Kluwer Competition Law Blog

Proposed changes to Jersey's merger control regime

Sara Johns (Ogier) · Monday, October 24th, 2016

Introduction

The Jersey Competition Regulatory Authority (the **JCRA**) has published its recommendations for proposed changes to the island's merger control regime.

Similar recommendations have also been published by the Guernsey Competition and Regulatory Authority (the **GCRA**) – which, with the JCRA, operates under the combined banner of the Channel Islands Competition & Regulatory Authorities or "**CICRA**" – with the aim of implementing a common set of merger control rules across the Channel Islands.

The recommendations follow an independent report by Oxera[1] into Jersey's regulatory and competition framework published in November 2015. The report suggested that changes were needed to ensure that only mergers affecting the local economy, which the JCRA can do something about, are investigated. The report also suggested that the merger control thresholds and processes applied in Jersey should be clear and easy to understand so as to reduce uncertainty for businesses.

The current regime

At present, in common with many other jurisdictions, Jersey's merger control regime is structured as a two stage assessment process.

Firstly, there is a mandatory requirement for transactions meeting certain prescribed thresholds to be notified to the JCRA before they are implemented (the "jurisdictional test"). If the JCRA's approval for such a transaction is required but not obtained, it is automatically void in so far as it purports to transfer title to Jersey situs shares and assets (the "automatically void" provisions). It is not possible for the JCRA to retrospectively approve or validate such a transaction, even if it is found not to give rise to competition concerns.

Secondly, the JCRA may prohibit a notified merger if they regard it as likely to give rise to a substantial lessening of competition in Jersey (the "substantive test").

The jurisdictional test is currently based on the parties' share of supply of goods and services in Jersey, with three limbs designed to catch horizontal, vertical and conglomerate mergers. The wide and subjective nature of the test, coupled with the frequent lack of publicly available information by which the parties' shares of supply may be gauged, often creates uncertainty as to whether the JCRA's approval is needed.

This uncertainty, together with the draconian effect of the "automatically void" provisions, has often resulted in parties and their advisors understandably taking a cautious approach and applying for approval of transactions where the share of supply is difficult to establish with certainty. This has meant the JCRA spending considerable time and resources reviewing transactions which manifestly present no competition law concerns for the island.

So, what will change?

Mandatory turnover test

Moving forward, the JCRA's most significant proposal is that the mandatory share of supply test should be replaced with a narrower, more objective jurisdictional test based on the parties' turnover in the Channel Islands (overall) and Jersey (viewed separately).

Under this new test, the parties would need to obtain the JCRA's approval if:

- the combined aggregated annual turnover in the Channel Islands of the undertakings concerned in the transaction exceeds £5 million; and
- the annual local turnover in Jersey of each of at least two of the undertakings concerned exceeds £2 million.

Regular Channel Island practitioners will know that this mirrors the basic jurisdictional test currently in place in Guernsey, albeit that the detail for calculating the turnover for financial institutions would, under the JCRA's new proposals, more closely reflect the European position.

So far so good… but there's a twist.

Voluntary share of supply regime – calling in a transaction

The JCRA acknowledges that transactions involving businesses with low local turnover do not generally raise issues from a competition law point of view because barriers to entry are typically low.

However, based on its experience of operating in the local markets, the JCRA has expressed concern that some low value transactions – which it would not have the chance to review purely on the basis of the proposed turnover thresholds – could still potentially substantially lessen competition in Jersey.

To address this concern, the JCRA wishes to introduce a voluntary notification regime which would operate alongside the mandatory turnover test. In essence, this would give the JCRA the power within a specified period to call in for review low value transactions in concentrated markets, based on a share of supply test, even if the new turnover thresholds were not exceeded. In this situation, the JCRA would be able to require remedies if, following review, it concluded that the transaction gave rise to a substantial lessening of competition in Jersey.

Other changes

Additional key changes proposed by the JCRA include the following:

- transactions exceeding the mandatory turnover thresholds that are not notified and approved by the JCRA, would not be automatically void if the JCRA is satisfied after a first detailed review that they present no substantive competition law issues;
- the "automatically void" provisions would similarly not apply in respect the voluntary notification (share of supply) regime;
- a new short form merger application process would be introduced in Jersey for all sectors, where it is clear based on a pre-notification review that the JCRA is unlikely to have concerns about the transaction. The short form process would run on a shorter timetable and at a reduced filing fee than the current process;
- certain specific situations would be excluded from the merger control regime altogether, including where securities are being held by financial institutions on a temporary basis with a view to resale, where control is acquired by insolvency officers, and where operations are carried out by financial holding companies purely with a view to maintaining the value of investments.

Commentary

In putting forward its recommendations, the JCRA has acknowledged that framing an appropriate jurisdictional threshold test has been particularly challenging in the context of the economies of the Channel Islands. Getting the right balance for dealing with large (often financial) institutions with high turnover whose customer base is not "local" on the one hand, and smaller businesses with relatively low turnover but potentially significant market shares on the other, is difficult.

By the JCRA's own admission, however, many of the law firm respondents to the consultation that preceded the recommendations were not generally supportive of adopting a dual voluntary share of supply and mandatory turnover regime. Whilst a key aim of overhauling the legislation has been to increase objectivity and certainty, there is concern that allowing the JCRA to call in transactions based on share of supply will undermine the achievement of these objectives whilst potentially increasing complexity and costs for the parties involved. This concern is not alleviated by the JCRA stating it expects to call in transactions only rarely.

Overall, however, the proposals are welcome, in particular removing the "automatically void" sanction for transactions which the JCRA is quickly able to conclude give rise to no competition law issues.

Those dealing with the Channel Islands in future will also no doubt be pleased to find that, whilst still dealing with two jurisdictions, the islands will have a common merger control regime applied consistently by the JCRA and the GCRA working together as CICRA. That alone will be a major step forward for all concerned.

[1]

http://www.oxera.com/getmedia/17401ec0-3dba-44f0-8b7e-cbc83208042e/A-review-of-the-Jersey-regulatory-and-competition-framework.pdf.aspx?ext=.pdf

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