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THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

THE COMMITTEE *FOR* ECONOMIC DEVELOPMENT

DEVELOPMENT OF COMPETITION LEGISLATION

The States are asked to decide: -

Whether, after consideration of the Policy Letter dated 30th January 2020, of the Committee *for* Economic Development, they are of the opinion:-

1. to agree to amend the definition of 'merger or acquisition' and 'joint venture' as set out in paragraphs 4.1 to 4.5;
2. to agree to repeal the provision that no right, title, or interest shall pass in any property or shares on transactions that have not been notified to the Guernsey Competition and Regulatory Authority (the "**GCRA**"), and replace it with an ability for the GCRA to impose financial penalties for failure to notify a transaction that attracts mandatory notification, as set out in paragraphs 4.6 to 4.8;
3. to agree to insert an explicit exemption regarding the transactions set out at paragraphs 4.9 to 4.11, relating to financial institutions; and
4. to direct the preparation of such legislation as may be necessary to give effect to the above decisions.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

THE COMMITTEE *FOR* ECONOMIC DEVELOPMENT

DEVELOPMENT OF COMPETITION LEGISLATION

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

30th January, 2020

Dear Sirs,

1 Executive Summary

1.1 Guernsey's competition law regime was introduced by way of the Competition Legislation (defined in paragraph 1.2), with the aim of bringing benefits to consumers, and the local economy more generally, by encouraging companies to increase efficiency, reduce costs and provide the lowest prices to consumers.

1.2 The Committee *for* Economic Development (the "**Committee**") is now proposing amendments to the following enactments:

1.2.1 The Competition (Enabling Provisions) (Guernsey) Law, 2009;
1.2.2 The Competition (Guernsey) Ordinance, 2012 (the "**Competition Ordinance**"); and
1.2.3 The Guernsey Competition and Regulatory Authority Ordinance, 2012 (the "**GCRA Ordinance**");

(together the above are referred to, in this Policy Letter, as the "**Competition Legislation**").

2 Background

2.1 Guernsey's competition law regime, as set out in the Competition Legislation, is conceptually based on the European Union competition regime, in common with many other countries across the world. The competition law regime is administered and enforced by the Guernsey Competition and Regulatory Authority (the "**GCRA**"), established by the GCRA Ordinance.

2.2 The GCRA has a statutory function of advising the Committee *for* Economic Development (the "**Committee**") generally in relation to (i) the administration and enforcement of the Competition Legislation, (ii) practice and procedures relating thereto and (iii) competition matters generally.

2.3 Since the implementation of the Competition Legislation, it has become apparent to the GCRA, and legal practitioners, that Guernsey's competition regime would be improved by making some amendments to the Competition Legislation, in particular with regard to the regulation of mergers and acquisitions (the "**Merger Control Regime**").

2.4 Mergers can bring many benefits to an economy, such as 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 crucial role in limiting the ability of firms to avoid competition by gaining control of their competitors.

2.5 The GCRA, therefore, seeks to filter out and examine, by way of the Merger Control Regime, those mergers that are most likely to give rise to a substantial lessening of competition within any market in Guernsey for goods or services, to the prejudice of (i) consumers, (ii) the economic development and well-being of the Bailiwick, and (iii) the public interest. Such mergers may be subject to conditions or, ultimately, blocked.

2.6 The current Merger Control Regime applies a two-stage assessment process. First, it provides that those mergers which fulfil certain threshold conditions[1] must be notified to the GCRA for clearance (the "**Threshold Test**"). Second, it provides that the GCRA shall not approve the merger unless it is satisfied that the merger, or acquisition, (a) would not substantially lessen competition within any market in Guernsey for goods or services and (b) 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 and (iii) the public interest[2].

2.7 In putting in place the legal framework for a system of merger control, the issue of where to "set the bar" for the 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 be notifiable to the GCRA. By contrast, if the bar is set too high, transactions which may be harmful to competition will not be

[1] Section 1 of The Competition (Prescribed Mergers and Acquisitions)(Guernsey) Regulations, 2012. See paragraph 5.2

[2] Section 13(2) of The Competition Ordinance.

notifiable. Framing an appropriate Threshold Test is particularly challenging in the context of a small island economy like Guernsey, 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. Guernsey's Threshold Test is currently based on the merging parties' turnover.

2.8 Since the introduction of the Competition Legislation, various concerns have been raised in relation to the Merger Control Regime. These relate, mainly, to the way in which certain concepts have been defined, leading to the unintended consequence that certain transactions may be captured by the Merger Control Regime, even where there is no discernible anti-competitive effect in Guernsey.

2.9 The purpose of the amendments proposed in this Policy Letter, which the States of Deliberation (the "**States**") are asked to approve, is to refine the definitions of these concepts, with the intention that those mergers which are most likely to have an impact on the local market, are referred to the GCRA.

3 Proposed Amendments to the Merger Control Regime.

Many of the proposed amendments to the Merger Control Regime can be effected by regulations of the Committee, without the requirement for an Ordinance of the States. For the sake of completeness, an overview of the Committee's current intentions in this regard is set out in paragraph 5 of this Policy Letter for completeness. However, certain amendments can only be made by Ordinance, giving effect to a resolution of the States, and these are set out in paragraph 4 below.

4 Proposed Amendments requiring resolution of the States.

Definition of 'Merger or Acquisition' and 'Joint Venture'

4.1 The purpose of a regime of merger control is to regulate, in advance, the impact of mergers on the competitive structure of markets. Merger control regimes should, therefore, identify and scrutinise transactions that will give rise to a lasting change to market structure. The following example of the EU regime makes clear that, even if a transaction meets the relevant threshold test, only mergers, acquisitions and joint ventures that give rise to a lasting change in market structure should be of interest to competition regulators. The EU Merger Regulation, Council Regulation (EC) No 139/2004 of 20 January 2004, on the control of concentrations between undertakings, identifies a merger as reviewable if it gives rise to a "change of control on a lasting basis"[3].

[3] Article 3(1) of the Merger Regulation.

4.2 The Competition Legislation does not currently explicitly identify reviewable transactions as those affecting market structure *in some lasting way*. "Mergers or acquisitions" are defined in s.61 of the Competition Ordinance.

4.3 For present purposes, the most relevant parts of the definition are found in:

4.3.1 Section 61(1)(a) which provides that a merger or acquisition occurs when "there is a transfer from one undertaking ("the **transferor**") to another ("the **transferee**") of the business of the transferor"; and

4.3.2 Section 61(3)(b) which provides that a merger or acquisition occurs on the creation of a "joint venture", defined in section 61(4) as being created when "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."

4.4 These definitions have given rise to two issues. First, company reorganisations which involve the transfer of business between group companies are caught by s.61(1)(a) of the Competition Ordinance and thus qualify as "mergers or acquisitions", despite the fact that an intra group reorganisation does not result in a lasting change in market structure. 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; or joint production agreements). Such contractual joint ventures do not bring about a lasting change in market structure.

4.5 The Committee therefore recommends that the definitions in section 61 of the Competition Ordinance identified in paragraph 4.3 above are amended to make clear that only those mergers, acquisitions and joint ventures that give rise to a lasting change in market structure.

<u>Failure to obtain prior clearance</u>

4.6 At present, if there is a merger or acquisition without the approval of the GCRA then:

4.6.1 where any party to a merger or acquisition is a company registered in Guernsey, no right, title or interest in any shares of the Guernsey company shall pass, vest or be transferred, charged or otherwise dealt with in accordance with the terms of the merger or acquisition, by virtue of section 13(6)(a) of the Competition Ordinance; and

4.6.2 no right, title or interest in any property in Guernsey, or governed, according to the Guernsey rules of private international law, under the Laws of Guernsey, shall pass, vest or be transferred, charged or otherwise dealt with in accordance with the terms of the merger or acquisition, by virtue of section 13(6)(b) of the Competition Ordinance.

4.7 Notwithstanding the possibility of acquiring retrospective approval under section 13(6), the fact that an un-notified transaction is ineffective to pass title is a significant issue for merging parties and their legal advisers.

4.8 The Committee therefore proposes that sections 13(6)(a) and 13(6)(b) should be repealed and replaced with an ability for the GCRA to impose financial penalties for a failure to notify a merger or acquisition which was subject to mandatory notification requirements, and a power to require the purchaser to divest itself of the right, title or interest in the Guernsey company or Guernsey property, where the transaction is found to give rise to a substantial lessening of competition.

Exempt transactions

4.9 Article 3(5) of the Merger Regulation exempts certain transactions, from the EU merger regime. The Committee proposes that these transactions should also be exempted from Guernsey's competition regime, to the extent relevant. The Merger Control Regime should only apply to transactions that bring about a lasting change in market structure whilst the exemptions listed in Article 3(5) would only effect temporary changes in respect of the same.

4.10 Such exemptions include:

4.10.1 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 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; and

4.10.2 control being acquired by an office-holder relating to liquidation, winding up, insolvency, cessation of payments, compositions or analogous proceedings.

4.11 It is proposed that equivalent exemptions are explicitly inserted into the Competition Ordinance, in addition to the power of the Committee to grant exemptions under 14 of the Competition Ordinance, to ensure that financial institutions holding securities on a temporary basis, and liquidators are not inadvertently caught by Competition Legislation.

5 Amendments which the Committee intends to make by regulation.

5.1 For the sake of completeness, as part of the process of reviewing and revising the Merger Control Regime, the Committee currently intends to exercise its existing regulation making powers in the following respects:

Share of supply test

5.2 The Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations, 2012 (the "**PMA Regulations**") provide that mergers and acquisitions are notifiable to the GCRA, if;

5.2.1 the combined applicable turnover, of the undertakings involved, in the merger or acquisition arising in the Channel Islands exceeds £5 million; and

5.2.2 two or more of the undertakings involved in the merger, or acquisition, each have an applicable turnover arising in Guernsey, which exceeds £2 million.

(the "**turnover test**").

5.3 The Committee intends to introduce an additional alternative test based on the estimated market share/share of supply to the market of the parties involved (the "**share of supply test**").

5.4 The GCRA has advised the Committee that the turnover test alone has not proved satisfactory in giving the GCRA the resources it needs to achieve the objectives of the Merger Control Regime[4]. Mergers of parties with a combined turnover, below the notifiable levels, may still involve significant local activities, and potentially harm the local economy, and local consumers, whose choices post-merger may be restricted unacceptably.

'Undertakings Involved'

5.5 The Committee intends to amend the PMA Regulations to provide that the turnover of the whole group to which the merging parties belong should be

[4] That is, enabling review by the GCRA of those mergers that are most likely to give rise to a substantial lessening of competition in Guernsey.

counted, rather than just the merging parties themselves, in order to obtain a true picture of how the merger, or acquisition, effects competition within the whole of the relevant market.

Transactions in stages

5.6 In order to prevent a merger being carried out in stages, thereby avoiding the mandatory notification requirement, the Committee proposes the introduction of provisions specifying that transactions between the same undertakings which take place within a specified time period will be treated as the same transaction.

Definition of 'financial institution'

5.7 An entity's turnover is used as an indicator of its economic strength, and entities that have a combined turnover meeting, or exceeding, the thresholds set out in the Competition (Calculation of Turnover) (Guernsey) Regulations, 2012 are notifiable under the Merger Control Regime.

5.8 As the aim of the Merger Control Regime is to manage any anti-competitive impact of mergers in Guernsey, only local turnover (i.e. generated by a locally based business selling to a locally based consumer), is included when calculating whether an entity's turnover meets the relevant thresholds. As an exception to this principle, the turnover of financial institutions, credit institutions and insurance undertakings are deemed to arise 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 and so it is not possible to attribute turnover to customers' location in any meaningful way. The location of the business entity making the supply is therefore used. As such, financial institutions, credit institutions and insurance undertakings based outside of Guernsey, but selling to local consumers, may come within scope of the Merger Control Regime if they satisfy the threshold conditions.

5.9 The definition that has been given to the term "financial institution"[5] under the Merger Control Regime is different to that in the Merger Regulation. It is extremely broad, encompassing not only controlled investment businesses within the meaning of the Protection of Investors (Bailiwick of Guernsey) Law, 1987 but also financial services businesses as defined in the Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008[6]. This has led to transactions potentially becoming notifiable to the GCRA

[5] Regulation 7 of the Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations, 2012.
[6] See Part 1 of Schedule 1 to the Registration of Non-Regulated Financial Services Businesses (Bailiwick of Guernsey) Law, 2008.

on the basis of turnover generated by a much broader spectrum of financial services businesses than the GCRA considers necessary, such as from sales made to customers outside of Guernsey and where there is therefore less possibility of the transaction having any impact on competition in Guernsey.

5.10 In order to remedy this, the Committee therefore intends to make regulations adopting a narrower scope which excludes non regulated financial services businesses from the definition of financial institution.

Introduction of short form merger application

5.11 The GCRA has proposed the introduction of a new "short form" merger application in Guernsey. 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.

6 Consultation

6.1 In November 2015, the GCRA launched a consultation on proposed amendments to the Merger Control Regime in Guernsey. Further discussions took place at a series of meetings held between GCRA and stakeholders to develop the proposed amendments set out in this Policy Letter.

6.2 The Law Officers have been consulted regarding the proposals in this policy letter.

7 Resources

No resourcing issues have been identified, outside of the required legal drafting.

8 Compliance with Rule 4

8.1 Rule 4 of the Rules of Procedure of the States of Deliberation and their Committees sets out the information which must be included in, or appended to, motions laid before the States.

8.2 In accordance with Rule 4(1), the Propositions have been submitted to the Law Officers for advice on any legal or constitutional implications. They have raised no legal objection to the Proposals in this Letter.

8.3 In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.

Yours faithfully

C N K Parkinson
President

Vice-President
A C Dudley-Owen

D de G de Lisle
N R Inder
J I Mooney