AFR ADVOCATES

Competition Law

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Competitive Guernsey

Guernsey has been considering the introduction of local competition law since at least 2005 and, by bringing into effect The Competition (Guernsey) Ordinance, 2012 on 1 August 2012, has introduced an effective Competition Law regime, to regulate the 3 core areas recognised in most competition regimes, namely the abuse of a dominant position, anti-competitive arrangements, and mergers and acquisitions.

The history of the journey from 2005, or earlier, to now is beyond the scope of this article, but it may surprise a number of those who complain that such legislation is novel and unnecessary for Guernsey, as it is neither a member of the United Kingdom nor the EU, to realise that in fact Competition Law in its wider sense has applied in Guernsey for many years. Any agreement or conduct which affects trade between, for example, Guernsey and Ireland and France would be subject to Irish, French and broader EU competition rules. This was confirmed in the case of The Community v Konica UK Limited and Konica Europe GmbH back in 1988.

Prior to the introduction of Guernsey's first competition law, Guernsey largely used UK law for the basis of its rules, notably, for instance, in relation to mergers and acquisitions.

Logically and sensibly Guernsey's competition law is largely modelled on those already in force in Europe and its fellow Channel Island jurisdiction of Jersey. Findings of anti-competitive behaviour by the European Commission can be headline international news, often for the size of fine which can be imposed for abuses of a dominant position, but also for the imposition of conditions on a merger or even blocking the merger entirely, if it is decided that the merger would hinder effective competition.

Under its Competition regime, the Guernsey Competition and Regulatory Authority (GCRA) and the Courts of Guernsey must "take into account the principles laid down by, and any relevant decisions of, the Court of Justice or General Court of the European Union in respect of corresponding questions arising under Community law in relation to competition within the internal market of the European Union". Although recognising European decisions, this wording seems to allow the GCRA and the Courts wide scope to determine the application of EU competition law precedent in Guernsey.

The fact that the Guernsey Law is also very similar (although not identical) to the Jersey legislation, which was introduced in 2005, is designed to facilitate a common approach to implementation which is reflected in the recently created pan-island regulator, the Channel Islands Competition and Regulatory Authority (CICRA) of which the Guernsey 'arm' is the GCRA. This is also reflected in certain provisions of the Guernsey Law, such as it applying to mergers or acquisitions where the combined applicable turnover of the undertakings involved in the transaction arising in the Channel Islands (that is the Bailiwicks of Guernsey and Jersey) exceeds £5 million.

The GCRA replaces Guernsey's previous regulatory authority, the OUR, with its new title and remit reflecting the addition of competition to its more restricted and specific regulatory remit.

Although the Jersey Law is some 7 years old, neither the law nor the body responsible for administration and enforcement, the Jersey Competition Regulatory Authority (JCRA), are considered in Jersey to be an unmitigated success, so the States of Guernsey has taken note of some of the more contentious aspects of the Jersey law and has chosen to adopt a different approach on some issues.

Again although based on Jersey and EU law, the Guernsey Law has to some degree acknowledged that as a 'small island economy' there are unique challenges and issues that need to be addressed through the competition regulatory framework that is adopted.

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Guernsey is no different from most offshore jurisdictions in facing the same or similar issues associated with larger jurisdictions, but on a smaller scale. The regulations and particularly their implementation and exercise should be tailored to specific market needs. The previous regulatory regime in Guernsey, restricted as it was to telecommunications, post and electricity, at times demonstrated in its implementation that it may not always be appropriate to import a regulatory or competition regime unchanged from larger jurisdictions without taking into account the offshore or small economy specifics.

The new competition laws are primarily concerned with conduct and turnover in Guernsey. International mergers and acquisitions are unlikely to be affected.

Specifically, the new Law prohibits anti-competitive agreements, ensures that businesses in a market do not abuse a dominant position, and requires that certain mergers and acquisitions be approved in advance by the GCRA. The Law gives some definition to these core elements:

- Conduct which constitutes the abuse of a dominant position within the islands is prohibited including:

  - unfair purchase or selling prices (e.g. price discrimination, excessive prices or predatory pricing);
  - limiting production, markets or technical development to the prejudice of consumers;
  - applying dissimilar conditions to equivalent transactions with other trading parties thereby placing them at a competitive disadvantage;
  - making the sale of one product conditional on another that the customer does not really want.

  Definitions of dominance have developed over the years and can vary across different markets.

  Generally, and at its most basic, if an undertaking is able to set prices or operate independently of the actions of competitors or the wishes of consumers then they are likely to occupy a dominant position. Percentage shares of markets can be relevant but are not the sole determinant in a properly administered regime. For example there could be a finding of dominance in a very fragmented market even if an undertaking has as little as 25% of the market, whereas in other markets a much higher market share would be needed .

- "Anti-competitive practices" which have the object or effect of preventing competition in the islands are also prohibited. Examples of such arrangements include:

  - price fixing;
  - market sharing;
  - in certain circumstances, exclusive supply and distribution agreements.

  Such practices are any agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services.

  The key issue is the object or effect of such agreements, so the motive of the parties is irrelevant. Even if they did not intend to prevent competition then such an agreement may still be caught.

  The definition of "agreement between undertakings" is wide, and includes an agreement whether or not it is legally enforceable, a decision by an association of undertakings or even just a concerted practice involving undertakings. We have already seen Press references to agreements between Doctors for consultation charges and the Guernsey Bar Council fees for conveyancing as such arrangements.

  Other examples are agreements or informal arrangements between tenderers for a contract not to go below a certain price, or particular exclusive relationships. Even informal nonbinding agreements are caught by the Laws. Cartels are considered to be one of the most serious offences under competition law.

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In limited circumstances, the GCRA may grant an exemption from this prohibition for a particular arrangement.

In order to qualify for an exemption, the arrangement must, amongst other things:

- improve the production or distribution of goods or services or promote technical or economic progress in such production or distribution;
- allow consumers a fair share of any resulting benefit; and
- not afford the ability to / possibility of eliminating competition in respect of a substantial part of the goods or services / market in question.

However, before breathing a sigh of relief, the experience in other jurisdictions is that the granting of such exemptions is rare.

- The GCRA's approval is required before certain mergers and acquisitions can be implemented.

The simple fact that a merger or acquisition, mostly the acquisition of shares (and hence control) in a company, the acquisition of a business or setting up of a joint venture, has occurred is not necessarily a problem.

However, the definition in the Guernsey Law is very wide. The GCRA will need to be seen to operate in such a way that this regime does not create unnecessary hurdles.

If the transaction is going to have an appreciable effect on competition within any market then it needs to be addressed. Echoing the earlier point about small economies, it must be addressed proportionately and with the best long-term interest of the Guernsey consumer and the wider Guernsey economy in mind. The GCRA must look to encourage, not deter, investment in the Bailiwick. In some instances that may require market consolidation.

Whilst some jurisdictions, including Jersey, have a regime of merger control based on the parties' share of supply, a merger or acquisition will require the prior approval of the GCRA if:

- the combined applicable turnover of the undertakings involved in the transaction arising in the Channel Islands exceeds £5 million; and
- two or more of the undertakings involved in the transaction each has an applicable turnover arising in Guernsey which exceeds £2 million.

Such mergers will only be approved if the GCRA is satisfied that they will not (a) substantially lessen competition and (b) prejudice consumers, the economy of the Bailiwick and the public interest.

If approval is required and either not sought or not given:

- no right, title or interest in any shares in a Guernsey company; and
- no right, title or interest in any property in Guernsey or governed, according to the Guernsey rules of private international law, by the law of Guernsey,

passes, vests, is transferred, charged or otherwise dealt with in accordance with the terms of the merger or acquisition.

When the GCRA grants an exemption or approval, this can be effective from a date earlier than the date on which it was granted, but it must be noted that as regards a merger or acquisition, the effect of a breach continues unless and until the GCRA approves the merger or acquisition and authorises the dealing in the shares or property in question.

The remit of the GCRA is wide, and the conditions they impose may bind both the applicant and any other person or undertaking (whether or not existing at the time of the approval) specified by the GCRA.

As well as conditions the GCRA can impose fines for breaches, but is required to take certain factors into account when determining whether or not to impose a fine and the amount of any such fine, subject to express provisions governing the calculation of turnover:

- whether the breach was brought to the attention of the GCRA by the person;
- the seriousness of the breach;
- whether it was committed intentionally, recklessly or negligently;
- any efforts to rectify the breach and prevent recurrence;
- the potential financial consequences of imposing the penalty for the person / undertaking concerned and third parties; and
- penalties imposed by the GCRA in other cases.

The maximum fine permissible is up to 10% of annual turnover (for a period of up to three years of the infringement) which will be paid to the States of Guernsey.

Generally speaking, the place in which turnover arises is determined by the location of the customer to whom the products are sold or the services provided. In most cases, therefore, it is the turnover derived from sales of products and services to Channel Island customers that is relevant to calculating whether the thresholds are exceeded. Turnover is calculated by reference to an undertaking's preceding business year or, if no figures are available for that year, the one before it. As a general rule, only amounts derived from the sale of products and services in the course of an undertaking's ordinary activities are taken into account, net of directly related taxes.

Special rules apply to insurance businesses and also to credit and financial institutions. As regards the latter, turnover is calculated by reference to the place where specific income items are received by the institution or a branch or division of it, rather than where the underlying customers are located. Whilst it is envisaged that this may result in many credit and financial institutions exceeding the turnover thresholds noted above, a separate preliminary review process has been implemented which is designed to weed out relevant transactions warranting the GCRA's further consideration under the normal review process.

Some of the perceived benefits of utilizing a turnover test are:

- it is more objective, and makes it easier for companies operating in both islands to know whether they need approval for a merger or acquisition;
- the GCRA will have more time to focus on local matters because there will be fewer large international mergers requiring approval.

Interestingly, and subject to the approval of the States of Jersey, Jersey intends to replace its share of supply test with the same turnover test.

Where a cartel exists (i.e. an agreement between businesses not to compete with each other), "whistleblowers" that report their activity, and co-operate with the investigation, are to be treated leniently

The future

This is the beginning, rather than the end of changes in Guernsey, and the Channel Islands generally.

The coming into force of the Competition regime is an opportunity for Guernsey businesses to consider their behaviour and position in the marketplace. Those that use price fixing of any kind, or have arrangements with competitors limiting or controlling their output are likely to be in violation of the new law and anyone planning any kind of merger or takeover of another business would be advised to take legal advice early on.

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When the States of Guernsey debated the topic back in 2005 and when it introduced the enabling legislation in 2009, it also considered the issue of trading standards and the protection of consumers, supply of goods and services and standards that should be observed by and be enforceable against undertakings. One of the stated aims of the new regime is to make provision "for the benefit of consumers or any class or description thereof".

Currently there is very little if any consumer legislation in Guernsey and in this writer's opinion the introduction of the Competition Law and Ordinance means that the next logical, and some might say overdue, tranche of legislation will be in this area.

Whether overdue or not it is important that the legislators, and the GCRA, recognise the local economy and market conditions and do not put in place an inappropriate and disproportionate regime. All and any such laws need to be flexible and proportionate – as was seen at times with the OUR, policies and regimes that developed in larger economies may not work or be necessary in Guernsey.

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