Guernsey Competition Law

GCRA Guideline 6a - Mergers & Acquisitions – substantive assessment

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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 law in Guernsey.

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

This Guideline should not be relied on as a substitute for the laws 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 types of organisation are considered a 'business'?

Throughout this Guideline, we refer to a 'business'. This term (also referred to as an 'undertaking' in Guernsey competition law) 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 What is a merger or an acquisition?

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

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

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

What constitutes a merger under the laws?

The 2012 Ordinance contains a comprehensive definition of the concept of a "merger or acquisition". In general, the following transactions will be considered to be mergers:

- Direct or indirect acquisition of control by one undertaking (or a person who controls an undertaking) of another undertaking, or the business of another undertaking, or the substantial parts of the assets of another undertaking;

- A statutory merger, amalgamation or combination of two or more undertakings; and

- The creation of a joint venture, by partnership or otherwise.

"Control" is defined as arising when decisive influence is capable of being exercised in respect of the business or undertaking. When determining whether decisive influence exists, the GCRA and the Royal Court must take into account all relevant facts and circumstances, and not merely the legal effect of acts or agreements. The concept of "decisive influence" is also used in the EU Merger Regulation (**EUMR**)[2] to identify when a notifiable merger should take place. There is a great deal of ECJ jurisprudence[3] and European Commission guidance[4] regarding the interpretation of this phrase, and the GCRA will have close regard to that decision making practice when applying Guernsey merger control law.

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

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

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

As noted above, the competition laws in Guernsey include the creation of a joint venture within the definition of a merger or acquisition. A joint venture is defined as a business carried on jointly by two or more persons, regardless of the legal form that the joint venture takes. The EUMR also applies to joint ventures, provided they are "performing on a lasting basis all the functions of an autonomous economic entity"[5] (also known as 'full-function joint ventures').

While the provisions of the 2012 Ordinance and those of the EUMR relating to joint ventures are somewhat different, the GCRA takes the view that the use of the term "business" in the definition of joint venture in the 2012 Ordinance means that the merger notification processes in the Channel Islands are also intended to apply only to full-function joint ventures. As such, in applying the merger control provisions of the 2012 Ordinance to joint ventures, the GCRA will have close regard to the extensive discussion of the concept of full-function joint ventures in the European Commission's guidance[6].

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

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

3 Why might a merger or acquisition give rise to concerns?

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

In the case of vertical mergers, concerns tend to be about possible changes to the pattern of industry behaviour following the merger, rather than the reduction in the number of rivals in a given market. For example, the merger may increase the likelihood that competitors to the new merged business may no longer have access to inputs they require to compete in the market, or suppliers will no longer be in a position to sell their goods or services to a customer that forms part of a merged entity. Whether such developments are detrimental to effective competition is at the core of any examination of such transactions.

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

4 Is the merger or acquisition notifiable?

Part III of the 2012 Ordinance deals with mergers and acquisitions.

Section 13 of the 2012 Ordinance provides that a person must not execute a merger of a type prescribed by Regulation without GCRA approval.

The Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations, 2012 (the **M&A Regulations**) prescribes the mergers to which the prohibition set out in Section 13(1) of the 2012 Ordinance applies.

The notification criteria are based on turnover.

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

Thresholds

Under the M&A Regulations, the thresholds for determining whether a merger must be notified to the GCRA are based on the turnover of the undertakings involved in the merger.

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 applicable turnover arising in Guernsey which exceeds £2 million.

Which are the undertakings involved in the merger?

Regulation 2 of the M&A Regulations provides 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. The EUMR[7] incorporates a concept of "undertakings concerned" in a merger, which is similar. the GCRA will have regard to the guidelines produced by the European Commission[8] when applying the M&A Regulations on this point.

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

8 *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*, 2008/C95/01, 16 April 2008, at paragraphs 129-153

How is the turnover of an undertaking determined?

Regulation 1(3) of the M&A Regulations states that the turnover of an undertaking is to be calculated in accordance with Regulations 2 to 7 of *The Competition (Calculation of Turnover) (Guernsey) Regulations, 2012* (**Turnover Regulations**). Those provisions stipulate that for a "standard" business, turnover is to comprise amounts "derived from the sale of products and the provision of services falling within the undertaking's ordinary activities", after deduction of rebates and taxes based on sales. The relevant period over which turnover is to be calculated is the immediately preceding "business year", defined in Regulation 8 of the Turnover Regulations as a period for which the business has published (or prepared) accounts.

An undertaking's turnover also comprises the turnover of its "connected undertakings" (eg, subsidiaries, parent companies and sibling companies) – see Regulation 4 of the Turnover Regulations. As a result of this provision, where an undertaking involved in a merger is part of a broader corporate group, its turnover will usually comprise the turnover of the entire corporate group.

Special rules exist for the calculation of turnover for:

- credit and financial institutions – these are defined in Regulation 8 of the Turnover Regulations by reference to Guernsey financial services legislation. Under Regulation 5 of the Turnover Regulations, the turnover of credit or financial institutions comprise a series of income items;

- insurance undertakings – these are defined in Regulation 8 of the Turnover Regulations by reference to Guernsey legislation. Under

Regulation 6 of the Turnover Regulations, the turnover of insurance undertakings comprises gross premiums; and

- associations of undertakings – under Regulation 7, the turnover of associations of undertakings comprises the sum of the turnover of each of the member undertakings.

The geographic attribution of an undertaking's turnover (ie, whether an undertaking's turnover arises in the Channel Islands or Guernsey under Regulation 1 of the M&A Regulations) is determined in accordance with the rules outlined in Regulation 1(2) of the M&A Regulations. For "standard" businesses, the place in which turnover arises is determined by the location of the customer. Special rules exist for credit and financial institutions and insurance undertakings. For credit and financial institutions, turnover arises in the place where the branch or division of that institution is based, while for insurance undertakings, turnover arises where the gross premiums are received.

The provisions in the M&A Regulations closely follow equivalent provisions in the EUMR[9]. The GCRA will have regard to the guidelines produced by the European Commission[10] when applying the M&A Regulations on this point.

[9] *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings*, Article 5

[10] *Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*, 2008/C95/01, 16 April 2008, at paragraphs 157-203 and 206-220

5 How will the GCRA assess a merger?

Where we receive applications for approval of mergers, we are required to consider whether the merger will substantially lessen competition within any market and whether it would be to the prejudice of consumers, the economic development and well-being of the Bailiwick or the public interest.

Substantial lessening of competition test

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

- defining the affected relevant market(s). Further details on the GCRA's approach to market definition can be found in *GCRA Guideline 7 - Market Definition*;
- assessing concentration levels in the affected markets – identifying the competitors in the market/s and their relative share/s of that market;
- assessing whether the merger creates or enhances the merged firm's ability or incentives to exercise market power, either unilaterally or in coordination with competitors;
- assessing whether other market forces, such as the entry of new competitors or the countervailing power of customers, eliminate the risk of a substantial lessening of competition; and
- assessing any pro-competitive effects or efficiencies that may result from the merger. We will seek evidence that the benefits will arise in a short time period, would not otherwise have been realised and that they directly arose from the merger.

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

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

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

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

When assessing horizontal mergers[11] and non-horizontal (ie, vertical and conglomerate) mergers[12], the GCRA will have regard to the guidelines produced by the European Commission. We may also consider the substantive merger guidelines applied by the Competition and Markets Authority in the UK, as well as those of other competition authorities.

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

Public interest considerations

Section 13(2)(b) of the 2012 Ordinance provides that the GCRA must not grant approval to notified mergers unless we are satisfied that the merger would not be to the prejudice of:

i. consumers, or any class or description thereof;

ii. the economic development and well-being of the Bailiwick of Guernsey; and

iii. the public interest.

The 2012 Ordinance does not include any definitions with respect to the terms "economic development and well-being" and "public interest". In the GCRA's view, a wide

[11] *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 2004/C31/03, 5 February 2004

[12] *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*, 2008/C265/07, 18 October 2004

range of factors are potentially relevant to an assessment of these criteria.

In relation to an assessment of whether a merger would be to the prejudice of consumers (or any class of them), the GCRA's starting point will be that preserving effective competition in a market should be sufficient to ensure that the interests of all classes of consumers are protected. However, there may be circumstances in which mergers may harm certain classes of consumers (eg, residential consumers; business consumers; consumers based in a particular location). Where parties are claiming that a merger should be approved due to the efficiencies that will result, the need for the GCRA to be satisfied that the merger will not prejudice the interests of consumers may lead to us requiring compelling evidence that the efficiency benefits will be passed on to consumers.

In relation to analysing the effect of a merger on the economic development and well-being of the Bailiwick of Guernsey, the GCRA may have regard to the likely impact of the merger on economic activity in the Bailiwick.

When assessing whether a merger will prejudice the public interest, the non-exhaustive list of the factors that the GCRA may consider includes:

- the impact of the merger on employment in Guernsey;

- the impact of the merger on the provision of essential services in Guernsey (including transport links).

In the MAF, parties are asked to provide evidence as to the impact of the merger on consumers, economic

development and the public interest. The GCRA will also accept evidence from third parties as to the likely effect of the merger on these matters.

6 Approving mergers on the basis of conditions

Under section 17(1) of the 2012 Ordinance, the GCRA may attach conditions to its approval of a merger. The attachment of conditions would be appropriate where the GCRA is satisfied that, without conditions, the merger could not be approved, but, if one or more conditions were fulfilled, the merger would not substantially lessen competition, or, in Guernsey, would be to the prejudice of consumers, the economic development and well-being of the Bailiwick or the public interest.

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

- Where a horizontal merger involving two retail competitors would substantially lessen competition in only one area, or in a limited number of products. In the first case, a condition that the merger can proceed as long as retail outlets in particular geographical areas are excluded, or subsequently sold off, may allow the merger to proceed. In the second, again the exclusion or sale to a third party of a particular product range may allow the merger to proceed.

- In a vertical merger that involves one company acquiring a critical source of supply for it and its competitors, a condition assuring continued supplies to competitors on reasonable commercial terms may be appropriate.

- In a conglomerate merger, where it may be appropriate in certain circumstances to require, as

a condition of the approval, that the merged enterprise does not grant discounts for bundled products or services, at such a level that suppliers of individual components of the bundle cannot compete profitably.

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

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

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

When assessing proposals for conditions, the GCRA will take account of guidance published by other competition

authorities, including the European Commission[13] and the UK competition authorities[14].

[13] *Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004*, 2008/C267/01, 22 October 2008

[14] Competition Commission, *CC8 – Merger Remedies* (November 2008)

7 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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