Guernsey Competition Law

GCRA Guideline 6b - Mergers & Acquisitions – Procedure

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What this Guideline is about

This Guideline is one in a series of publications designed to inform businesses and consumers about how we, the Guernsey Competition and Regulatory Authority (**GCRA**), apply competition laws in Guernsey.

The purpose of this Guideline is to explain to consumers, businesses and their advisers the provisions in Guernsey competition law in respect of anti-competitive agreements. Specifically, this Guideline has been prepared to explain Part II of *The Competition (Guernsey) Ordinance, 2012* (the **2012 Ordinance**).

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

Why is competition important?

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.

Competition law in Guernsey

In Guernsey, the 2012 Ordinance prohibits anti-competitive behaviour, including anti-competitive agreements between businesses and the abuse of a dominant position in a market. It also requires certain mergers and acquisitions to be notified to the GCRA for approval.

What powers does the GCRA have?

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

What type of organisation is considered a 'business'?

In this guide, we refer to a 'business'. This term (also referred to as an 'undertaking' in the 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

Guernsey competition law is modelled on the competition provisions in the Treaty on the Functioning of the EU (**TFEU**). Section 54 of the 2012 Ordinance provides that the GCRA and the Royal Court may 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[1].

Relevant sources of EU competition law 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. Section 54, however, does not prevent us from departing from EU precedents where this is appropriate in light of the particular circumstances of Guernsey.

[1] The provisions of section 54 were amended with effect from 23 February 2021 by the European Union (Competition) (Brexit) (Guernsey) Regulations, 2021, regulation 1, which replaced the word "must" with the word "may".

2 Purpose of this Guideline

This Guideline sets out how parties and their advisors should notify mergers to the GCRA. It should be read in conjunction with GCRA Guideline 6A, which addresses the substantive merger assessment carried out by the GCRA.

3 When can I notify a merger?

The 2012 Ordinance prohibits parties from completing a notifiable merger before they have obtained approval from the GCRA. Mergers must therefore be notified to us prior to their implementation and following the announcement of the public bid, or the acquisition of a controlling interest. We therefore recommend that all sale and purchase agreements contain a condition precedent making the merger conditional upon receiving GCRA 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 the Guernsey 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.

4 Who should make the application?

The obligation to apply for approval under Regulations 4 and 5 of *The Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations, 2012* (the **M&A Regulations**) falls on the acquiring undertaking, although this does not preclude all parties from submitting the application jointly. It will normally be appropriate for an application to be submitted jointly by both or all parties, although they may appoint a joint representative, eg, the acquiring business or its legal adviser, for this purpose.

We have the power to 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.

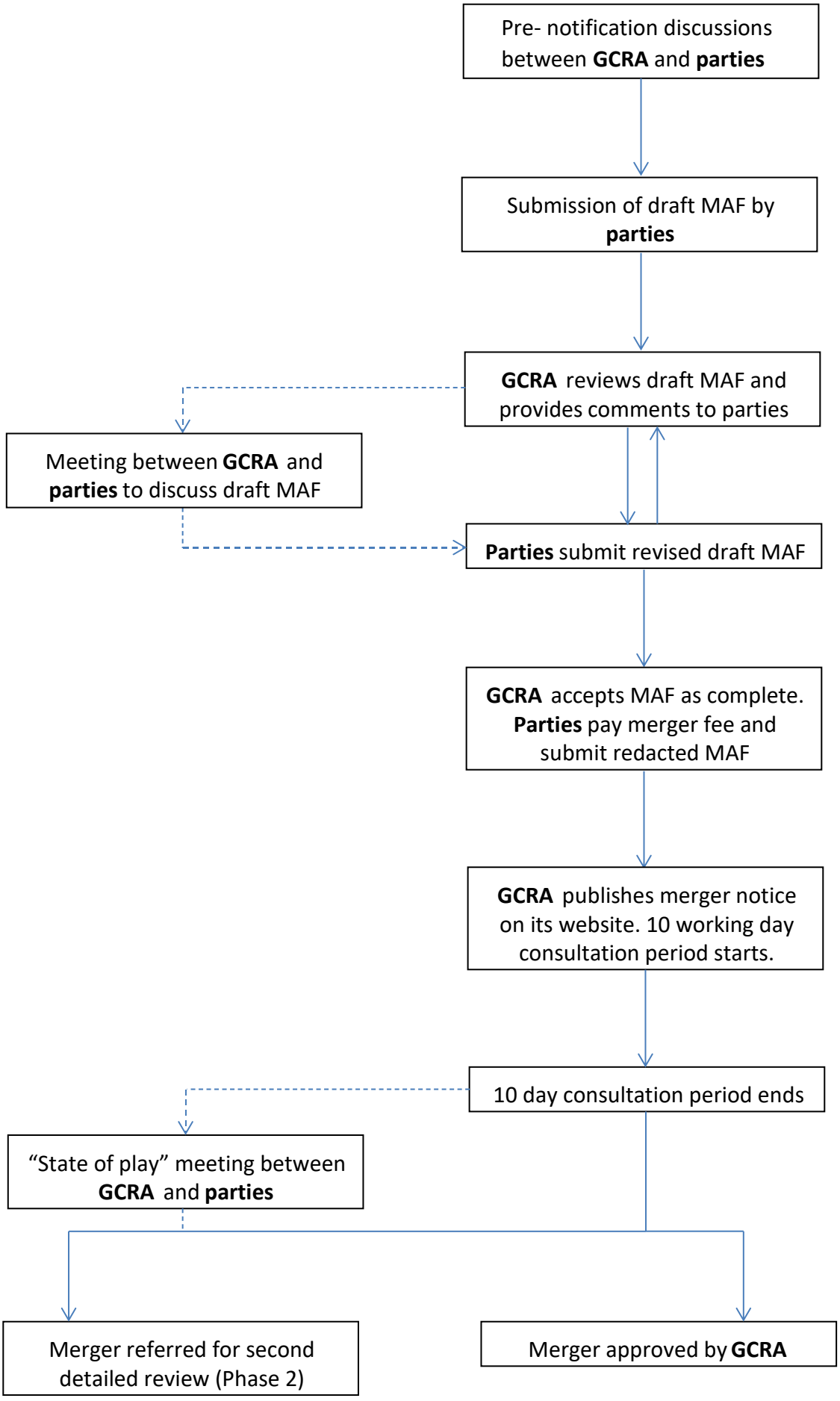
5 Procedure – overview

Except in the case of preliminary review, the GCRA'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:

Phase 1 - Procedure



6 First detailed review

Pre-notification

Based on its experience of assessing notified mergers, the GCRA'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 us and where a full draft Merger Application Form (**MAF**) has been submitted.

Pre-notification has a number of specific benefits for the notifying parties, including:

- Allowing them to provide information to us on the markets involved in the merger;
- Enabling us to clarify the information that we require to for the MAF to be considered to be complete and so reducing the risk that we will be required to 'stop the clock' during Phase 1;
- Enabling us to identify areas where we do not require extensive information from the parties, which reduces the administrative burden.

For these reasons, we encourage notifying parties to contact us as soon as there is a good faith intention to proceed with a notifiable merger. We also require pre-notification of all notifiable mergers through the submission of a draft MAF.

Pre-notification discussions

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.

We encourage notifying parties to engage with us at an early stage, ideally before the submission of a draft MAF. Such early engagement enables both the parties and us to identify any particular areas of difficulty, to clarify any questions that the parties may have regarding our process and timescales

and allows us to allocate (a) case officer(s) to the merger before the submission of the draft MAF.

Draft Merger Application Form

Notifying parties must provide us with a draft MAF, which is available on the GCRA website.

We will review the draft MAF 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 MAF.

A MAF 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 MAF if it is unclear or incomplete. If a pre-notification meeting to discuss the draft MAF is required, this will be arranged by us.

Redactions

As part of its public consultation on a notified merger, the GCRA will make available to third parties on request a copy of the MAF. Notifying parties should therefore provide us with a copy of the MAF with any information in respect of which they wish to claim confidentiality clearly marked. We will agree a non-confidential version of the MAF with the notifying parties before it is made public.

Notification

Consultation

When a MAF has been accepted by us as complete and the merger filing fee has been received, we will publish a notice on our 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. We 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 (eg, other regulatory agencies).

"State of play" meeting

If, either following submission of the MAF 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, we will arrange a "state of play" meeting 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

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

There is no statutory deadline by which we must conclude a first detailed review. However, by way of administrative target, we aim to reach a decision within 25 working days of registration of an application. If we issue any requests for further information from the parties, then we will regard this as having "stopped the clock" with respect to this timetable, which will only resume once we have received a satisfactory response to our information request.

7 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 GCRA 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 from us, seeking information required to assess various "theories of harm" (ie, the basis upon which the merger might substantially lessen competition or operate against the public interest).

Once the analysis of "theories of harm" is complete, we will issue our provisional findings in respect of the merger. The provisional findings will state our 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 us. Our final decision will be placed on our website.

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 we issue any requests for further information from the parties, then we will regard this as having "stopped the clock" with respect to this timetable. The timetable will only resume once we have received a satisfactory response to our information request from the parties.

8 Preliminary review

Where an acquiring undertaking involved in a merger is a credit or financial institution (terms defined in Regulation 8 of the M&A Regulations), then it is entitled to apply for a preliminary review of the merger. An application for preliminary review is made using the Shortened MAF (which can be found on the GCRA's website).

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 M&A 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.

We do not offer pre-notification discussions in respect of preliminary review or comment on draft Shortened MAFs. Notifying Parties should submit the Shortened MAF to the GCRA when they consider it to be complete.

Upon receiving a completed Shortened MAF, a non-confidential version of that form and the appropriate filing fee, we will register the application and post a notice on our website, stating that the parties have submitted the application (and the industries in which the parties are active) and inviting comments on the proposed merger. This consultation period will last for 7 days.

If no public comments are received, and we otherwise have no concerns regarding the merger, then on the working day after the expiry of 14 days since registration, we will issue a short form decision, approving the merger. The decision will be published on

our website, once we and the parties have discussed the redaction of any commercially sensitive information.

If we have any concerns regarding a merger notified under the preliminary review, we will require the parties to prepare a standard MAF. This will be advised during the 14 day period after registration.

If a merger is eligible for preliminary review, but the parties consider that it is likely to require detailed analysis, they are entitled to apply for both preliminary review and a first detailed review by submitting a standard MAF, in order to shorten the time likely to be taken by to conduct its assessment.

9 Fees

The law allows the GCRA to impose fees in order to cover the cost of conducting merger reviews. The fee should be provided to us by bank transfer and account details will be provided on request.

We will not register an application for approval of a merger unless the relevant fee has been paid in full, and we will not proceed with a second detailed review until we receive any further fee payable.

The fees payable for mergers are prescribed by *the Competition (Merger and Opinion Application Fees) (Guernsey) Regulations, 2012*, and are based on the combined applicable turnover of the undertakings involved in the merger arising in the Channel Islands, as calculated in accordance with regulations 1(2) and 1(3) of the M&A Regulations.

For a preliminary review, the fee is £500. For a first detailed review, the fee is £5,000 if the combined applicable turnover of the undertakings involved in the merger arising in the Channel Islands is less than £10 million and £10,000 if that turnover is more than £10 million.

If a second detailed review is required, then the relevant regulations entitle us to levy "*such fee calculated by the Authority to cover its reasonable costs, fees and expenses in connection with the determination of the application, less any fee paid for a first detailed review in respect of the same matter*". We will assess the resources likely to be required to conduct our review of the application, and will advise the parties of the approximate level of any further fee at the commencement of the second detailed review of our assessment. It will be invoiced separately and is payable in advance.

10 Confidentiality

The laws require the GCRA to keep confidential non-public information we receive 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[1].

Third parties may request a copy of the MAF in order to consider whether to make a submission to us regarding the merger. For this reason, we require the merging parties to produce a non-confidential version of the MAF, which must be submitted at the same time as the full MAF, for distribution to those third parties.

In the event that a merger review proceeds to a second detailed review, we will provide a copy of our provisional findings to all parties who have registered an interest in the review of that merger (eg, responded to the public consultation). The parties will be 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, we will apply the European Commission's guidelines[2].

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1 In assessing claims for confidentiality, the GCRA 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_merg ers_26052015.pdf

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

11 How can I find out more?

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

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Publications

All our publications, including the detailed Guidelines we publish covering specific areas of the law, can be downloaded from our website: www.gcra.gg.