Economy

Competition Law consultation Paper 2: Mergers and Acquisitions

Consultation Paper:

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Background

1. Consultation paper 2 outlines proposed legislative amendments to Jersey's mergers and acquisitions framework.

2. It is generally accepted that mergers between, and acquisitions of, businesses can lead to the expansion of markets and bring benefits to the economy. Combining activities may assist businesses to develop new products more efficiently and / or reduce production or distribution costs. As a result, markets may become more competitive, allowing consumers to benefit from higher-quality goods at fairer prices.

3. However, in some cases mergers and acquisitions may reduce competition in the market which usually manifests itself through the creation or strengthening of a dominant player. This can be to the detriment of consumers, as the creation of dominant players may lead to increased prices, reduced choice or less innovation.

4. Jersey's competition framework provides rules for the control of mergers and acquisitions based on the effect of a proposed transaction on the structure of competition in the Island. In particular, to prevent any harmful effects on competition in Jersey, the Competition (Jersey) Law 2005 (the **Competition law**) provides that certain mergers and acquisitions must be approved by the Jersey Competition Regulatory Authority (the **JCRA**) before they can be implemented.

5. This paper sets out several proposed changes to improve the operation of the legislative framework for the control of mergers and acquisitions in Jersey. The proposals are designed to take into account the unique characteristics of Jersey's markets. The aim is to – wherever possible – reduce the administrative burden on businesses and enable the JCRA to better focus its limited resources on those transactions that may have the greatest negative impact on competition in the Island.

6. For brevity, 'mergers and acquisitions' are generally simply referred to as 'mergers' throughout this paper.

Section A: Definition of a 'merger or acquisition'

(1) Prior control of an undertaking

7. Article 2(1) of the Competition Law provides that a 'merger or acquisition' occurs if:

   (a) 2 or more undertakings that were previously independent of one another merge; or
   (b) a person who controls an undertaking acquires direct or indirect control of the whole or part of another one.

8. It follows from Article 2(1)(b) that a 'merger or acquisition' occurs in the case of the acquisition of 'control'. This is defined in Article 2(2) of the Competition Law as the possibility of exercising "decisive influence" with regard to the activities of an undertaking. Similarly, Article 3(1)(b) of the European Union Merger Regulation (the **EUMR**) provides that a 'concentration' (broadly speaking, a merger or acquisition) shall be deemed to arise upon the acquisition of 'control', which is defined in Article 3(2) as "the possibility of exercising decisive influence on an undertaking".

9. It is clear from Article 2(1)(b) of the Competition Law that 'control' may be acquired by a person in circumstances where that person already controls an undertaking. Similarly, Article 3(1)(b) EUMR provides that control may be acquired by a person (or persons) already controlling at least one undertaking. Additionally, Article 3(1)(b) EUMR also establishes that control may be acquired by one or more 'undertakings'. Similar language is not included in Article 2(1)(b) of the Competition Law and so the question could arise whether the acquisition of control by a person (read: an undertaking such as a company[1]), that does not already control another undertaking, is included.

10. It is the Government's view that any potential uncertainty on this point should be removed. The Government proposes that the scope of Article 2(1)(b) of the Competition Law is aligned with Article 3(1)(b) EUMR. It is considered that any divergence from the EU position could have serious consequences, as businesses could organise themselves in such a way as to fall outside the requirement to notify (e.g. by the creation of a special stand-alone company for the purpose of an acquisition, for example). Hence, avoiding the duty of notification that might otherwise arise.

11. If amended as proposed, Article 2(1)(b) would provide that a 'merger or acquisition' occurs for the purposes of the Competition law if "one or more persons who already control one or more undertakings, or one or more undertakings [emphasis added], acquire direct or indirect control of the whole or parts of one or more other undertakings whether by purchase of securities or assets, by contract or by any other means". This would help clarify that the requirement of prior control in Article 2(1)(b) only relates to an acquiring individual.

(2) Asset acquisitions

12. In relation to the acquisition by an undertaking of the assets of another undertaking, Article 2(4) of the Competition Law specifically provides that a 'merger or acquisition' also occurs if:

[1] In accordance with the Interpretation (Jersey) Law 1954, the term 'person' includes any body of persons corporate or unincorporated.

(a) an undertaking acquires the whole or a substantial part of the assets of another undertaking; and
(b) the result of the acquisition is to place the acquiring undertaking in a position to replace or substantially replace the other undertaking in the business in which that undertaking was engaged immediately before the acquisition.

13. The language in Article 2(4)(b) (in particular the words "immediately before the acquisition") may give rise to uncertainty as to whether this provision is capable of applying to cases where the relevant activities have ceased before the time of the transaction. It is the Government's view that if the Jersey merger regime could not apply to such cases, this would significantly limit the regime's effectiveness and scope. This could for example be the case where an entity ceased trading before an anticipated merger with the specific intention to evade scrutiny under Jersey's merger control system.

14. The EUMR does not contain a provision similar to Article 2(4) of the Competition Law. For asset acquisitions, the test under Article 3(1)(b) EUMR is whether the acquired assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which turnover can be clearly attributed. Article 3(1)(b) EURM does not require that the acquiring undertaking is put in a position in which it can replace the acquired undertaking in the business in which that undertaking was engaged immediately before the acquisition. Therefore, the application of the EUMR is, in principle, not excluded by the fact that the acquired business is no longer actively trading at the moment of completion of a transaction.[2]

15. The Government understands that a provision similar to Article 2(4) of the Competition Law was previously also included in the Irish Competition Act 2002. However, as a result of amendments introduced by the Irish Competition and Consumer Protection Act 2014, the Irish Competition Act 2002 now applies to the "acquisition of assets that constitute a business to which a turnover can be attributed". The 2014 Act thus amended the definition of an asset acquisition in Ireland to bring it broadly in line with the approach adopted under the EUMR.

16. In order to align the Competition Law provisions on asset acquisitions with best practice, the Government considers that Article 2(4) should be changed in the same way as Section 16(1)(c) of Irish Competition Act 2002 was amended. More specifically, it is proposed to revoke Article 2(4) and replace this by a new sub-paragraph in Article 2(1). The new sub-paragraph would provide that a merger or acquisition also occurs if "the acquisition by an undertaking of the whole or a part of another undertaking, although not involving the acquisition of a corporate legal entity, involves the acquisition of assets that constitute a business to which a turnover can be attributed, and for the purposes of this paragraph 'assets' includes goodwill".

17. The proposed amendments would ensure that Jersey's M&A regime is (in principle) capable of applying to a transaction even if the activities of the acquired undertaking have ceased before the time of the transaction, <u>so long as</u> those assets constitute a business with a market presence, to which a turnover can be clearly attributed. As such, the proposed amendments would remove any potential legal uncertainty that may be created by the current language in Article 2(4)(b). For the avoidance of doubt, even if an asset acquisition constitutes a 'merger or acquisition' for the purposes of the Competition Law, it is always necessary to consider whether the relevant notification thresholds are met.

[2] See for example: European Commission, Case M.7940 – Netto / Grocery Store at Armitage Avenue Little Hulton, 26 February 2016.

(3) Joint ventures

18. Article 2(5) of the Competition Law provides that a 'merger or acquisition' also occurs for the purposes of the Law on the creation of a 'joint venture', which is defined as being a business activity:

    (a) carried on jointly by 2 or more persons, whether or not in partnership; or
    (b) carried on by a company formed by 2 or more persons to enable them to carry on that activity jointly by means of their joint control of the company or by means of their ownership of shares in the capital of the company.

19. The JCRA has previously stated that the current "wide definition of 'joint venture' 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; joint production agreements). Such contractual joint ventures do not bring about a lasting change in the structure of the market, which is generally considered to be the essence of a merger". The JCRA recommended that the definition in Article 2(5) is amended so that only joint ventures bringing about a lasting change in the structure of the market fall within its scope.

20. In August 2022, the JCRA reiterated its recommendations regarding the types of joint ventures that should be caught by the merger regime. The Government supports the JCRA's recommendation and proposes to amend the current definition of 'joint venture' in the Competition Law. More specifically, it is proposed that only the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity – irrespective of whether the undertaking to be jointly controlled existed prior to its formation – shall constitute a 'merger or acquisition' within the meaning of Article 2(1)(b) of the Competition Law (i.e. so-called 'full-function' joint ventures as developed under the EUMR).

Question

1. Do you support the proposed changes to the definition of 'mergers and acquisitions' in Article 2 of the Competition Law and agree that these achieve the below policy objectives?
    - clarify that an undertaking that does not already control another undertaking is included in the scope of Article 2(1)(b) of the Competition Law;
    - clarify that the framework can apply to the acquisition of control over assets, so long those assets constitute a business to which a turnover can be attributed; and
    - clarify that only the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so-called 'full-function' joint ventures) shall constitute a 'merger or acquisition' within the meaning of the Competition Law.

Section B: Definition of a 'undertaking'

21. In addition to the above-proposed amendments concerning the types of mergers that should be caught by the merger control regime, the question has also arisen whether the current definition of 'undertaking' in Article 1 of the Competition Law is capable of capturing those entities that would be captured under the EU definition of 'undertaking'.

22. The term 'undertaking' is defined in Article 1 of the Competition Law as "a person who is carrying on a business and includes an association, whether or not incorporated, that consists of or includes such persons". According to the Interpretation (Jersey) Law 1954, a 'person' "shall include any body of persons corporate

or unincorporated". 'Business' is furthermore defined in Article 1 of the Competition Law as including "any economic activity, trade or profession whether or not carried on for profit".

23. In EU competition law, the concept of 'undertaking' is not defined in the Treaty on the Functioning of the EU but has been widely interpreted by the European Courts as "every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed".[3]

24. The JCRA has advised that the Competition Law definition of 'undertaking' should allow it to review mergers between businesses, irrespective of their legal form. The Government shares the JCRA's view that the definition of 'undertaking' should be capable of capturing the same types of transactions that would be caught by the EUMR. However, in light of the definition of 'business' and provided the changes outlined above are made to capture certain asset acquisitions, it is the Government's view that it is not necessary to amend the Competition Law definition of 'undertaking' to ensure that it applies to all 'undertakings' as that term is understood in EU competition law. This view is supported by Kassie Smith KC who was requested to review the Government's interpretation of the definition of 'undertaking' in the Competition Law'.

25. Stakeholders will also agree that the definition of 'undertaking' is central in Jersey competition law and determines the categories of actors to which the rules apply, not just in the M&A area but also under the antitrust prohibitions. As such, any changes to the current definition of 'undertaking' in the Competition Law would have to be carefully considered as they may also affect the scope of other provisions.

26. As the JCRA has previously issued recommendations regarding the definition of 'undertaking' in Article 1 of the Competition Law, the Government wishes to take the opportunity presented by this consultation to explain its reasons for not proposing any changes in this area and to enable stakeholders to comment.

Question

2. Do you agree that – as proposed – the current definition of 'undertaking' in Article 1 of the Competition Law is retained? If you believe that the definition of 'undertaking' should be changed, please explain why, supported by examples of types of mergers or acquisitions that may escape JCRA scrutiny as a result of the current definition.

Section C: Jurisdictional test

(1) Background

27. Appropriate jurisdictional thresholds play a critical role in a well-functioning M&A regime that seeks to be effective, efficient, and transparent.

28. It is generally accepted that many mergers have benign or even positive effects on consumer welfare and so should be permitted, unless there are strong indications that a transaction might have a significant negative effect on competition. Therefore – even in a small jurisdiction such as Jersey – there is no need for a systematic review of all mergers by the JCRA. In any event, scrutiny of all mergers would unduly burden the Authority and impose unreasonable costs and delays on local businesses.

[3] E.g. Case C-41/90, *Höfner and Elser v Macrotron GmbH,* [1991] ECR I-1979.

29. In order to create a successful merger control regime in Jersey, a key question is 'where to set the bar'. In order words, which transactions need to need notified to the JCRA for an assessment and – equally important – which mergers should not be subject to any prior scrutiny. Setting the thresholds is however not a straightforward task. In general, notification jurisdictional tests for mergers can be considered in the context of two possible types of errors:

    1. If thresholds are set too high, the framework may fail to capture some mergers that may substantially lessen competition in the Island.
    2. If thresholds are set too low, the JCRA may become over-burdened with applications for the approval of uncontroversial mergers, resulting in unnecessary costs created by the legal procedure for the undertakings and the JCRA.

30. A 'type 1' error could lead to consumer harm from reduced competition as a result of not reviewing certain mergers, while the costs of a 'type 2' error are the administrative costs associated with the legal procedures for the firms and the JCRA. Any notification threshold should therefore seek to balance the probability of both types of errors, in order to minimise costs to society.

31. It is also important that Jersey's merger regime is designed in a way which takes into account the unique characteristics of the Island's markets. In Jersey, this is a particular challenge as there are large, often financial, institutions with high turnovers but whose consumer base is not 'local', in contrast to smaller businesses with relatively low turnover but potentially significant local market shares.

(2) Introduction of a new turnover test

32. Jersey's merger control regime currently requires mandatory notification to the JCRA of all transactions that trigger the relevant thresholds in the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the **M&A Order**). The test for notification is based on an undertaking's 'share of supply or purchase' (so-called **share of supply test**), which is intended to be a flexible test. The applicable thresholds in the M&A Order depend on the type of merger at issue (i.e. horizontal, vertical or conglomerate).[4]

33. As a result, under current legislation, the JCRA must investigate mergers as soon as the thresholds in the M&A Order are met, even if the transaction is between international companies for which Jersey is a small part of their total business, and when the impact on the local economy is – in all likelihood – negligible. In 2015, economics consultancy Oxera suggested that the merger regime in Jersey should be changed so that only mergers that affect the local economy are investigated. It is furthermore understood that share of supply tests are more commonly used in systems that operate a voluntary merger filing system (for example, the UK) rather than in a mandatory regime such as exists in Jersey.[5]

34. In August 2022, the JCRA wrote to the Government advising that the current combination of a mandatory filing regime with a flexible jurisdictional test leads to a number of practical issues for merging parties, their advisers and the Authority:

[4] Articles 2, 3 and 4 of the M&A Order.
[5] According to the international best practice guidelines (Recommended Practices for Merger Notification & Review Procedures – ICN (www.internationalcompetitionnetwork.org), an objective jurisdictional threshold test based on the parties' turnover is likely to be more appropriate in the context of a mandatory notification regime.

- The flexible nature of the share of supply test creates considerable uncertainty for businesses as to whether the filing requirement is triggered in any given case.
- This leads to many requests for guidance being made to the JCRA by the merging parties and their advisers, which can be resource intensive and may in any event not give the parties the degree of legal certainty they are seeking.
- The share of supply test itself is broadly drafted – catching horizontal, vertical and conglomerate mergers – and means that the JCRA receives a number of applications for clearance in respect of transactions which present no substantive competition issues.

35. The JCRA considers that a narrower and more objective mandatory jurisdictional threshold test would provide greater confidence to businesses, reduce the need for informal guidance and reduce the number of notifications. This would also allow the JCRA to focus its limited resources on the most problematic cases. To improve the operation of Jersey's merger control regime, the JCRA therefore recommended that the current jurisdictional test in the M&A Order is replaced by a new mandatory test for when JCRA approval is required based on the local turnover of the undertakings concerned.

36. The JCRA's recommendation to introduce a mandatory local turnover test is supported by Oxera, which was commissioned in 2021 by the Government to advise on a number of proposed changes to Jersey's competition framework. Oxera broadly reinterred the JCRA's concerns in relation to a share of supply test and stressed that this type of jurisdictional test has a number of disadvantages compared to a turnover test, which are particularly evident in the context of a merger regime in a small economy.

37. Firstly, a share of supply test requires the notifying parties to undertake an assessment of the total size of the market, and of the shares of supply of the acquirer and target within this market, before understanding whether they need to notify. This assessment is cumbersome for parties and introduces a degree of uncertainty into the process, especially in markets where information is not readily available. On the other hand, information on businesses' turnover is more objective and readily available, making it easier for them to understand whether they need to request approval for a merger if the notification test is based on a turnover threshold.

38. Secondly, a notification test based on shares of supply might capture large international mergers that are likely to have little effect on the Jersey market. Thirdly, a jurisdictional test based on turnovers is considered more appropriate as the use of local turnover offers to some extent a proxy for the significance of a merger to the local economy.

39. It is also worth noting that turnover tests are commonplace in jurisdictions that operate a mandatory notification regime. On the other hand, the share of supply test is intended to be a flexible test, more commonly used in systems (for example, the UK) that operate a voluntary merger filing system. Mandatory notification systems are present in most OECD jurisdictions. A 2020 OECD publication highlighted that 44 of 55 surveyed jurisdictions have a mandatory merger notification system, and 52 of these jurisdictions use turnover as the criteria (or as one of the criteria) for establishing merger notification thresholds.

40. Overall, the Government agrees with Oxera and the JCRA and considers that the introduction of a mandatory local turnover test – replacing the current share of supply test in the M&A Order – is an appropriate approach

for Jersey.[6] It is anticipated that the introduction of a turnover test for mergers will reduce the need for informal guidance from the JCRA and the number of notifications that will have to be made to the Authority. In turn, this will allow the JCRA to prioritise those cases which may have the greatest negative impact on competition in Jersey.

41. The main purpose of this consultation is to obtain views on the proposed new framework for merger control in Jersey, i.e. the introduction of a new local turnover test to replace the current jurisdictional test based on shares of supply (see question 3 below). Additionally, the annex to this paper sets out a couple of options for consideration in relation to turnover locations (in the Channel Islands and Jersey) and thresholds, noting that no firm decision has been taken in this regard, and further stakeholder engagement will take place once draft legislative changes have been prepared. However, any views regarding the turnover that should be taken into account, would be welcomed and would assist policy making.

Question

3. Do you support the introduction of a new mandatory, local turnover test – replacing the current share of supply test – to determine whether a particular merger or acquisition needs to be notified to the JCRA for approval?

Section D: Calculation of turnover

42. The introduction of a local turnover test is considered to be consistent with international best practice and more appropriate for a mandatory filing regime such as Jersey's. It would also address some of the current issues relating to the share of supply test (e.g. introducing criteria that are more objectively quantifiable, thus making it easier for merging parties to know whether they should notify).

43. Irrespective of the eventual structure of any new turnover test, in line with JCRA recommendations, it is proposed that, for the purposes of turnover calculation, the term 'undertakings concerned', is introduced in the M&A Order. This is a well-developed concept under the EUMR. The European Commission's Consolidated Jurisdictional Notice (the **Jurisdictional Notice**) contains further detail regarding the concept of 'undertaking concerned'. The JCRA has proposed that new Guidelines will incorporate or refer to the relevant section(s) of the Jurisdictional Notice, developing it as necessary for the particular circumstances of Jersey.

44. It is proposed that for the purposes of the new test, the 'applicable turnover' of an undertaking concerned shall comprise the amounts derived by the undertaking in the preceding business year from the sale of products and the provision of services falling within the ordinary activities of the undertaking to businesses or consumers in the Channel Islands or Jersey (as the case may be), after deduction of sales rebates, GST and other taxes directly related to turnover. This would ensure that mergers only become notifiable to the extent that they have a local impact. Thus, for example, if a Jersey company makes a sale to a UK customer, the turnover generated through that sale would be deemed to be UK turnover rather than Jersey turnover.

45. Furthermore, when an undertaking belongs to a group, both the turnover of the undertaking concerned and the turnover of those undertakings with which the undertaking has certain links should be taken into account to determine whether the thresholds for notification are met. In line with EUMR rules, the applicable

[6] The Government understands that this amendment does not require any change to primary law as the legal power to prescribe which types of transactions must be notified to the JCRA for prior approval already exists in Article 20(3) of the Competition Law.

turnover of an undertaking shall be calculated by adding together the respective turnovers of the undertakings listed below. However, the applicable turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the below undertakings.

(a) the undertaking concerned;
(b) those undertakings in which the undertaking concerned, directly or indirectly:
  - owns more than half the capital or business assets, or
  - has the power to exercise more than half the voting rights, or
  - has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
  - has the right to manage the undertakings' affairs;
(c) those undertakings which have in the undertaking concerned the rights or powers listed in (b);
(d) those undertakings in which an undertaking as referred to in (c) has the rights or powers listed in (b);
(e) those undertakings in which two or more undertakings as referred to in (a) to (d) jointly have the rights or powers listed in (b).

46. Additionally, there may be cases where only a part of a business is acquired by another business. As explained in the Jurisdictional Notice, in those cases, the possible impact of a transaction on the market will depend "on the combination of the seller's economic and financial resources that are the subject of the transaction with those of the acquirer and not on the remaining business of the seller". In those cases, the undertakings concerned are the acquirer(s) and the acquired part(s) of the target undertaking, but the remaining businesses of the seller will not be relevant.

47. Furthermore, in order to prevent mergers from being carried out in stages (for example staggered operations or follow-up deals), it is proposed that if two or more transactions take place within a two-year period between the same persons or undertakings, they shall be qualified as one and the same acquisition arising on the date of the last transaction.

48. In addition, given the specific nature of the sector, the Government also proposes to introduce specific rules in the M&A Order for the calculation of turnover of <u>credit institutions</u>, <u>financial institutions</u> and <u>insurance undertakings</u>. In this area, the Government proposes to build on EU precedent as the EU Regulations in the banking sector are based on years of legal and economic assessment.

49. It should be noted that the EU terms 'financial institution', 'credit institution' and 'insurance undertaking' as such do not seem to appear in Jersey law. However, it seems possible to broadly 'construct' these definitions in the M&A Order as the different 'elements' of the EU definitions can be found in other laws currently in force in Jersey. The advantage of this approach is that, whilst the definitions are broadly aligned with the applicable EU Regulations, there is no need to introduce new, separate definitions in the M&A Order, which will contribute to legal certainty for businesses and legal and financial practitioners operating in the Island.

- '**Financial institution**' means a 'holding company' as defined in the Companies (Jersey) Law 1991 or an undertaking the principal activity of which is to pursue one or more of the activities listed in points (b)-(l) of Article 7(1) of Schedule 2 of the Proceeds of Crime (Jersey) Law 1999.
- '**Credit institution'** means a 'deposit-taking business' as defined in Article 3(1)(a) of the Banking Business (Jersey) Law 1991.
- '**Insurance undertaking**' means an 'insurance company' as defined in the Insurance Business (Jersey) Law 1996.

50. In order to measure the turnover of financial institutions and credit institutions, the Government proposes that the applicable turnover shall be limited to the sum of the following income items which are received by the branch or division of that institution established in the Channel Islands or Jersey (as the case may be), after deduction of GST and other taxes directly related to those items.

(a) interest income and similar income;
(b) income from securities;
   - income from shares and other variable yield securities,
   - income from participating interests,
   - income from shares in affiliated undertakings commissions receivable;
(c) commissions receivable;
(d) net profit on financial operations;
(e) other operating income.

51. Furthermore, the applicable turnover of an undertaking which is an insurance undertaking shall be limited to the value of gross premiums received from Channel Islands residents or Jersey residents (as the case may be). The value of gross premiums received shall comprise all amounts received and receivable in respect of insurance contracts issued by or on behalf of the undertaking, including outgoing reinsurance premiums, and after deduction of taxes and parafiscal contributions or levies charged by reference to the amounts of individual premiums or the total volume of premiums.

Question

4. Do you support the proposed rules for the calculation of turnover, including the turnover of credit institutions, financial institutions and insurance undertakings?

Section E: Discretionary share of supply test

52. Whilst it is considered that a notification test based on the turnovers of the undertakings concerned has several advantages over a test based on shares of supply, there may, exceptionally, be transactions in small but concentrated markets which would not be caught by the turnover provisions, but which may nevertheless have the potential to negatively affect competition in Jersey. Dr Michal Gal, an expert in competition policy for small jurisdictions, identified that a test based solely on the parties' turnover may be raise issues, especially in small economies. She stated that:

> This is because the relevant turnover that might indicate a significant control of a relevant market may change significantly from one market to another. For example, a relatively small turnover will capture mergers that might create anti-competitive effects in most industries. Yet such a threshold would require almost all mergers to be notified, given the high turnover rates of the parties. This might, in turn, flood the authority with merger applications of transactions that in reality have very limited effect on the market's competitiveness.[7]

53. To enable the JCRA to review potentially harmful transactions below the turnover thresholds, it is proposed to introduce a discretionary power for the Authority in the M&A Order empowering it to demand notification

[7] Dr Michal S. Gal, "*Guernsey Merger Guernsey Merger Regulation Report*", 2009.

of transactions irrespective of the undertakings' turnovers.[8] This recommendation is supported by the JCRA and Oxera. The additional test would be based on the parties' share of supply and would complement the proposed new turnover test. As such, it would allow the JCRA to review cases which would not be captured by the turnover test, but which could nonetheless be harmful to competition in Jersey. This would enable the JCRA to review transactions in small but concentrated markets without the need to introduce a more complex principal jurisdictional test.

54. Important to note is that the proposed discretionary share of supply test will not impose a prior notification requirement on the undertakings concerned and, therefore, the 'standstill' and the 'gun-jumping' provisions in Article 20(1) and (2) of the Competition Law will not apply in this context. Furthermore, the proposed discretionary share of supply test should not unduly affect the legal certainty of the M&A regime. For this reason, it is proposed that the JCRA would only have a limited amount of time to require notification of a transaction below the mandatory notification thresholds.[9] It should also be noted that discretionary tests allowing authorities to call in for review transactions below the mandatory notification thresholds exist in various other jurisdictions.[10]

55. The main purpose of this consultation is to obtain views on the proposed introduction of an additional, discretionary share of supply test, complementing the proposed new jurisdictional test (question 5 above). Additionally, the annex to this paper sets out a couple of options for consideration in relation to share of supply percentages that could apply in the context of the proposed discretionary power for the JCRA to review certain mergers below the mandatory notification thresholds. No firm decision has been taken in this regard, and further stakeholder engagement will take place once draft legislative changes have been prepared, thus enabling stakeholders to comment. However, any views stakeholders may have on this would be welcomed and would assist policy making.

56. The below illustration provides a simplified overview of the proposed new structure of Jersey's merger control framework.

[8] The Government understands that there is currently no legal power in the Competition Law that would enable the Minister to introduce by Order an additional discretionary power for the JCRA to demand notification of mergers below the mandatory notification thresholds. As such, in order to introduce the additional discretionary share of supply test in the M&A Order, the legal power will firstly need to be created in the Competition Law.

[9] As a comparison, the merger control law in the UK only allows the CMA to call in mergers for review under its own initiative for up to four months after either the merger was made public or the CMA was told about it.

[10] For example, in Hungary the regulator may call in a transaction where (among other things) it is not obvious that the concentration does not significantly reduce competition in the relevant market. Furthermore, in Latvia the regulator may call in for review a transaction where there is a cause for suspicion that the transaction might result in or strengthen a dominant position, or where competition in the relevant market may be notably reduced. In Iceland, the regulator may require parties to submit a notification of a merger or acquisition (below the mandatory notification thresholds) if, in the opinion of the regulator, the transaction is likely to substantially reduce effective competition.

The JCRA would have jurisdiction to review a merger or acquisition when Test 1 or Test 2 is met

Test 1 **Mandatory notification**	• Jurisdictional test based on the undertakings' turnover
Test 2 **Discretionary power for JCRA to require notification**	• Share of supply test to enable the JCRA to review certain cases below the mandatory notification thresholds (time-limited).

If neither test is met, the JCRA does not have jurisdiction to review the transaction

Question

5. Do you support the introduction of an additional, discretionary share of supply test (complementing a relatively straightforward mandatory turnover test) to allow the JCRA, in certain cases, to review transactions which would not be caught by the mandatory turnover provisions, but which may nevertheless have the potential to substantially lessen competition in Jersey?

Section F: Exceptions

57. Both the Competition Law and the EUMR provide rules on when a merger or acquisition (in case of the EUMR a 'concentration') is deemed to occur. The EUMR, in Article 3(5), also sets out three specific situations where the acquisition of a controlling interest does not amount to 'concentration'. Similar exceptions do not exist in the Jersey merger regime. The Government supports the JCRA's recommendation that a small number of exceptions, reflecting those in Article 3(5) EUMR, is also introduced in Jersey's merger control framework.

58. Firstly, it is proposed that a 'merger or acquisition' shall not be deemed to arise where credit institutions, financial institutions or insurance undertakings whose normal activity 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. The one-year period may be extended by the JCRA on request where such undertakings can show that the disposal was not reasonably possible within the period set. The first exception proposed closely reflects the wording of the provision in Article 3(5)(a) EUMR.

59. Whilst the Government believes that this exception is justified, it may enable occasional misuse by parties whereby an undertaking is acquired by an interim buyer (e.g. normally an investment bank), with an agreement for the future onward sale of that undertaking to the ultimate acquirer. In this way the merger or acquisition only becomes notifiable once the second transaction occurs and the vendor is able to effect a quick sale without the need for regulatory approval. In other words, the first transaction is only undertaken to facilitate the second transaction and the first buyer is directly linked to the ultimate acquirer. This concern was also identified by the Irish Competition Authority (now the Competition and Consumer Protection Commission) in 2007. To resolve this potential issue, the Government proposes to clarify the true intention of the first exception through an additional provision stipulating that this exception shall not apply where the undertaking has acquired control on the basis of the future onward sale of the business to an ultimate buyer, in circumstances where the ultimate buyer bears the major part of the economic risks.[11]

60. The second exception would provide that a 'merger or acquisition' shall not be deemed to arise where transactions referred to in Article 2(1)(b) of the Competition Law are carried out by undertakings, the sole object of which is to acquire holdings in other undertakings and to manage such holdings and turn them to profit, provided however that the voting rights in respect of the holding are exercised, in particular in relation to the appointment of members of the management and supervisory bodies of the undertakings in which they have holdings, only to maintain the full value of those investments and not to determine directly or indirectly the competitive conduct of those undertakings.

61. Thirdly, it is proposed that a 'merger or acquisition' shall not be deemed to arise where control of an undertaking is acquired by an office holder, in accordance with Jersey law, relating to liquidation, bankruptcy, winding up or other analogous proceedings of the undertaking.

62. Lastly, for the avoidance of doubt, it is proposed to clarify that an internal restructuring within a group of companies does not constitute a 'merger or acquisition' for the purposes of the Competition Law. As such, a 'merger or acquisition' shall not be deemed to occur where all of the undertakings involved in the merger or acquisition are, directly or indirectly, under the control of the same undertaking.

Question

6. Do you support the introduction of a small number of exceptions relating to specific situations in which a 'merger or acquisition' withing the meaning of Article 2 of the Competition Law would not be deemed to occur?

Section G: Retrospective merger clearance & 'gun-jumping' sanctions

63. The Jersey merger regime is a mandatory regime requiring mergers which exceed the thresholds in the M&A Order to be notified to the JCRA for review. Article 20(1) of the Competition Law stipulates that parties must suspend completion of the transaction until clearance from the JCRA has been obtained. However, there may, exceptionally, be situations where a merger that triggers the mandatory notification requirement, is nonetheless not notified to the JCRA, or implemented before clearance is obtained. Article 20(2) provides that if there is a breach of Article 20(1):

[11] For the same reasons, a similar provision was included in Section 16(8A) of the Irish Competition Act 2002.

(a) where any party to the merger or acquisition is a company incorporated in Jersey, the title to any shares in the company shall not pass in accordance with the terms of the merger or acquisition; and
(b) the title of any property in Jersey shall not pass in accordance with the terms of the merger or acquisition.

64. The sanctions in Article 20(2) are often referred to as 'gun-jumping' sanctions. The Government considers that putting a notifiable merger into effect without obtaining clearance from the JCRA is a serious breach of the Competition Law as it undermines the effective functioning of the merger control framework in Jersey. However, the Competition Law does not state whether a merger that is executed prior to clearance is subject to the 'gun jumping' sanctions in Article 20(2) for all time, or only until such time as the Authority issues a clearance determination. The Government acknowledges that this may create uncertainty regarding the legal status of a transaction going forward.

65. The Competition Law currently does not contain explicit provision enabling the JCRA to retrospectively approve non-notified mergers, creating ambiguity in this regard. In the Government's opinion, a merger which has been put into effect prior to a clearance decision from the JCRA should only remain subject to the sanctions of Article 20(2) of the Competition Law until such time as JCRA approval is obtained. It is the Government's view that the sanctions in are 20(2) designed – and should be retained – to protect the Authority's right of review but are not intended to prevent the transfer of title indefinitely.

66. Therefore, to improve the operation of the merger control framework in Jersey, the Government proposes to include explicit provision in the Competition Law enabling the JCRA request or accept retrospective merger applications for approval. On receipt of such an application, the Authority will proceed with its review of the transaction in accordance with the applicable Competition Law provisions and its merger control guidelines. The legislative changes would clarify that a notifiable merger completed without notification remains subject to the Article 20(2) sanctions, but only until the date of a clearance determination. The Article 20(2) sanctions would however remain in place if the JCRA decides, following its assessment, that it cannot approve the transaction under Article 22 of the Competition Law.

67. For the avoidance of doubt, the above proposed changes do not affect the JCRA's powers under Article 37 of the Competition Law to impose a financial penalty on an undertaking for a failure to notify a notifiable merger under Article 20(1). As such, even if the Authority retrospectively approves a particular merger, it may still impose a fine for breaching Article 20(1) in the first place.

68. For the avoidance of doubt – as outlined above – the proposed discretionary share of supply test will not impose a prior notification requirement and, therefore, neither the 'standstill' nor the 'gun-jumping' provisions in Article 20(1) and (2) of the Competition Law will apply in this context.

Question

7. Do you support the proposal to include explicit provision in the Competition Law enabling the JCRA to request or accept retrospective applications for approval where there has been a failure to notify a notifiable merger or acquisition?

Section H: Grounds for refusal to approve a merger

69. Articles 22(4) and (5) of the Competition Law set out the grounds upon which the Authority may refuse to approve a notified merger or acquisition.

70. Article 22(4) provides a discretionary power for the JCRA to refuse approval (the Authority "may"), rather than a requirement to do so (the Authority "shall"), in the circumstances specified (i.e. where the Authority is satisfied that the merger would substantially lessen competition). This provision therefore leaves open the possibility that there may be circumstances in which the JCRA could approve a transaction it considers would substantially lessen competition in Jersey. In line with international best practice, the Government proposes to amend Article 22(4) of the Competition Law so that the JCRA would not have the (theoretic) ability to grant approval to mergers and acquisitions that would substantially lessen competition in Jersey.

71. Secondly, Article 22(5) of the Competition Law goes on to provide that the Authority may refuse to approve a merger or acquisition if any information or document it has requested in connection with the application for the approval is not provided to it within a reasonable time of being requested. Once again, it is proposed to remove the Authority's discretion whether or not to refuse to approve and stipulate that the JCRA shall refuse to approve in the specified circumstance.

Question

8. Do you support the removal of the JCRA's discretion to refuse to approve a merger or acquisition in the circumstances mentioned in Article 22(4) and (5) of the Competition Law?

Section I: Information requests and interim measures

72. The JCRA has also advised that additional procedural powers are likely needed to support its ability to effectively to call in and review mergers that fulfil the thresholds set down in the discretionary share of supply test (Section E) and unnotified, notifiable mergers for retrospective approval (Section G). The Government shares the JCRA's view that the Authority should be appropriately to equipped to operate the merger control regime in Jersey effectively and efficiently.

73. Therefore, the Government firstly proposes that Articles 21 and 22 of the Competition Law (setting out the application process) should equally apply in the context of the discretionary share of supply test and retrospective applications for clearance. This will, amongst other things, enable the JCRA the gather the information it needs to properly review a merger.

74. Secondly, in the event the JCRA accepts or demands notification of a notifiable merger that was executed without prior clearance, the JCRA should be empowered to require undertakings (formal pledges) from parties that they will not take (further) pre-emptive action in respect of the merger (e.g. that they will hold the merged business separate; that they will not integrate them further). This may, however, not require any legislative change as under Article 40 of the Competition Law, the JCRA is empowered to impose interim measures to prevent the taking of pre-emptive action if the JCRA has reasonable cause to suspect a breach of Article 20(1). However, interim measures may only be imposed if it is considered necessary to prevent serious, irreparable damage to a particular person or class of persons or to protect the public interest.

Question

9. Do you agree that the proposed powers to gather information and impose interim measures – where these require legislative amendments – are appropriate to enable the JCRA to effectively review 1) mergers and acquisitions that fulfil the thresholds of the discretionary share of supply test and 2) unnotified, notifiable transactions for retrospective approval?

Annex: Merger control options

- ***Options for consideration in relation to turnover location and thresholds***

1. As outlined, the main purpose of this consultation is to obtain views on the proposed new framework for merger control in Jersey, i.e. the introduction of a new local turnover test to replace the current jurisdictional test based on shares of supply. In addition, the Government would welcome views in relation to the structure of the proposed new turnover test, which would assist policy making. Two options for consideration are described in more detail below, noting that no firm decision has been taken in this regard, and further stakeholder engagement will take place once draft legislative changes have been prepared.

2. Respondents may be aware that the recommendation to introduce a local turnover test to determine whether JCRA approval is required for a particular merger, is not new. In 2016, the JCRA recommended to amend the M&A Order to provide that a merger or acquisition would be subject to mandatory notification if:

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

3. A similar test is operated in Guernsey (although the second condition requires that the 'local' turnover is generated in Guernsey).[12] The Government understands that multi limb formats are commonplace in M&A regimes in various other jurisdictions. In 2016, the JCRA considered that the above dual limb test would be appropriate for the following reasons:

   (1) The individual turnover limb ensures that only transactions between parties that each achieve a significant degree of local turnover will be notifiable.
   (2) The Channel Islands turnover element ensures that transactions involving very small businesses are not captured inappropriately by the regime.
   (3) Whilst the Channel Islands do not form a common market from a legal standpoint, their geographic proximity, significant transport and communication links and historic ties, mean that the next closest competitor to many firms based in one Bailiwick are likely to be those in the other. Certainly, the tendency for firms to operate across the Channel Islands means that entities with a significant presence in Guernsey are often more credible potential competitors than those based further afield.

4. When consulted in 2021, Oxera also advised that taking the turnover generated in the Channel Islands as a whole as one of the relevant thresholds would be a sensible approach. This would capture the current strength of a business in the Jersey market, as well as the strength of businesses that are already present in Guernsey and which could easily enter or expand in the Jersey market in the future. This rule would therefore ensure that mergers that might lead to a loss of potential future competition could be reviewed by the JCRA.

5. However, Oxera questioned whether the second limb requirement – that at least two undertakings should have a turnover of £2 million in Jersey – could lead to certain transactions being excluded from JCRA review. This could be the case where only one business is in Jersey while the acquirer is located elsewhere (even if it is located in Guernsey). As such, this rule might fail to capture mergers that could lead to a loss of future competition, if the business located elsewhere exerts a competitive constraint in the Jersey market or would likely have entered the market organically, absent the transaction.

[12] See: The Competition (Prescribed Mergers and Acquisitions) (Guernsey) Regulations, 2012.

6. Oxera considered that one way to account for this would be to make the Jersey threshold contingent on the turnover of only one of the undertakings concerned, such that it would capture mergers where only one of the parties has a significant presence in Jersey. Whilst this could potentially capture some transactions that may not materially affect the Jersey economy, the alternative (2016 JCRA) proposal may result in some transactions, which may raise concerns, escaping prior JCRA scrutiny.

7. The below table presents some examples of transactions that would be captured by Oxera's proposed modifications, but which would not be captured by the 2016 JCRA recommendation. In all of these cases, Oxera's proposed changes would ensure that mergers that could have an impact on the Jersey economy are identified. This could happen if, for example, a company located in Guernsey had plans to enter the Jersey market absent the transaction. As such, the merger would eliminate a competitive constraint in the Jersey market, by removing the threat of potential competition by this entrant (example 1). For this reason, a rule that focuses on the combined turnover in the Channel Islands would be helpful, as due to the proximity of the two markets, players active in Guernsey are more likely to plan to enter or expand in Jersey as well.

8. The focus on the role of potential competition is also illustrated by a different scenario, where the threshold would capture mergers between a sizeable business in Jersey and a company outside the island (example 2). Again, the rationale for capturing these mergers is to ensure that transactions involving sizeable Jersey businesses would be reviewed and would not result in a loss of actual or potential competition. In these cases, having a short-form notification may be beneficial, as transactions where it is clear that the company based outside of Jersey has no plan or intention to enter the Jersey market organically in the near future could be quickly dismissed.

9. On the other hand, transactions where the turnover in Jersey is relatively modest would be unlikely to give rise to a substantial loss of competition, and as such, these transactions are still exempted from the duty to notify in Oxera's proposal (see example 3).

Table 2.1 Illustrative examples

Example	Company A (Target)	Company B (Acquirer)	Notifiable under current proposal	Notifiable under Oxera's proposal
1	£2m in Jersey and £1m in Guernsey	£5m (Guernsey)	No	Yes
2	£10m (Jersey)	£30m (UK)	No	Yes
3	£4m (Jersey)	£10m (Germany)	No	No

Source: Oxera.

10. In respect of the level of turnover needed to trigger the notification requirement, Oxera advised that the JCRA's 2016 proposals (£5 million in the Channel Islands and £2 million in Jersey) remain appropriate (albeit, as outlined, that the Jersey threshold is contingent on the turnover of only one of the undertakings concerned). It is important that the threshold reflects the characteristics of the economy of Jersey. Oxera therefore carried out a high-level comparison of turnover thresholds in other jurisdictions and considered turnover thresholds as a proportion of GDP, which can be considered a proxy of the size of the economy. Of the jurisdictions considered by Oxera, the JCRA's proposal is broadly in line with the threshold used in Iceland, Slovenia and Bosnia, and slightly higher than the threshold used in Bulgaria and Malta.

Table 2.2 Merger control in different jurisdictions

	Aggregate annual turnover of all undertakings	Annual turnover of each of the participating undertakings	Share of supply	Aggregate turnover as a % of GDP
Jersey proposal	£5m (Channel Islands)*	£2m (Jersey only)*	25% discretionary test	0.10%
Bulgaria	£11m (25m levs)*	£1.3m (3m levs)*		0.02%
Slovenia	£30m (€35m)*	£86,000 (€1m): rule on the target *	>60% (discretionary additional test)	0.08%
Bosnia and Herzegovina		£3.5m (8m marks)	>40%, can be met by one undertaking alone	0.30%
UK		£70m (target)	≥25%, and the merger increases that share of supply	n.a. (turnover threshold is only applicable to the target)
Iceland	£12m (ISK 2 bn)*	£1.2m (ISK 200m)*		0.07%
New Zealand	There is no specific or mandatory notification threshold. The notification regime is voluntary[12]			
Malta	£2m*		≥ 10% of the turnover of the undertakings concerned, for each undertaking*	0.02%
Mauritius			≥ 30%	n.a.

Note: * identifies the conditions that have to be met simultaneously.

11. Overall, Oxera considered that replacing the current share of supply test in the M&A Order by a new test based on the turnovers of the undertakings concerned in the Channel Islands and Jersey would be appropriate. More specifically, under Oxera's proposals, a merger or acquisition would be subject to mandatory notification if:

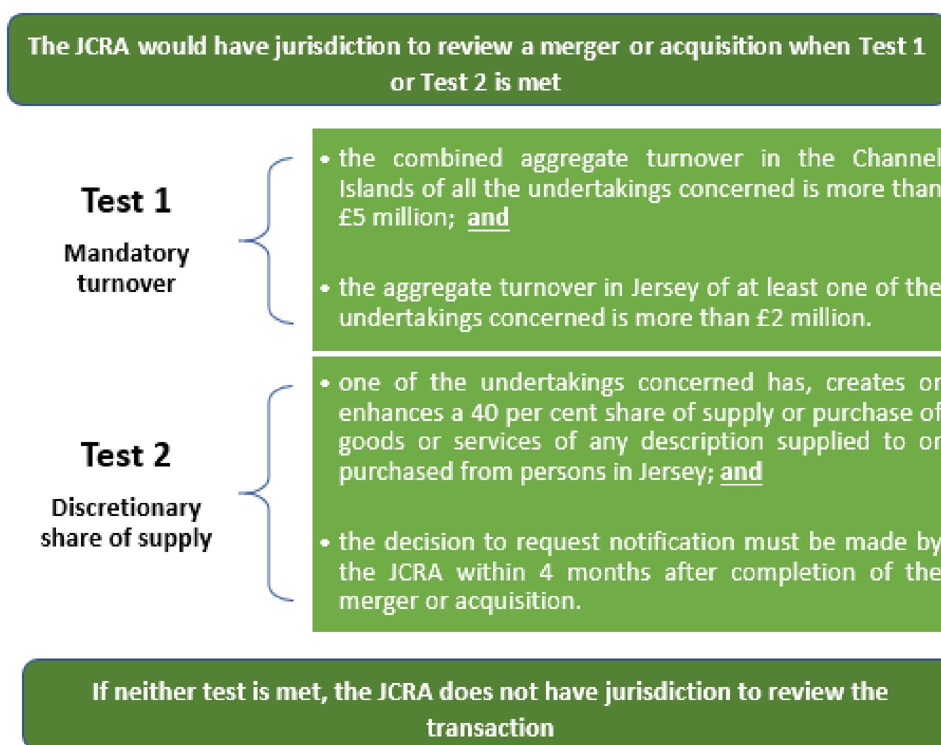
    a) the combined aggregate turnover in the Channel Islands of all the undertakings concerned is more than £5 million; and
    b) the aggregate turnover in Jersey of at least one of the undertakings concerned is more than £2 million.

12. It should be noted that Oxera has suggested that the new turnover test is accompanied by a short-form briefing paper, which could help clear uncontroversial cases more quickly, without the need for an in-depth review. In the absence of a short form notification, Oxera considers that the JCRA's 2016 proposal (of having both undertakings based in Jersey and each having a turnover of at least £2 million) would be more appropriate. This would ensure that the JCRA is able to focus on reviewing transactions involving businesses based in Jersey, although this rule would have the drawback of failing to capture transactions where the acquirer could be a credible entrant based in Guernsey or elsewhere.

- ***Options for consideration in relation to proposed share of supply test***

13. As regards the proposed discretionary share of supply test, Oxera advised that a threshold of 40% should apply to all types of transactions (whether vertical, horizontal or conglomerate) which is an increase of 15% on the current thresholds (for vertical and horizontal mergers). This is considered appropriate as the discretionary share of supply rule is meant to capture exceptional cases, where although the turnovers of the parties are low, their shares of supply are significant in a given market. Moreover, the current thresholds imply that a transaction that allows four equal firms to operate in the market could be caught. It is considered appropriate to set the share of supply threshold at a higher level of 40%, which assumes that most mergers among competitors in small markets will be justified by the need to operate at efficient levels of production.

14. The below illustration provides an overview of Jersey's merger control regime should Oxera's recommendations be implemented (**Option 1**).



15. As outlined, is anticipated that the mandatory test under Option 1 will likely capture more transactions (including potentially some uncontroversial ones) than the test put forward by the JCRA in 2016, as Oxera's proposal only requires one undertaking to generate a turnover of £2 million in Jersey. However, on the other hand, the test put forward by the JCRA in 2016 may fail to capture some transactions that could lead to a loss of (future) competition in Jersey. This reiterates the importance of striking the right balance (i.e. "where to set the bar") and any further options that may be put forward in the context of this consultation will be carefully considered.

16. Oxera was also asked what advice they would give if Option 1 could not be practically implemented. As outlined, in that case Oxera considers that the JCRA's 2016 proposal, which requires at least two undertakings to generate £2 million turnover in Jersey, could serve as an alternative. This solution would likely reduce the number of notifiable transactions and allow the JCRA to focus on reviewing those transactions involving

businesses based in Jersey. However, as outlined, this option would have the drawback of potentially failing to capture transactions where the acquirer could be a credible entrant based in Guernsey or elsewhere.

17. Important to note is furthermore that should respondents consider the JCRA's 2016 recommendations as regards turnover to be preferable to Option 1, Oxera recommends that this is accompanied by increased flexibility for the JCRA to call in for review transactions – which do not meet the mandatory notification thresholds – under the discretionary share of supply test. It is therefore important to recognise the linkage between the principal turnover test and the additional discretionary share of supply test. As such, if the original 2016 JCRA proposal is implemented, which is likely to capture fewer transactions, the JCRA will need to be appropriately empowered under the share of supply test so that it can review transactions, that are not notifiable under the principal test, but which may nonetheless affect competition in Jersey.

18. In the event the JCRA's 2016 recommendations as regards turnover would be preferred, Oxera takes the view that the current 25% share of supply threshold should be maintained for the purposes of the discretionary test. This would allow the JCRA to be flexible and potentially review cases where one important player in Jersey is being acquired by a firm based elsewhere. This would mitigate the risk that important transactions, that could lead to a loss of potential competition in the Island, would be missed.

19. The below illustration provides an overview of Jersey's merger control regime should the JCRA's 2016 recommendations as regards turnover be implemented (**Option 2**).