In the event that, following the assessment, CICRA concludes that the transaction does have an impact on the level of competition in the Island's economy, the remedy for such a finding may be for CICRA to obtain undertakings from the parties. Any obligation for undertakings would be carried out in a consultation with the parties to the transaction. It is of note that the use of undertakings to remedy competition concerns is a method already applied by the Competition and Markets Authority in the UK.

"Share of Supply/Purchase" - Threshold

45. Should a share of supply/purchase test be considered a suitable approach to those transactions which fall below the turnover threshold, the appropriate threshold for the share of supply/purchase test needs to be addressed. One option is that CICRA will be able to call in a merger or acquisition where the "share of supply or purchase" of one of more parties to the merger in any product or service exceeds one or more of the following thresholds:

    a) Horizontal mergers or acquisitions - Where it results in a share of supply or purchase of 25% or more being achieved, or increased. This threshold is intended to apply to 'horizontal mergers', i.e. where the parties are existing 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%, CICRA could assess the transaction further. Equally, where one party has 15% and the other has 10%, CICRA can carry out an assessment.

    b) Vertical mergers or acquisitions - Where one party has a share of supply or purchase of 25% or more, and the other has a 'vertical' relationship with that party (for example, as a supplier to or customer of that party). So for example, if a company with a 25% or more share of supply of bricks in Guernsey was to merge with a house builder, CICRA could assess the transaction. Equally, if a company with a retail share of 25% of potatoes was to merge with a potato producer, this could also require assessment.

    c) Conglomerate mergers or acquisitions - Where one party has a share of supply or purchase of 40% or more and there is no horizontal or vertical relationship, the merger could be assessed by CICRA unless it qualifies for either one of the two exemption:

        a. exempts the acquisition of undertakings located outside Guernsey, and with no Guernsey assets or sales, by undertakings with a current share of supply or purchase of 40% or more in Guernsey; and
        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.

    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. These types of mergers are referred to as conglomerate mergers. An example might be if a major electricity supplier was to merge with a major telecommunications supplier.

46. As with the turnover test, the same threshold levels in the share of supply/purchase test could be applied to all industries as opposed to having different levels for different industries. However, CICRA does question whether the threshold levels set for the share of supply/purchase and referred to above should in fact be increased. By way of example, the Seychelles has set the threshold at 40% of the market share.

47. It is also of note that the proposed provisions under the share of supply/purchase test limit the geographic market to Guernsey. In relation to the existing turnover test, this test considers both the Channel Island market (in relation to the "combined aggregated annual turnover") and the Guernsey market (regarding the annual turnover of at least 2 undertakings concerned). There is therefore a question as to whether the share of supply market should be extended to all of the Channel Islands rather than being limited to Guernsey.

48. If the share of supply/purchase test was to be adopted, there may be circumstances where the parties are concerned that, even though they are not required to follow the mandatory notification regime under the turnover test, an in-depth assessment of the transaction could still be carried out by CICRA under the share of supply/purchase test. Should the parties have such concerns, CICRA is of the view that they may still follow the notification regime should they so wish in order to have certainty that the merger can proceed (with or without undertakings).

49. Where respondents have information that might contribute to informing the appropriate level of the share of supply/purchase threshold, CICRA would welcome receiving such data.

E. "Preliminary review" Process

Issue 5

CICRA would welcome comments on the retention of, and any amendments to, the "Preliminary Review" Process.

Retention of the Process?

50. Where an acquiring undertaking involved in a merger is a credit institution or financial institution (terms defined in Regulation 8 of the Regulations), then it is entitled to apply for a preliminary review of the merger, using a Shortened Merger Application Form.

51. The preliminary review process is available to credit and financial institutions for 2 principal reasons:

a. the particular manner in which turnover is calculated for credit and financial institutions means that credit and financial institutions based in Guernsey are likely to have significant turnover in Guernsey for the purposes of the Regulations, even where most or all of their account-holders are based in other territories; and

b. where Guernsey-based credit and financial institutions are providing services to account-holders or customers in other territories, they will typically be operating in markets that have a wide geographic scope, and will compete against a large number of alternate providers in jurisdictions other than Guernsey.

52. The proposed mandatory notification regime is one which is based on "local" turnover and, if adopted, it may no longer be necessary to retain the preliminary review process, the reasoning being that a "local turnover" test will address the issues faced by those businesses with an international client base but very little local trading Further, in circumstances where notification is still necessary under the proposed regime, CICRA is likely to require a greater degree of review of such application than is afforded to it by the preliminary review process.

Amendments to the Process

53. In the event that the preliminary review process is to be retained, CICRA considers that the existing criteria will need to be amended.

54. At present, the preliminary review process is limited to cases where the acquirer is a credit institution or financial institution. It is not therefore available to insurance undertakings, nor is it available where the target entity is a credit or financial institution. There is therefore a question as to whether such a process should be made available to credit institutions, financial institutions and insurance undertakings, regardless of whether they are the acquirer or the target.

55. A further potential amendment is that eligibility for the process should be based on the nature of the underlying business and not the nature of the parties to the transaction. Finally, consideration should also be given to the extension of the process to certain categories of business which are currently not eligible (e.g. a fiduciary business which is not also a financial institution).

56. Comments on the retention of, and any amendments to, the preliminary review process are welcomed.

F. European Competition Law

Issue 6

CICRA would welcome comments on the clarification that could be achieved in a new Regulation or revised M&A Guidelines regarding the treatment of corresponding questions under EU law.

57. The competition laws in Guernsey are modelled on the competition provisions in the Treaty on the Functioning of the European Union. Section 54 of the Ordinance provides that CICRA and the Royal Court must take into account the principles laid down by and any relevant decisions of the European courts in respect of corresponding questions arising under EU competition law.

58. Accordingly, CICRA endeavours to ensure that, as far as possible, competition matters arising in Guernsey are dealt with in a manner consistent with - or, at least, that takes account of - the treatment of corresponding questions under EU competition law. Section 54 does not however prevent CICRA from departing from EU precedents where this is appropriate in light of the particular circumstances of Guernsey; EU jurisprudence is treated as persuasive but not binding.

59. The Regulations largely follow the model of the EU Regulations. If the issues identified are resolved, there will potentially be greater alignment to the EU Regulations' wording than is currently the case.

60. Where appropriate, incorporation of sections of the EU Regulations and EC Jurisdictional Notice into either a new regulation or revised M&A Guidelines respectively are options for consideration. An example would be in relation to the concept of turnover, both with regards to its calculation (paragraph 157-194 of the EC Jurisdictional Notice) and geographic attribution (paragraphs 195-202 of the EC Jurisdictional Notice).

61. There are also a number of differences between the Guernsey Regulations and the EU Regulations. Again, where appropriate, CICRA intends to clarify in its M&A Guidelines its position where there are clear differences in language between the EU Regulations and the local regulations.

62. CICRA would welcome comments on the approach to be taken by CICRA regarding the treatment of corresponding questions that arise under EU law.

5. Next Steps

Consultation Process

64. CICRA will carefully consider the responses to this Consultation and will take them into account in preparing formal advice and making specific recommendations to the Department for Commerce and Employment of the States of Guernsey.

65. CICRA will publish its formal proposals to the Commerce and Employment Department, setting out the areas where it considers amendments to the existing mergers and acquisitions regime should be made.

66. The Commerce and Employment Department will consider CICRA's formal proposals and then determine whether or not to proceed with amendments to the current regime.

6. Annex A: Current Version of the Regulation

THE COMMERCE AND EMPLOYMENT DEPARTMENT, in exercise of the powers conferred upon it by sections 13(1), 16 and 63 of the Competition (Guernsey) Ordinance, 2012a ("the Ordinance"), and all other powers enabling it in that behalf, hereby makes the following regulations:

Prescribed mergers and acquisitions.

1. (1) Mergers and acquisitions are prescribed for the purposes of section 13(1) of the Ordinance if—

    (a) the combined applicable turnover of the undertakings involved in the merger or acquisition arising in the Channel Islands exceeds £5 million, and
    (b) two or more of the undertakings involved in the merger or acquisition each have an applicable turnover arising in Guernsey which exceeds £2 million.

    (2) For the purposes of subparagraph (1) the place in which the undertaking's turnover arises –

    (a) in respect of undertakings other than credit institutions, financial institutions, or insurance undertakings is determined by the location of the customer to whom the products are sold or the services provided,

    (b) in respect of undertakings that are credit institutions or financial institutions is determined by the place in which the income items listed in regulation 4 of the Turnover Regulations are received by the institution or a branch or division thereof, and

    (c) in respect of insurance undertakings is determined by the place in which the gross premiums are received by the undertaking or a branch or division thereof.

    (3) For the purpose of these regulations the applicable turnover of an undertaking shall be calculated in accordance with regulations 2 to 7 of the Turnover Regulations.

Undertakings involved in a merger or acquisition.

2. For the purposes of regulation 1(1) an undertaking is involved in a merger or acquisition if—

    (a) it is being acquired by another undertaking,

    (b) it is acquiring another undertaking,

(c) it is entering into a joint venture with another undertaking,

(d) it is the joint venture of other undertakings, or

(e) it is involved in an amalgamation or other combination with another undertaking.

Application for approval from the Authority.

3. Where an undertaking is involved in a prescribed merger or acquisition, an application must be made for the approval of the Authority in accordance with these regulations and the provisions of the Ordinance.

Application for approval by way of preliminary review.

4. (1) Where a credit institution or financial institution is an acquiring undertaking in a prescribed merger or acquisition, it shall apply to the Authority for approval by way of a preliminary review of the merger or acquisition and shall provide such information as the Authority may require in that respect.

(2) Subject to section 17(2) of the Ordinance, where, on receipt of an application for preliminary review, the Authority considers that-

(a) the merger or acquisition satisfies the requirements of sections 13(2) and 17(3) of the Ordinance, it shall notify the undertaking of its decision in accordance with section 17 of the Ordinance, or

(b) further information is required in order to determine whether the merger or acquisition satisfies the requirements of sections 13(2) and 17(3) of the Ordinance, it shall notify the undertaking that it must apply for a first detailed review, in accordance with regulation 5.

Application for approval by way of first detailed review.

5. (1) Where an acquiring undertaking in a prescribed merger or acquisition is –

(a) an undertaking other than a credit institution or financial institution, or

(b) an undertaking which is a credit institution or a financial institution and which, on application for a preliminary review, has been notified by the Authority that a first detailed review is required,

it shall apply to the Authority for approval by way of a first detailed review of the merger or acquisition and shall provide such information as the Authority may require in that respect.

(2) Subject to section 17(2) of the Ordinance, where, on receipt of an application for a first detailed review, the Authority considers that –

(a) the merger or acquisition satisfies the requirements of sections 13(2) and 17(3) of the Ordinance, it shall notify the undertaking of its decision in accordance with section 17 of the Ordinance, or

(b) further information is required in order to determine whether the merger or acquisition satisfies the requirements of sections 13(2) and 17(3) of the Ordinance, it shall notify the undertaking that it must apply for a second detailed review, in accordance with regulation 6.

Application for approval by way of second detailed review.

6. (1) Where an acquiring undertaking in a prescribed merger or acquisition is an undertaking which, on application for a first detailed review, has been notified by the Authority that a second detailed review is required, it shall apply to the Authority for approval by way of a second detailed review of the merger or acquisition and shall provide such information as the Authority may require in that respect.

(2) Subject to section 17(2) of the Ordinance, where the Authority is in receipt of a completed application for a second detailed review it shall notify the undertaking as to whether or not it gives its approval to the merger or acquisition in accordance with section 17 of the Ordinance.

Interpretation.

7. (1) In these regulations

"**applicable turnover**" means the turnover of an undertaking calculated in accordance with the Turnover Regulations,

"**acquiring undertaking**" means-

(a) an undertaking involved in the proposed merger or acquisition acquiring another undertaking, and

(b) all undertakings involved in the proposed merger or acquisition by way of a joint venture, an amalgamation or other combination with other undertakings,

"**credit institution**" means a deposit-taking business as defined in section 3 of the Banking Supervision (Bailiwick of Guernsey) Law, 1994,

"**financial institution**" means a controlled investment business as defined in the Protection of Investors (Bailiwick of Guernsey), Law l987 and a financial services

business as defined in the Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008,

"**insurance undertaking**" means an insurance business as defined in the Insurance Business (Bailiwick of Guernsey) Law, 2002,

"**prescribed merger or acquisition**" means a merger or acquisition prescribed by regulation 1(1),

"**the Turnover Regulations**" means the Competition (Calculation of Turnover) (Guernsey) Regulations, 2012,

and other words and expressions have the same meaning as in the Ordinance.

(2) The Interpretation (Guernsey) Law, l948 applies to the interpretation of these regulations as it applies to the interpretation of an enactment.

(3) Any reference in these regulations to an enactment or statutory instrument is a reference thereto as from time to time amended, repealed and replaced (with or without modification), extended or applied.

Citation.

8. These Regulations may be cited as the Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations, 2012.

Commencement

9. These Regulations shall come into force on the 1st August, 2012.