

REDACTED LETTER

Guernsey Competition Regulatory Authority
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By email: info@circa.gg

25 January 2016

Our ref: MOURANTOZANNES/66368190/2

Dear Sir/Madam

Comments on the Consultation Document for amendments to the Guernsey Mergers and Acquisitions regime

This letter is sent on behalf of Mourant Ozannes in response to CICRA's Consultation Document No. CICRA 15/43 dated 13 November 2015 (the **Consultation Document**), relating to proposed changes to the mergers and acquisitions regime in Guernsey. Thank you for the opportunity to provide these comments.

Defined terms used in this letter have the same meaning as those terms in the Consultation Document, save that reference to the **Regulations** includes the Competition (Calculation of Turnover) (Guernsey) Regulations, 2012 (as the case may be).

Our specific responses to the questions raised in the Consultation Paper are set out below. Where appropriate, we have also referred to specific transactions which required us to liaise with CICRA in respect of relevant issues arising under the current Ordinance and/or the Regulations.

We have noted the comments provided by the Commercial Bar Association (**CBA**) on 15 January 2016 and have commented below only on those areas where we wish to expand on the points made in the CBA submission.

A: Local Turnover Test (Issue 1)

Comments on the merits as well as practical implications of a "local" turnover notification test

Applicable Turnover

In our view a "local" turnover test would better reflect what we understand to have been the initial rationale to regulate mergers and acquisitions in Guernsey. It would reduce the complexity (and related cost) of the current process and the impact on those transactions which would not, in practice, negatively affect competition in Guernsey.

If a "local" turnover test is to be adopted, we suggest that, in principle, it is the turnover of goods and services delivered in Guernsey that should constitute applicable turnover for purpose of the calculation. Whilst the Consolidated Jurisdictional Notice issued by the EU Commission provides a basis for establishing the geographical allocation of turnover, we would anticipate further detailed consideration around the methodology for determining

"local" turnover appropriate to this jurisdiction, together with appropriate guidance on which all relevant parties may rely. [Redacted]

"Undertakings Concerned"

We agree that further clarification is required with regards to which undertakings are considered to be relevant for the purpose of the calculation of applicable turnover.

A general definition of what is considered to be "an undertaking" for the purpose of the Ordinance and the Regulations would be helpful, as we have in the past had to raise queries on this point with CICRA. [Redacted]

It would also be useful if the Ordinance clarified that, in cases where an asset being acquired forms only part of the seller's business (a partial asset sale), only those parts of the business relevant to the assets being disposed of should be considered when calculating that undertaking's turnover, in order to determine whether the thresholds are met.

B. Definition of Financial Institution (Issue 2)

Comments on the merits as well as practical implications of applying a definition of "financial institution" which reflects the wording adopted in the EU Regulations

The definition under the Regulations currently includes service providers licensed under the POI Law, in addition to finance and banking businesses. Even though the nature of the income is different as between POI licensee service providers and finance/banking businesses, the turnover is currently assessed in the same way.

Given that the definition of financial institution under the EU Regulations is targeted at the banking and investment businesses only (and not service providers) it may be appropriate to consider certain aspects of those EU Regulations, in order to assist in determining the treatment of "local" turnover, under any amended regime. However, further consideration should be given to determining whether the wholesale adoption of relevant EU Regulations is appropriate. The adoption of certain of the EU Regulations, together with guidance from CICRA (on which parties may rely), may be an alternative approach which can be tailored to Guernsey. The CICRA guidance would provide greater certainty, and reduce the possibility of parties having to consider obtaining appropriate EU advice in order to understand the Guernsey position, all of which would assist with costs for the parties involved. [Redacted]

C. Exemptions (Issue 3)

The use of block exemptions would be a useful addition to the Guernsey regime, as a means of clarifying and streamlining the regulatory process for mergers and acquisitions. We assume that there will be more discussion around the scope and detail of any potential exemptions.

In addition to the potential exemptions mentioned, we would suggest further consideration of mergers and acquisitions involving structures which hold assets, particularly real property assets, outside the jurisdiction, including those involving the creation of joint ventures.

D. Share of Supply/Purchase (Issue 4)

Comments on the merits as well as the practical implications of a "share of supply/purchase" test are welcome

As noted above, we support a "local" turnover threshold test which, if met, would give rise to a mandatory notification. We do not support the proposal for a share of supply/purchase test in addition to the threshold test, as this would add another layer of regulation and with it, potential uncertainty. In practice, this additional test would be likely to increase the level

of complexity involved in considering the regulatory process for mergers and acquisitions, as well as costs.

E. Preliminary Review Process (Issue 5)

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

We agree that the preliminary review process is less likely to be required if a "local" turnover test is adopted, as such a revised test would address the specific issues identified for financial and credit institutions under the current Regulations.

We believe that the preliminary review process should be retained and be made available for all types of parties and businesses, so that there is a cost-effective and time efficient process for transactions. [Redacted]

F: European Competition Law

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

As noted in paragraph B above, whilst we recognise the value of being able to look to EU Regulations for assistance in interpreting particular provisions in the Ordinance and the Regulations, there is also the potential risk of increasing the costs to those parties wishing to do business in the jurisdiction, because specific EU regulatory advice may be required, in order to understand the Guernsey regulations. If CICRA is able to provide clarification of appropriate EU Regulations through detailed guidance (updated as required) on which parties may rely, this may be a preferable approach in terms of costs and complexity (rather than wholesale reliance on the relevant EU Regulations).

Other comments relating to points not specifically raised in the consultation:

Method for obtaining specific guidance

If the parties are unsure whether they fall within the threshold test, CICRA should have the powers to consider enquiries regarding the application of the mergers and acquisitions provisions under the Ordinance and Regulations, and to provide a binding decision, on which the parties may rely. It may be appropriate to apply a fee for this type of enquiry. As the body of guidance increases (assuming proposals for CICRA guidance are adopted), the likelihood of this type of enquiry arising will reduce. But giving CICRA the ability to provide a form of confirmation / decision would be useful, to ensure there is sufficient flexibility within the regime to make the process as time efficient and cost effective as possible, for the relevant parties.

Yours faithfully



MOURANT OZANNES