

STATES OF DELIBERATION

29th July, 2009

Billet d'État No. XXI (Volume II) Article 9

Commerce and Employment Department

Promoting Competition and Preventing Market Abuse

AMENDMENT

Proposed by: Deputy D De G De Lisle

Seconded by: Deputy

To:

- a) delete “, thresholds, criteria” from Proposition 1;
- b) insert at the end of the words in both Proposition, 1 and 2: “, but that the thresholds and criteria shall be as set out in Proposition 2A; and
- c) insert a proposition between propositions 2 and 3, as follows:

“2A. That, with reference to thresholds and criteria, the following shall apply:

Thresholds

A proposed merger or acquisition will be required to be referred to the Regulatory Authority before being executed where the ‘share of supply or purchase’ of one or more parties to the merger in any product or service exceeds certain thresholds. The merger is subject to the requirement for prior approval in three situations:

- Where it results in a share of supply or purchase of 25% or more being achieved, or increased. This threshold is intended to apply to ‘horizontal mergers’, i.e. where the parties are existing competitors, and their combined shares of supply or purchase equal or exceed 25%. So for example, where one competitor has 24% and the other has 1%, the parties to the merger would need to apply for approval. Equally, where one party has 15% and the other has 10%, the parties would need to apply.
- Where one party has a share of supply or purchase of 25% or more, and the other has a ‘vertical’ relationship with that party (for example, as a supplier to or customer of that party). So for example, if a company with a 25% or more share of supply of bricks in Guernsey was to merge with a house builder, this would require an application for approval. Equally, if a company with a retail

share of 25% of potatoes was to merge with a potato producer, this would also require an application.

- Where one party has a share of supply or purchase of 40% or more, the merger will require prior approval. This is designed to deal with a situation where there is no horizontal or vertical relationship between the parties, but where the merger may nevertheless raise competition concerns. These types of mergers are referred to as conglomerate mergers. An example might be if a major electricity supplier was to merge with a major telecommunications supplier.

It should be emphasized that these thresholds are purely jurisdictional tests, and do not imply in any way that the merger is problematic from a competition point of view. The Regulatory Authority can reach such a conclusion only after a full assessment as to whether the merger would substantially lessen competition.

Criteria: The share of supply/purchase test

The share of supply/purchase test is not to be confused with a market share test. Market shares can be determined only after a proper economic assessment of what the relevant market is. The ‘share of supply/purchase’ test is designed to avoid the need for the parties to undertake such an economic assessment – which may be open to varying views – before deciding whether the merger needs approval. To determine whether the share of supply/purchase test is met, the parties should look at the various products and/or services they supply or purchase in Guernsey and assess their respective share of the supply or purchase of each product and/or service. A number of measures may be used in determining share of supply such as value of sales or purchases (i.e., turnover), capacity (in the case of a manufacturing business), floor space (in the case of a retailing business), and/or employees. Where more than one such measure is available, and any of them results in the threshold being exceeded, the parties should apply for approval”.

Explanatory note

The amendment would bring in the same thresholds as Jersey has had in place working successfully for 3 years now—a very simple, practical, single and less burdensome on companies/businesses ‘share of supply purchase test’ to assess whether any merger has to be approved by the Regulatory Authority. The ‘share of supply or purchase test’ --also used by the Office of Fair Trading (OFT) responsible for competition matters in the UK --avoids the complicated and onerous to business market share tests, ensures commonality in the Channel Islands and sets the stage for Pan Channel Island joint working on mergers and acquisitions. It allows a uniform integrated approach and keeps the costs to businesses as low as possible. The Jersey experience shows that there does not appear to be a need for a turnover test.

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AMENDMENT

Proposed by: Deputy J Kuttelwascher

Seconded by: Deputy M H Dorey

To insert at the end of the words in Proposition 2:

“; and that the Commerce and Employment Department shall by Order prescribe fees for the consideration of formal mergers and acquisitions applications with effect from the commencement of the Mergers and Acquisitions legislation proposed in that Report”.