Amendments to Guernsey Mergers and Acquisitions Legislation

Recommendations

Guernsey Competition and Regulatory Authority

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Guernsey Competition and Regulatory Authority
Suite 4, 1st Floor Plaiderie Chambers
La Plaiderie, St Peter Port, Guernsey, GY1 1WG
Tel: +44 (0)1481 711120
Web: www.cicra.gg

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Introduction

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

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

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

Executive summary

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

Changes to the Competition (Guernsey) Ordinance 2012 (the "Ordinance")[1]

- Definition of 'merger and acquisition'
  - Definition of 'merger'
  - Definition of 'undertaking'
  - Definition of 'joint venture'
  - Create exemptions from the definition of 'merger and acquisition'
- Amend the consequences of a failure to obtain prior clearance

Competition (Calculation of Turnover) (Guernsey) Regulations 2012 (the "Turnover Regulations")

- Acquisition in stages
- Exclusion of seller's group turnover

Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations 2012 (the "PMA Regulations")

- Definition of 'undertaking concerned'
- Adoption of an ability to call in mergers between parties whose turnover falls below this threshold based on a share of supply test
- Preliminary review process

New CICRA Guidance and Procedures

- Introduce a formal pre-notification process for all transactions whether the filing is being made on a mandatory or voluntary basis.

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

[1] The GCRA notes that many of the definitions which it is putting forward as appropriate for amendment are contained both in the Ordinance and in the Competition (Enabling Provisions) (Guernsey) Law, 2009 (the "Enabling Law"). However, the Enabling Law provides that the States may amend the meanings of the expressions "merger or acquisition", "joint venture" and "undertaking" by Ordinance (Enabling Law, s.6(1)(a), (b)) and it follows that amendments to the Enabling Law itself are not required.

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

7. The recommended changes are set out in more detail in Annex A to this Paper. The GCRA is fully committed to supporting this process both with the Committee for Economic Development (CfED) and Law Draftsmen.

Merger control in Guernsey – rationale, current rules & consultation

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

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

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

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

12. The Guernsey regime is similar to other jurisdictions, in that the jurisdictional threshold test is currently based on the parties' turnover.

13. Since the introduction of the Ordinance and Regulations in 2012, various concerns have been raised in relation to the notification test under the merger regime. These relate mainly to the way in which certain concepts have been defined under the Ordinance and Regulations, leading to the unintended consequence that certain transactions may be captured by the rules, even where there is no discernible anti-competitive effect in the Channel Islands.

14. The purpose of the amendments proposed is to refine the definitions of these concepts, with the intention that those mergers which are more likely to have an impact on the local market are referred to the GCRA.

15. In November 2015, the GCRA launched a consultation[2] on a number of proposed amendments to the mergers and acquisitions regime in Guernsey. These proposals sought to address both the problems raised as well as a number of other issues with the regime that had become evident over several years of practical application of the rules by the GCRA and legal practitioners. At the same time, a parallel review was undertaken by the JCRA in Jersey. The two consultations have thus proceeded simultaneously.

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

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

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

Proposed Amendments

18. For the reasons explained above, the GCRA suggests that the current jurisdictional threshold test based on the parties' turnover in the Channel Islands and in Guernsey should be retained. The JCRA is recommending the same test is introduced in Jersey.

19. In addition, the GCRA proposes that an optional review is available to the GCRA based on a 'share of supply' test alongside the mandatory test to mitigate risks presented by a turnover test in a small island economy such as Guernsey. This combination of a mandatory turnover test and an optional share of supply test would, in the GCRA's view, best capture those mergers with the greatest likelihood of substantially lessening competition in Guernsey.

20. The GCRA also proposes that a number of concepts in the laws are redefined.

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

A: European Competition Law

22. Guernsey merger control rules draw heavily on concepts contained in the EU Merger Regulation[3] (**EUMR**) and accompanying guideline[4] (the **Consolidated Jurisdictional Notice**).

23. Section 54 of the Ordinance provides that, the GCRA must, in determining questions arising in relation to the merger and acquisition of undertakings, take into account the principles laid down by and any relevant decisions of the Court of Justice or Guernsey Court of the European Union. Section 54 does not however prevent the GCRA from departing from EU law principles where this is appropriate in light of the particular circumstances in Guernsey; EU jurisprudence is therefore treated as persuasive but not binding.

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

25. All respondents were of the opinion that, where appropriate, sections of the Consolidated Jurisdictional Notice should be incorporated into revised CICRA Guidelines. Where there are

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

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

differences in language between the EUMR and legislation in Guernsey, CICRA should clarify its position in the Guidelines.

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

B: 'Merger' and 'Joint Venture'

27. The purpose of a regime of merger control is to regulate, in advance, the impact of mergers on the competitive structure of markets[5]. Merger control regimes therefore define qualifying transactions as those that will give rise to a lasting change to market structure. For example:

    a. The EUMR defines a qualifying merger as one that gives rise to a change of control on a lasting basis;

    b. The UK merger rules define a qualifying merger as two or more enterprises "ceasing to be distinct";

    c. The French Commercial Code refers to the merger of two or more "previously independent undertakings".

28. The Guernsey merger rules as currently drafted do not comprehensively define qualifying transactions as those affecting market structure in some lasting way. Mergers are defined in s.61(1) of the Competition (Guernsey) Ordinance, 2012 (the 'Ordinance') as including:

    a. "The transfer from one undertaking to another of the business of the transferor." (Ordinance, s.61(1)(a));

    b. "On the creation of a joint venture", which is defined as a situation where "a business previously carried on independently by two or more undertakings, or a new business, is carried on jointly by them, whether or not in partnership or by means of their joint control of, or ownership of shares in the capital of, a body corporate." (Ordinance, s.61(3)(b), 61(4)).

    This has given rise to two issues in applying the rules.

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

29. First, company reorganisations which involve the transfer of business between group companies are caught by s.61(1)(a) of the Ordinance and thus qualify as mergers, despite the fact that a purely internal group reorganisation cannot give rise to a structural change in the market (as there is no change in the ultimate control of the group).

30. Second, the wide definition of "joint venture" and the absence of any link to a change of control is capable of catching joint ventures that are no more than contractual arrangements between two parties to co-operate (e.g. research and development agreements; joint production agreements)[6]. Such contractual joint ventures do not bring about a lasting change in the structure of the market, which is generally considered to be the essence of a merger.

31. The GCRA therefore recommends that:

    a. The definition of "merger" set out in the Ordinance is amended to make clear that only those mergers that give rise to a change of control on a lasting basis can fall within the scope of the merger control regimes; and

    b. The definition of "joint venture" set out in the Ordinance is amended so that only joint ventures bringing about a lasting change in the structure of the market fall within its scope. One way of achieving this would be to adopt the concept of the "full function joint venture", which is a developed concept under the EUMR encompassing the creation of a joint venture that performs "on a lasting basis all the functions of an autonomous economic entity". The GCRA would favour the adoption of this definition[7].

C: 'UNDERTAKING'

32. Unlike in Guernsey (and Jersey), the term 'undertaking' is not defined in European legislation. EU case law has defined an "undertaking" as: '*every entity engaged in economic activity, regardless of its legal status or the way in which it is financed*'[8].

33. The purpose of a regime of merger control is to regulate, in advance, the impact of mergers on the competitive structure of markets[9]. Mergers involving a business that is not a legal

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

7 At least one respondent to the consultation stated that if the concept of the full function joint venture were to be adopted, the rules should also provide that only the creation of a jointly controlled full function joint venture would amount to a merger. The GCRA considers that if it definition of a merger is amended in the way it has suggested would be appropriate, the requirement for there to be joint control will be clear.

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

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

person (e.g. a "going concern" or a collection of assets, personnel and goodwill to which turnover can be attributed) may affect the competitive structure of markets in the same way as can mergers between legal persons. Using a purposive, flexible definition of "undertaking", as is applied under the EUMR[10], allows a competition authority to review mergers between businesses, irrespective of the legal form of the undertakings involved.

34. Under the Guernsey Ordinance, 'undertaking' is defined as: '*a person carrying on a business and includes an association, whether or not incorporated, which consists of or includes such persons'*.

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

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

D: 'UNDERTAKINGS CONCERNED'

37. Merger control should only apply to those transactions which bring about a lasting change to the structure of the market. To an extent, Guernsey merger control law identifies this change to the structure of the market through the use of the concept of "change of control". This is similar to the position taken under the EUMR.

38. As explained above, many systems of merger control seek to filter out and examine those mergers that are most likely to give rise to a substantial lessening of competition. The Guernsey regime does this by assessing the turnover of the parties "involved" in the transaction. This test uses turnover as a proxy for the economic strength of the merged entity post transaction.

39. Since the turnover test is intended to capture the economic strength of the combined entity post transaction, it follows that it should be designed in a way that takes into account the turnover of all the undertakings that have acquired control and of the undertaking over which control has been acquired.

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

40. The Guernsey (Prescribed Mergers and Acquisitions) (Guernsey) Regulations, 2012 (the **PMA Regulations**) provide that the turnover of the "undertakings involved" in the proposed merger or acquisition should be taken into account. However, the definition of "undertakings involved" set out in the PMA Regulations is not linked to the concept of control or to the merger definition used in the Ordinance. This has led to difficulties of interpretation, with some practitioners expressing concern that the definition may not be wide enough to catch the turnover of all the undertakings that will form part of the post-merger entity.

41. The GCRA therefore proposes that the term "undertakings involved" should be replaced by the term "undertakings concerned", which is a well developed concept under the EUMR and which is clearly based on the premise that undertakings are concerned in a transaction if they have acquired control or control has been acquired over them (i.e. that there has been a change in the structure of the market).

42. The Consolidated Jurisdictional Notice contains further detail regarding the concept of "undertaking concerned". It is proposed that the new CICRA Guidelines will incorporate or refer to this section of the Consolidated Jurisdictional Notice[11], developing it as necessary for the particular circumstances of Guernsey. This approach was supported by respondents to the consultation.

F: EXCEPTIONS

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

44. The GCRA therefore proposes that three exceptions to the definition of a merger are included, reflecting those in Article 3 of the EUMR, namely:

    a. *Credit institutions or other financial institutions or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis securities which they*

[11] Paragraphs 132-156

have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behaviour of that undertaking or provided that they exercise such voting rights only with a view to preparing the disposal of all or part of that undertaking or of its assets or the disposal of those securities and that any such disposal takes place within one year of the date of acquisition; that period may be extended by the [GCRA] on request where such institutions or companies can show that the disposal was not reasonably possible within the period set;

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

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

45. The exceptions listed would be excluded from the scope of application of the merger rules altogether. The ability of the GCRA to grant Exemptions under Section 6 and that of the Department to grant Exemptions under Sections 9 and 14of the Ordinance would remain unchanged.

G: LOCAL TURNOVER TEST

LOCAL TURNOVER

46. The Guernsey merger control rules currently provide that, with the exception of credit, financial and insurance institutions, the place where an undertaking's turnover arises is determined by the location of the customer to whom the products are sold or the services provided (PMA Regulations, Regulation 1(2)(a)). Providing that turnover arises in the place where customers are located ensures that the GCRA (except in respect of the institutions mentioned above) only has jurisdiction to review a merger to the extent that it has a local economic impact. So, for example, if a Guernsey company makes a sale to a UK consumer, the turnover generated through that sale is deemed to be UK turnover rather than Guernsey turnover.

47. CICRA proposes to expand on this principle in revised Guidelines making reference to the Consolidated Jurisdictional Notice[12] as appropriate, as well as giving practical examples based on its experience of applying the turnover rules in Guernsey.

48. In order to prevent a merger being carried out in stages to avoid the mandatory notification requirement, the GCRA proposes that the Order should include provisions specifying that two or more transactions between the same undertakings which take place within a two year period will be treated as the same transaction. The GCRA further proposes that a provision making it clear that where a merger consists of the acquisition of parts of a business, only the turnover relating to the part of the business being acquired should be taken into account, should also be included.

FINANCIAL INSTITUTIONS, CREDIT INSTITUTIONS, AND INSURANCE UNDERTAKINGS

49. As an exception to the above principle, namely that the turnover of a business arises where its customer is located, the turnover of financial institutions, credit institutions and insurance undertakings is deemed to arise (in broad terms) in the location where the supplier is based. These rules have been created because these undertakings do not make "sales" to "customers" in the same way that normal trading entities do[13] and so it is not possible to attribute turnover to customers' location in any meaningful way. The location of the business entity is therefore used.

50. The Guernsey merger regime follows the EU approach in determining the way in which the turnover of the above mentioned institutions is to be calculated. However, the definition that has been given to the term "financial institution" under the Guernsey merger control rules is different to that used under the EU rules. It is extremely broad, encompassing a wide range of financial not only core financial institutions but also providers of financial services. This has led to transactions potentially becoming notifiable to the GCRA on the basis of turnover generated by financial services institutions from sales made to customers outside of Guernsey and where there is therefore no possibility of the transaction having any impact on competition in Guernsey. Respondents in Guernsey strongly supported narrowing the definition of "financial institution" used under the Guernsey rules.

51. The GCRA therefore proposes that the turnover of financial, credit and insurance institutions continue to be calculated in the same way as under the EUMR but that the EUMR definitions of these institutions should be adopted. This proposal was supported by respondents to the consultation.

[12] In particular, paragraphs 157 - 202

[13] For example, a bank earns revenue from the spread between deposit rates and lending rates, rather than from the sale of products to customers.

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

52. Based on CICRA's experience of applying the merger control rules in both Jersey and Guernsey, it notes that there may, exceptionally, be transactions in small but concentrated markets which would not be caught by the turnover provisions described above but which might nevertheless have the potential to substantially lessen competition in Guernsey. To address this issue, the GCRA proposes that it should retain the ability to review such transactions even though the mandatory turnover thresholds are not met.

53. The GCRA's power to call such transactions in for review, which it would expect to exercise only rarely, would be based on a voluntary share of supply test, which would complement the mandatory turnover threshold test. This would provide that, for transactions which do not meet the turnover threshold, the GCRA would have a short period of time[14] during which it could call the transaction in for review if specified share of supply thresholds were met.

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

55. The GCRA has taken account of these concerns, and discussed them further with respondents. In the GCRA's view, the option to call in merger transactions for review based on a share of supply test alongside a mandatory turnover test is particularly well suited to the circumstances of the Channel Islands. This is because it gives the GCRA discretion to call in for review local transactions in lower value but concentrated markets, without the mandatory filing threshold being lowered to a level that would lead to an unacceptably large number of transactions becoming notifiable. As a means of balancing the advantages and disadvantages of any notification threshold, it is the GCRA's view that this approach strikes the appropriate balance and complements a mandatory turnover based merger regime. As mentioned above, the GCRA would only expect to use this power in exceptional circumstances and automatic voidness provision should not by default apply. The GCRA therefore recommends this change.

I: PRELIMINARY REVIEW PROCESS

56. The current Guernsey merger control regime provides a 'fast track' for transactions which are merely 'technical' filings and where there are clearly no substantive issues to be

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

considered. This process is known as preliminary review. The Guernsey consultation asked for respondents' views on whether the preliminary review should be made available in respect of transactions other than those involving financial and insurance undertakings. Respondents were strongly in favour of this approach.

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

58. The GCRA therefore proposes the introduction of a new 'short form' merger application in Guernsey[15]. This would be available for all submissions, regardless of the sector involved, where it is clear that the GCRA is unlikely to have concerns with the transaction. The appropriateness of this type of submission would be assessed during pre-notification (see below).

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

J: Pre Notification Requirement

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

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

[15] A parallel change would be made to the Jersey regime.

K: Failure to Obtain Prior Clearance

62. As the law stands in Guernsey, no right, title or interest in Guernsey shares or property is passed until GCRA approval has been received. Unlike the position in Jersey, there is therefore provision for retrospective approval by the GCRA in the event that, after completion of a transaction, it is found that it should have been notified.

63. Respondents to the consultation indicated that notwithstanding the possibility of acquiring retrospective approval, the fact that an unnotified transaction is ineffective to pass title is a significant issue for merging parties and their legal advisers

64. For the mandatory notification regime, the GCRA proposes the 'automatically void' provision is removed where a failure to notify is found and the consequent first detailed review finds no second detailed review is necessary. Otherwise the void provision should remain. But, the GCRA recommends that it should have the power to call in unnotified transactions for review and seek remedies in lieu of a referral to a second detailed review. The GCRA also proposes that it should have the power to impose fines on parties that fail to notify transactions that are subject to mandatory notification requirements, including in the event that a failure to notify is found and the consequent first detailed review finds no second detailed review is necessary.

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

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

L: Information Requests and Interim Measures

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

a. To require the provision of information by parties to a transaction that was not notified but which either:
    i. Was subject to the mandatory notification requirement; or
    ii. May fulfil the thresholds set down in the voluntary share of supply test.

b. To require undertakings from parties to an unnotified merger as described above that they will not take pre-emptive action in respect of the merger (e.g. that they will hold the merged business separate; that they will not integrate them further).

c. To make an enforcement order to prevent the taking of pre-emptive action in respect of the transaction.

M:PRIVATE MERGER APPROVAL

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

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

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

N: TRANSPARENCY

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

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

Next Steps

73. In the event that the CfED accepts the recommendations contained in this Paper, the GCRA is available to the CfED and Law Draftsmen to assist, as appropriate, with the process of drafting the necessary amendments to legislation.

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

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

ANNEX A: PROPOSED CHANGES TO LEGISLATION AND GUIDELINES

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

Proposed Change	Legislation	CICRA Guideline
European Competition Law	No change required	Interim guidelines
Merger	Competition (Guernsey) Ordinance 2012	New guidelines
'Undertaking'	Competition (Guernsey) Ordinance 2012	New guidelines
'Undertakings Concerned'	Amendment to Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations	New guidelines
Joint Ventures	Competition (Guernsey) Ordinance 2012	New guidelines
Exceptions	Amendment to Competition (Guernsey) Ordinance	New guidelines
Acquisition in stages	Amendment to Competition (Calculation of Turnover) (Guernsey) Regulations New Mergers Order	New guidelines
Exclusion of seller's group turnover	Amendment to Competition (Calculation of Turnover) (Guernsey) Regulations New Mergers Order	New guidelines

Adoption of a Voluntary Share of Supply Test	Amendment to Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations	New guidelines
Preliminary Review Process	Amendment to Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations	Revised (or new) guidelines
Pre Notification Requirement	No change required	New guidelines
Failure to Obtain Prior Clearance	Amendment to Competition (Guernsey) Ordinance	New guidelines
Private Merger Approval	n/a	n/a
Transparency and Consultation	n/a	New guidelines

GUIDELINES

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

INTERIM POSITION

Once timelines can be established, it may be desirable to give effect, at least in part, to some of the proposed amendments through more detailed interim guidance.