STATES OF JERSEY

REVIEW OF THE CIRCUMSTANCES AROUND THE JERSEY COMPETITION REGULATORY AUTHORITY'S DECISION ON ATF FUELS

Presented to the States on 20th December 2018
by the Chief Minister

STATES GREFFE

FOREWORD

States Members may be aware of a ruling by the Jersey Competition Regulatory Authority ("JCRA") in March 2016, that ATF Fuels had breached the Competition (Jersey) Law 2005, but in a judgment released in January this year, the Royal Court overturned the decision.

The States of Jersey established the Competition (Jersey) Law 2005 ("the Competition Law") in order to ensure that there was independent supervision of competition in the supply of goods and services. This duty was given to the JCRA. The Government's responsibility is to ensure that the competition system as a whole is operating properly, and that the JCRA is exercising its powers reasonably.

My predecessor therefore commissioned a review of the circumstances leading up to the decision of the JCRA and its handling of the case.

The focus of the review was to establish whether the JCRA had discharged its legal duties appropriately, and whether there were any significant deficiencies in how the Competition Law had operated.

The Report, by Kassie Smith, Q.C. of Monckton Chambers, has now been received, and is being presented to the States to meet the commitment that this would be published.

The Report concludes that the Authority has acted appropriately in deciding to conduct an investigation and in reaching its decision.

There are some recommendations restating views expressed by Oxera that the States should revisit the statutory appeals framework, and to establish litigation resources needed by the JCRA. The latter will need to be subject to a Government Plan bid, and the States Treasury has been asked to take this forward. Work on legislative change will be progressed early in the New Year.

There are new recommendations which we will now consider, relating to –

- establishing a formal settlement procedure so that companies under investigation have a clearer alternative path to avoid action being taken against them by the JCRA;
- requesting the JCRA to record and explain how it makes its decisions to investigate companies, in order to aid public confidence in its actions;
- requesting the Ports of Jersey to consider and clarify the ways in which economic regulation licences will work for Port operators that are not licensed by the JCRA.

CHIEF MINISTER

REPORT OF KASSIE SMITH, Q.C.

Introduction

1. On 8 January 2018, the Royal Court handed down judgment in the appeal *ATF Overseas Holdings Ltd. v Jersey Competition and Regulatory Authority* [2018] JCR 004.

2. The Appellant ("**ATF**") had appealed against a decision of the Jersey Competition and Regulatory Authority ("**JCRA**" or "**the Authority**") of 30 March 2016 ("**the Decision**"). In the Decision, the JCRA concluded that ATF had contravened Article 16 of the Competition (Jersey) Law 2005 ("**the 2005 Law**") by abusing a dominant position in the market for the supply of Jet A1 aviation fuel ("**aviation fuel**") at Jersey Airport in the following two ways:

   a. refusing to supply aviation fuel to Aviation Beauport Limited ("**ABP**") for the purposes of supplying that fuel to its third party customers at Jersey Airport; and

   b. unfairly discriminating in its pricing in respect of sales of aviation fuel to ABP by charging ABP higher prices than other comparable customers.

3. In its judgment, the Court held that ATF "*has not abused its dominant position in the market for the supply of aviation fuel at Jersey Airport during the period in question, whether as a result of its refusal to sell to ABP for the purposes of resale or by the pricing structure offered to ABP …"*.[1] As a result, the Court held that the Decision of the JCRA was wrong and set it aside.

Terms of Reference for this Review

4. I have been asked by the States of Jersey to carry out a review of the circumstances leading up to the Decision, including, whether the JCRA discharged its legal duties appropriately and whether there are any significant deficiencies in how the competition law has operated.

5. Specific Terms of Reference for the review were approved by decision of the Assistant Chief Minister on 20 March 2018. A copy of the Terms of Reference is at **Annex A**.

6. The Terms of Reference can be divided into two distinct parts. The first part relates to the circumstances leading up to the Decision and, in particular, to the quality and adequacy of the investigation carried out and decisions reached by the JCRA. In other words, whether the JCRA discharged its legal duties appropriately in reaching the Decision.

7. The second part relates to "*substantive principles established in the judgment*". In particular, whether there are any significant deficiencies in how the competition law has operated and how these might be addressed, and how the

[1] Paragraph 142, Judgment.

licensing issue was addressed by the Court and by the Ports of Jersey ("**PoJ**"). This report separately addresses each of these parts of the Terms of Reference.

Process of my review

8. In preparing this report, I have been provided with and have reviewed a large number of documents produced during the JCRA's investigation and the subsequent appeal to the Royal Court, including all information requests made by the JCRA to ATF and PoJ; the responses to those information requests and all submissions (both written and oral) made by ATF and PoJ to the JCRA; certain JCRA Board papers; and all affidavits and written submissions made by the parties to the Royal Court.

9. I received written representations from a small number of stakeholders, and I held meetings in Jersey on 23 and 24 July 2018 with stakeholders to address points of clarification. A list of stakeholders from whom I received representations and/or with whom I held meetings in Jersey is at **Annex B.**

Relevant background

The Competition (Jersey) Law 2005

10. The investigation was carried out and the Decision made under the 2005 Law. The 2005 Law reflects substantive and procedural provisions of UK and EU competition law.

11. Article 16(1) of the 2005 Law prohibits "*any abuse by one or more undertakings of a dominant position in trade for any goods or services in Jersey or any part of Jersey*". Article 16 reflects the terms of Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**") and the Chapter I Prohibition under the UK's Competition Act 1998.

12. Moreover, Article 60 of the 2005 Law provides that "*[t]he Authority and the Court shall attempt to ensure that so far as possible questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under European Union law in relation to competition within the European Union*". Therefore, in applying the provisions of the 2005 Law, including the Article 16(1) prohibition on abuse of a dominant position, the Authority and the Jersey Court were required to attempt to ensure that they acted consistently with EU case-law.

13. Part 5 of the 2005 Law deals with investigations by the Authority. Article 26(1) of the 2005 Law provides that the Authority "*may conduct an investigation if it has reasonable cause to suspect that a person – (a) is in breach of … Article 16(1) …*". Therefore, the threshold test for commencing an investigation is a "*reasonable cause to suspect test*".

14. As part of an investigation, under Article 27 of the 2005 Law, the Authority has the power by notice to require a person being investigated or any other person "*that appears to the Authority to be in possession of relevant information or documents*" to provide information and/or documents to the Authority and to answer questions in respect of information. If that person fails to comply with the Authority's notice or "*knowingly or recklessly provides information that is*

false, misleading or incomplete", then that person is guilty of an offence and liable to a fine.

15. Following an investigation, if the Authority proposes to make a decision that a person has acted in breach of *inter alia* Article 16(1) then it *"must give the person written notice of its proposed decision and allow the person a reasonable time to make representations to it before making any decision*".

16. The Authority has published *CICRA Guideline 10 – Procedures for investigations conducted by CICRA* ("**the Investigations Guideline**") which seeks to explain to consumers, businesses and their advisers the procedures that the Authority uses to investigate potential breaches of Jersey competition law and the approach that the Authority will take to such investigations. I refer further to the Investigations Guideline below.

17. Article 53(1) of the 2005 Law provides that a person may appeal against a decision by the Authority that it is in breach of Article 16(1).

18. Article 53(3) of the 2005 Law provides that "*[i]n determining an appeal under this Article the Court is not restricted to a consideration of questions of law or to any information that was before the Authority*". Moreover, under Article 53(4), when determining such an appeal the Court may "*confirm the decision of the Authority appealed against, revoke the decision or substitute for the decision any decision the Authority could have made*".

19. Therefore, an appeal against a decision by the Authority is in the nature of a full rehearing and full review of the merits of the case. Notably, on such a rehearing, the Court may receive and consider evidence and information that was not before the Authority when it made its decision, and it may consider questions of law that were not before the Authority.

The JCRA's investigation

20. In June 2014, Fuel Supplies Channel Islands Limited ("**FSCI**" or "**Rubis**") gave three months' notice that it would cease to supply aviation fuel at Jersey Airport. FSCI/Rubis had supplied aviation fuel to ABP for resale. On 27 June 2014, ATF entered into a Fuel Operators Agreement with Jersey Airport to supply fuel at Jersey Airport and also a Licence Agreement with the Public of the Island of Jersey regarding fuel storage at the Airport. FSCI/Rubis stopped supplying fuel at Jersey Airport on 1 October 2014.

21. In January 2015, the JCRA received a complaint from ABP to the effect that it was being treated unfairly by ATF in respect of the supply of aviation fuel at Jersey Airport. On 6 February 2015, the JCRA Board approved the opening of an investigation under Article 26 and the use of formal investigation powers under Article 27 of the 2005 Law.

22. On 2 March 2015, the JCRA issued an information request to ATF under Article 27 of the 2005 Law. ATF responded to that request on 17 March 2015. The JCRA sent a supplemental, informal request for information by e-mail to ATF on 19 March 2015. ATF replied by e-mail on 23 March 2015. On 31 July 2015, the JCRA sent a letter to ATF setting out "*the factual background to its findings to enable any issues of fact to be challenged as appropriate and*

any errors corrected prior to the JCRA issuing a decision in respect of its findings". In addition to the fact checking, the letter also set out various specific questions arising from the investigation. ATF responded to that letter on 14 August 2015. On 28 August 2015, the JCRA issued a further information request to ATF under Article 27. ATF responded to that request on 4 September 2015.

23. On 11 September 2015, the JCRA sent its draft Decision to ATF and indicated that ATF had a period of one month to respond, and that the JCRA would consider any representations that ATF wished to make. ATF responded with detailed representations by way of its letter dated 12 October 2015. On 20 November 2015, the JCRA wrote to ATF inviting it to a meeting to discuss the response in more detail and asked specifically for further clarification and/or evidence on three particular issues, including asking ATF to identify the factors which it takes into account when calculating fuel prices and the weighting it gives to each factor.

24. The meeting between the JCRA and ATF took place on 3 December 2015. For ATF, Peter de Putron, Hiren Patel and Jonathan Best of ATF attended the meeting, together with ATF's Counsel, Alistair Lindsay. The JCRA was represented by Michael Byrne, Sarah Livestro, Jonathan Tooley, together with their lawyer, Garrett Breen.

25. Following this meeting, ATF sent a letter to the JCRA dated 16 December 2015 enclosing a document entitled *Submission by ATF on Abuse*. In its covering letter, ATF stated that "*[i]n respect of the other matters identified for submission, having considered the full explanations and documents already provided to JCRA, we do not consider that they need to be provided*". On 26 January 2016, the JCRA wrote to ATF asking it to address the further issues discussed at the meeting of 3 December 2015, including providing an explanation of the cost drivers for the price of aviation fuel. By a letter of 15 February 2016, ATF replied to JCRA stating *inter alia* that it had "*provided all the information it intends to provide to CICRA*". The JCRA responded to this letter on 29 February 2016 noting that ATF had provided all the information it intended to provide.

26. On 18 January 2016, the JCRA had issued an information request to PoJ under Article 27 of the 2005 Law. PoJ had responded to that request on 1 February 2016. I consider this request and reply further below.

27. On 30 March 2016, the JCRA issued the Decision.

ATF's appeal

28. ATF filed its appeal against the Decision on 26 April 2016. ATF filed Written Submissions in support of its appeal on 8 July 2016 together with an economic assessment by Derek Ridyard of RBB Economics dated 8 July 2016 and the first Affidavit of Hiren Patel of ATF dated 8 July 2016.

29. The JCRA filed a written Response dated 5 August 2016, together with a report by Wynne Jones of Frontier Economics; the first Affidavit of Maggie Barnes of ABP and the first Affidavit of Sarah Livestro of the JCRA.

30. ATF filed a second Affidavit of Hiren Patel dated 1 November 2016, and a third Affidavit dated 1 December 2016. In response, the JCRA filed the second Affidavit of Maggie Barnes of ABP dated 9 December 2016 and the First Affidavit of Nicholas de Breyne of FSCI dated 12 December 2016.

31. The hearing of the appeal had been originally listed to take place on 9 to 11 January 2017. However, on 5 January 2017, ATF filed the fourth Affidavit of Hiren Patel and the first Affidavit of Doug Bannister of PoJ both dated 5 January 2017.

32. On 6 January 2017, the JCRA applied for the fourth Affidavit of Hiren Patel and the first Affidavit of Mr. Bannister to be excluded or for the hearing to be adjourned. The Court rejected the JCRA's application to exclude evidence and ordered that the hearing be adjourned. On 10 January 2017, the Court made orders setting directions for the adjourned hearing, the filing of new evidence and regarding costs.

33. The JCRA filed the first Affidavit of Michael Byrne of the JCRA, the third Affidavit of Maggie Barnes of ABP and the second affidavit of Nicholas de Breyne of FSCI, each dated 24 February 2017. In response, ATF filed the fifth Affidavit of Hiren Patel dated 16 March 2017 and the second Affidavit of Doug Bannister of PoJ dated 15 March 2017. Subsequently, ATF filed sixth and seventh Affidavits of Hiren Patel dated 7 September 2017 and 28 September 2017.

34. ATF produced a Skeleton Argument dated 19 September 2017 and the JCRA produced its Skeleton Argument on 26 September 2017. The hearing before the Royal Court (made up of Sir William Bailhache, Bailiff and Jurats Crill and Ramsden) took place from 3 to 6 October 2017.

35. The Court handed down its judgment on 8 January 2018.

36. On 13 February 2018, the JCRA issued a press release confirming that it had decided not to appeal the Royal Court's judgment. The press release stated that "*[w]hile there are important aspects of the judgment that merit an appeal, the legal costs (ultimately paid by the taxpayer) pose too high a risk should the appeal be unsuccessful. CICRA has therefore decided not to take the case further to the appeal court. In the light of this judgment, CICRA will engage with policy makers to consider revisions to the competition law where appropriate to ensure that it is better able to protect businesses and business sectors as it is tasked to do by the States of Jersey.*"

Part 1: Review of the circumstances leading up to the Decision

37. The Terms of Reference identify the key stages in the case as including the following:

    a. The decision of the JCRA to conduct an investigation in March 2015;

    b. Submissions made to the JCRA and the resulting judgment exercised by the Authority on the substantive points made;

    c. The draft decision issued in September 2015;

d. The hearing meeting in December 2015;

e. The determination made by the JCRA in March 2016 that ATF had abused a dominant position.

38. A review is requested of the circumstances leading up to the Decision and whether:

a. The JCRA exercised its discretion reasonably in deciding to conduct an investigation. How did the Authority use its prioritisation principles and were they appropriately and proportionately applied?

b. Was the evidence available to the Board of sufficient quality and scope and appropriately considered and applied?

c. Had the Board properly considered the risks of taking the decision that it did in terms of the potential for appeal and quantified the level of litigation costs associated with that?

d. Had the JCRA reasonably examined and exhausted all avenues available to remedy the behaviours it considered problematic before making a final decision?

e. Overall, was the decision that the JCRA took reasonable and proportionate in the circumstances?

39. I will address issues (a), (c) and (d) first. I will then consider issues (b) and (e) together as they raise a number of overlapping matters.

Issue (a). The JCRA's initial decision to conduct an investigation

40. I am asked to consider whether the Authority exercised its discretion reasonably in deciding to conduct an investigation in the present case. In particular, I am asked to consider how the Authority used its prioritisation principles, and whether they were appropriately and proportionately applied.

The relevant legal test

41. As indicated above, under Article 26(1) of the 2005 Law, the JCRA "*may conduct an investigation if it has reasonable cause to suspect that a person – (a) is in breach of … Article 16(1) …*". This imposes a relatively low "*reasonable cause to suspect*" threshold which needs to be crossed by the JCRA before it can decide to conduct an investigation.

42. However, even if the "*reasonable cause to suspect*" test is met, the JCRA still has a discretion as to whether or not to start an investigation: Article 26(1) simply provides that the JCRA "*<u>may</u> conduct an investigation*" (emphasis added) if the test is met.

43. Section 3 of the Investigations Guideline addresses the JCRA's approach to opening an investigation. It refers to the "*reasonable cause to suspect*" standard that the JCRA will apply. It also provides as follows:

"Whether a reasonable cause to suspect exists will depend on our assessment of the information available. Information on potential infringements may come from complaints we receive, information we receive from leniency applicants concerning possible cartels, or information that otherwise becomes known to us, such as from the media or other public sources. …

Upon receipt of such information, we conduct a preliminary assessment to determine the likelihood of finding a breach of the law or a licence condition. Sources of information during a preliminary assessment can include any party or parties providing information to us, and public sources. Any information provided to us during this process is done on a voluntary basis. **We would normally expect to complete a preliminary assessment within two weeks**, depending on the availability of information, but the complexity and perceived urgency of the matter can influence these timescales significantly.

Having conducted a preliminary assessment, we determine whether a reasonable cause to suspect exists and, if so, if and when to commence a formal investigation. Even if a reasonable cause to suspect exists, we may still decide either not to commence a formal investigation, or to delay its initiation. Our decision will depend on considerations such as: the gravity of the conduct involved; the harm or potential harm caused to the Jersey or Guernsey economy, consumers, or businesses; whether the dispute is more applicable to private resolution among the parties involved; the matter's apparent urgency; and other activities that we are currently undertaking." (emphasis in original document)

The Authority's decision to commence the investigation

44. As I have indicated above, the Authority received a complaint from ABP in January 2015 to the effect that it was being treated unfairly by ATF in respect of the supply of aviation fuel at Jersey Airport. On 6 February 2015, the JCRA Board approved the opening of an investigation under Article 26 and the use of formal investigation powers under Article 27 of the 2005 Law.

45. I have seen copies of the following documents relevant to the JCRA's initial decision to conduct an investigation: (a) CICRA Board Paper dated 6 February 2015; and (b) Minutes of Board Meeting No. 175 of 6 February 2015. This issue was also discussed in my meetings with the Authority and with Margaret Barnes (formerly of ABP).

46. Mrs. Barnes explained to me that ABP raised two issues in its complaint to the Authority: third party sales and the price of fuel purchased for ABP's own use. She explained that ABP put together a bundle of documents which they presented to the Authority. This bundle consisted of a spreadsheet timeline of all relevant events, essentially the discussions that had taken place between ABP and ATF, and all relevant documents, such as e-mails, correspondence and notes of meetings. She said that she had a meeting with the Authority's staff member, Jonathan Tooley, in January 2015, where she presented him with ABP's complaint.

47. The Authority's Board Paper of 6 February 2015 records that ATF's retail market share in aviation fuel at Jersey airport was about 80% and it was the wholesale supplier to all other retail providers. It was the sole operator with full airport access, and the on-site fuel storage and airport fuel farm assets were in

the hands of ATF and/or Jersey airport. ATF therefore controlled the only supply chain in Jersey for aviation fuel. The Authority concluded that ATF therefore appeared to be the dominant (and only wholesale) aviation fuel supplier at Jersey airport. I note that, although ATF disputed dominance at an initial stage in the investigation, it eventually accepted that it was dominant in the market for the supply of aviation fuel at Jersey Airport and did not appeal that aspect of the Decision.

48. The Authority also recorded in its Board Paper that there was evidence that ATF refused to supply aviation fuel to ABP for resale to third parties, although ABP had previously obtained supplies of fuel from FSCI/ Rubis for third party resale for a number of years. Further, there was evidence that ATF was offering less favourable contract terms, including price, to ABP than to other fuel buyers, including those with smaller demand.

49. As a matter of fact, it has never been in issue that ATF was refusing to supply aviation fuel to ABP for resale to third parties (ATF argued that this did not amount to an abuse as a matter of law and/or that such refusal was objectively justified), nor has it been disputed that ATF was charging different, higher prices to ABP than to some other fuel buyers (again, ATF argued that the other fuel buyers who got lower prices than ABP were in a different position from ABP thus justifying the difference in prices and/or the differential pricing was justified on the basis of higher costs). As a matter of law, both refusal to supply and discriminatory pricing are generally recognised as potential abuses of a dominant position for the purposes of Article 101 TFEU and therefore are potential breaches of Article 16 of the 2005 Law.

50. In the circumstances, in my opinion, the Authority had clearly met the threshold set out in Article 26(1) of the 2005 Law to the effect that the Authority "*may conduct an investigation if it has reasonable cause to suspect that a person – (a) is in breach of ... Article 16(1) ...*". It was reasonable for the Board to have concluded on 6 February 2015 that there was reasonable cause to suspect that ATF was in breach of Article 16 of the 2005 Law.

51. However, as I have indicated above, even if the "*reasonable cause to suspect*" test is met, the Authority still has a discretion as to whether or not to start an investigation.

52. Mrs. Barnes told me that, during her meeting with Jonathan Tooley in January 2015, he explained to her that even if there was a case against ATF, the Authority would not necessarily take it up. The decision to proceed with an investigation would be one for the Authority's Board. She said that she was subsequently contacted by the Authority to say that they had decided that there was a case to answer and that they would be taking it on to investigate.

53. Section 3 of the Investigations Guideline sets out the considerations that the Authority will consider in deciding whether or not to exercise its discretion to commence an investigation. These include "*the gravity of the conduct involved; the harm or potential harm caused to the Jersey or Guernsey economy, consumers, or businesses; whether the dispute is more applicable to private resolution among the parties involved; the matter's apparent urgency ….*".

54. In their meetings with me and written submissions to me, various stakeholders complained that in their opinion the Authority had acted disproportionately in deciding to commence the investigation or that it should not have started the investigation because the issues were not "*material*". It was said that "*it is not really anything that would impact generally the market*" and "*too much time and effort [was put] into an investigation with relatively limited impact*".

55. In its Board Paper of 6 February 2015, the Authority addressed the gravity of ATF's conduct about which complaint had been made and the potential harm caused by it both to ABP itself and to customers. In particular, the Authority noted that, for a number of years, ABP had been the alternative fuel retailer to the main airport operator (previously FSCI/Rubis, then ATF) and the only Fixed Base Operator ("**FBO**") at Jersey airport. It noted that ABP typically bought 2 million litres per annum of jet fuel, around 20% of the Jersey market, making it one of the two or three largest aviation fuel buyers overall. About 75% of these purchases were for sales to third parties. The Authority also noted the negative impact on customers as a result of reduced choice as to fuel supplier resulting from ATF's alleged refusal to supply to ABP for resale.

56. As to price discrimination, the Authority noted that ABP estimated that it was paying 9–10 pence per litre more than it had under previous arrangements with FSCI/ Rubis against a background in which fuel prices had fallen substantially.

57. The Authority had clearly considered the gravity of the conduct involved and the harm or potential harm that it might cause. In the context of the market being that for the supply of aviation fuel at Jersey Airport, in my view, it would have been reasonable for the Authority to conclude that the potential negative impact of the conduct on the relevant market and upon ABP and customers was significant.

58. It is also important to bear in mind the fact that the investigation concerned an alleged abuse of a dominant position in breach of Article 16 of the 2005 Law (rather than, say, a market review carried out under section 6(4) of the Competition Regulatory Authority (Jersey) Law 2001), and therefore allegedly unlawful conduct. The JCRA explained to me that it also took into account that, in a case such as this, it has a law enforcement function. I consider that this is also a relevant consideration, as is the deterrent effect of proceeding against unlawful conduct.

59. Further, various stakeholders complained that the dispute between ATF and ABP could and should have been resolved by means other than an investigation under the 2005 Law. I note that the question of whether "*the dispute is more applicable to private resolution among the parties involved*" is one of the considerations which the Investigation Guideline says that the Authority will consider in deciding whether to exercise its discretion to commence an investigation under the 2005 Law.

60. The Authority explained to me that it was fully aware that it was a small organisation with limited resources and so had to be pragmatic about what cases to pursue. In the present case, it particularly examined whether the case might be amenable to private resolution, but concluded that it was not. The possibility of the parties being able to negotiate a settlement was also specifically considered in the Authority's Board Paper of 6 February 2015.

61. It is therefore clear that whether this matter could be dealt with by alternative means was considered by the Authority in February 2015 before deciding whether to commence the investigation. In my analysis of **Issue (d)** below, I address the further question of whether the Authority had "*reasonably examined and exhausted all avenues available to remedy the behaviours it considered problematic before making a final decision*". However, for the reasons which I develop further below in that analysis, I consider that, at the time that the Authority decided to commence the investigation in February 2015, it was reasonable for it to consider that ATF's conduct of which ABP complained was not amenable to private resolution.

The prioritisation principles

62. I am asked in particular to consider how the JCRA used its prioritisation principles when deciding to commence the investigation and whether they were appropriately and proportionately applied.

63. CICRA's Prioritisation Principles were published on 16 March 2016 over a year after the Authority's initial decision to conduct an investigation in this case.[2] However, I understand that the Authority had previously developed and approved a set of prioritisation principles for market study investigations in November 2014.[3]

64. The Authority explained to me that, in deciding in February 2015 whether or not commence the investigation into ATF's conduct, it did not apply the market study investigations prioritisation principles which were not applicable to an investigation into a potential breach of Article 16 of the 2005 Law. Instead, it applied the principles that were set out in the Investigation Guideline at the time. In the circumstances, this appears to be a reasonable approach for the Authority to have taken at that time. I have considered how the Authority applied the relevant Guideline principles above.

Conclusion

65. I conclude that it was open to the Board to have concluded on 6 February 2015 that there was reasonable cause to suspect that ATF was in breach of Article 16 of the 2005 Law, and that the Authority had therefore fulfilled the threshold test for starting an investigation under Article 26 of the 2005 Law. The Authority exercised its discretion as to whether or not it should commence an investigation taking into account relevant considerations, including the gravity or materiality of the conduct concerned and the potential harm caused by it both to ABP itself and to customers; the Authority's law enforcement functions; the Authority's limited resources and whether the matter was amenable to private enforcement.

66. I bear in mind that the decision that the Authority took in February 2015 was simply to commence an investigation, rather than any final or even 'minded to' decision that there actually had been a breach of Article 16 of the 2005 Law. In those circumstances, I consider that the Authority exercised its discretion reasonably in making the decision to conduct an investigation into ATF.

[2] https://www.cicra.gg/strategic-plans/prioritisation-principles/cicra-prioritisation-principles/
[3] *A review of the Jersey regulatory and competition framework*, Oxera, 16 Nov 2015, page 55.

67. As I indicate above, there were no prioritisation principles specifically applicable to the Authority's decision to commence the investigation into ATF in February 2015. The Authority appears to have applied the principles set out in the Investigation Guideline appropriately and proportionately.

Recommendations

68. There are now a set of prioritisation principles applicable to the 2005 Law.[4] In summary, these provide that, in deciding how to prioritise allocating its resources, the Authority will consider whether the matter before it can be resolved in a manner that is actionable, realistic and meaningful. The Authority will apply these principles in deciding whether to exercise its discretion in future cases, including decisions to commence investigations under Article 26 of the 2005 Law.

69. As I have indicated, concerns were strongly expressed to me by various stakeholders as to how the Authority exercised its discretion in this case and, in particular, that it focussed on a matter that stakeholders considered was not material. Although I have concluded that the Authority did exercise its discretion reasonably in this case, there is obviously a lack of public confidence in how it makes such decisions. I therefore recommend that, in future, the Authority specifically records and explains (perhaps in its Annual Reports)[5] how it has applied its prioritisation principles to its decisions whether or not to commence investigations under the 2005 Law.

Issue (c). Risks of appeal and level of litigation costs

70. I am asked to consider whether the Board had properly considered the risks of taking the decision that it did in terms of the potential for appeal and quantified the level of litigation costs associated with that.

Potential for appeal

71. Dr. Philip Marsden, the JCRA Board member with particular responsibility for the ATF investigation, explained to me in our meeting that it had been made very clear to the Board by the Authority's executive that, were an infringement decision to be made against ATF, it was "*very likely*" that ATF would appeal such a decision. That is consistent with all the correspondence and submissions which I have seen from ATF to the Authority throughout the investigation. In those documents, ATF made it clear to the Authority that it would take the Authority to court if it decided that ATF had acted unlawfully.

72. I have seen a copy of the CICRA Board Paper dated 18 March 2016, in which the Board was asked to approve the Authority's final Decision. In that Paper, it was explicitly stated that "*it is considered likely that ATF will appeal any finding of a contravention of the competition law by the JCRA*". All of the written submissions from ATF and the transcript of the hearing with ATF were provided to the Board with that Paper. It is clear that the potential for an appeal was specifically considered by the Board before it approved the final Decision.

[4] https://www.cicra.gg/strategic-plans/prioritisation-principles/cicra-prioritisation-principles/
[5] See, by analogy, paragraph 4.6 of the CMA's Prioritisation Principles (CMA 16).

73. However, Dr. Marsden explained to me that "*there seemed to be very minimal chance of any kind of resolution*" of the conduct by ATF. Therefore, he explained that, having concluded that ATF's conduct breached Article 16 of the 2005 Law, the only way in which it could be resolved was by the Authority making a decision which would likely be appealed.

74. Dr. Marsden explained "*We knew there was going to be an appeal likely, so we had a very good idea of what we were taking on*". However, Dr. Marsden emphasised that the Board had in mind that the Authority had a law enforcement function. The Authority also indicated to me that, as an independent regulatory body, it did not consider that it should avoid making a decision simply on the basis that the subject of the decision was well resourced and likely to appeal.

75. In my opinion, in all the circumstances, it was not unreasonable for the Board to have concluded that it should make the Decision and that it should not be dissuaded from carrying out its law enforcement functions on the basis that the Decision was likely to be appealed.

The level of litigation costs

76. Dr. Marsden also explained to me that, before making the Decision, the Authority had well in mind that any appeal would be costly and that the Authority "*do not have a ring-fenced litigation budget*". Although it would have been impossible exactly to quantify in advance how much an appeal would end up costing, he said that the Board were aware that it would potentially be costly. In particular, he emphasised that an appeal may be costlier in Jersey than in other jurisdictions because of there being a full merits appeal and the "*need to engage off-Island counsel*".

77. He also explained that the Board was updated monthly as to "*how things were developing*" after the Decision and were getting estimates of the costs of the appeal. He said that they were "*very aware of the bill that was going up*". However, he indicated that, "*you do not really want that to influence a law enforcement decision of that nature*".

78. It is correct that the JCRA does not have a ring-fenced litigation budget. In its November 2015 Report,[6] Oxera noted that, if a JCRA decision is appealed, the Authority needs to request funding from the Government which the Government can refuse. Oxera stated that "*[i]t is important that the JCRA has more certainty over funding, particularly for appeals. This would provide it with the comfort to proactively undertake investigations without the concern that it will not have the resources to pursue an appeal by a company*".[7] Therefore, Oxera recommended that the Government should "*provide an explicit commitment that it will fund the JCRA as necessary if the Authority faces a legal challenge*" and that, if the Government decides not to provide funding, "*it should give a reasoned decision explaining why it is not in the Island's interests to do so*".[8] I am not aware of what the Government's plans

[6] *A review of the Jersey regulatory and competition framework*, Oxera, 16 Nov 2015.
[7] *Ibid*., page 35.
[8] *Ibid*., Recommendation 18, page 77.

are with respect to this Recommendation, but no such commitment appears to yet have been made.

79. It is also the case that the nature of appeals under the 2005 Law is likely to increase costs. As I have indicated above, Article 53(3) of the 2005 Law provides that "*[i]n determining an appeal under this Article the Court is not restricted to a consideration of questions of law or to any information that was before the Authority*". Moreover, under Article 53(4), when determining such an appeal the Court may "*confirm the decision of the Authority appealed against, revoke the decision or substitute for the decision any decision the Authority could have made*".

80. Therefore, an appeal against a decision by the Authority is in the nature of a full rehearing and full review of the merits of the case. Notably, on such a rehearing, the Court may receive and consider evidence and information that was not before the Authority when it made its decision, and it may consider questions of law that were not before the Authority.

81. In its November 2015 Report, Oxera commented on the existence of a full merits appeal in Jersey and highlighted that, in a number of jurisdictions, there has been a move away from appeals mechanisms on the merits of the case to a narrower set of reasons that would allow an appeal to succeed.[9] Although the focus of Oxera's report was not on the costs of such appeals in Jersey, it is certainly the case that the nature of an appeal under the 2005 Law, i.e. that it is a full rehearing on the merits, will be likely to increase costs. This is not a matter that is within the control of the JCRA, but results from the legislative regime.

82. Further, appeals under Article 53 of the 2005 Law are to the Royal Court which is a non-specialist court. However, in its November 2015 Report, Oxera noted that "*... competition law decisions often involve issues of judgement in relation to quite complex economic issues*".[10] As a result, Oxera recommended that there should be a way for the Royal Court to gain access to, and appoint specialists, to help it deal with technically complex matters.[11] It does not appear that this recommendation has been acted upon. It is also the case that the 2005 Law is still relatively recent and that this was the first appeal against a decision of the Authority made on the basis of Jersey competition law.[12] The entirely reasonable unfamiliarity of the court and advocates with competition law may however have had the potential to increase costs in this particular case.

83. Moreover, in addition to instructing Jersey counsel to appear before the Royal Court (I understand that advocates from other jurisdictions cannot appear in Jersey courts), both parties appear to have instructed specialist competition counsel from other jurisdictions.[13] This duplicates costs. These factors are all

[9] *Ibid*., pages 11 and 72 to 74.
[10] *Ibid*., page 73.
[11] *Ibid*., Recommendation 8, page 76.
[12] Previous appeals have been against the JCRA's decisions in the field of telecoms regulation.
[13] ATF was represented by Alistair Lindsay, an English barrister, at the hearing with the JCRA on 3 December 2015. The Authority told me that they also instructed English barristers during the course of the investigation and appeal for advice on specialist competition law issues.

likely to have increased the costs of the appeal against the Decision, but they result from way in which the legal regime operates in Jersey.

84. Further, the way in which this particular litigation developed appears to have had the potential to have increased costs. This again was not within the sole control of the JCRA.

85. I understand that the appeal against the Decision in the instant case would have been subject to Part 15 of the Royal Court Rules 2004 and Practice Direction RC 05/25 on *Administrative Appeals*. These rules provide *inter alia* that, following the service of the notice of appeal by the appellant, there should be three rounds of evidence only: an affidavit from the respondent; an affidavit in response from the appellant; and an affidavit in reply from the respondent (see Rule 15/3). Except with the leave of the Bailiff, the day fixed for the hearing of appeal shall not be more than 4 months from the date of service of the notice of appeal (Rule 15/2). The Practice Direction indicates that hearings of administrative appeals are generally expected to last no more than half a day (paragraph 2).

86. ATF's appeal of the Decision was likely to raise relatively complex issues of competition law and practice, so it would not have been surprising if it took longer than anticipated in the Court Rules and Practice Direction. However, the appeal took significantly longer and involved substantially more rounds of evidence than anticipated by the relevant court rules. This would inevitably have increased costs (and delay).

87. In the present case, ATF lodged its appeal on 26 April 2016. The appeal hearing took place about 18 months later over the course of three days from 3 to 6 October 2017. I have summarised the appeal process in paragraphs 28 to 34 above. As can be seen from that summary, a very large number of affidavits, expert reports and written submissions were submitted over an extensive period of time by the parties. In particular, the hearing was originally listed to start on Monday 9 January 2017, but was adjourned by the court after the appellant (ATF) filed the fourth affidavit of Mr. Patel and the first affidavit of Mr. Bannister on Thursday 5 January 2017. This was the first time that the appellant had produced evidence from the PoJ itself on a central issue in the case (i.e. licensing by the PoJ of fuel suppliers at Jersey airport) and it inevitably led to the production of significant further evidence by the JCRA.

88. The Authority told me that it was "*surprised by … the extent to which the new evidence was coming in*" and the extent to which costs were increasing.

89. Finally, although there is no evidence that it happened in this particular case, the lack of certainty over the funding available to the JCRA to defend appeals and the nature of the appeal process under the 2005 Law create incentives for those disadvantaged by a JCRA decision to appeal that decision in the expectation that the Authority will decide not to defend it given the risks and costs involved and/or the hope of getting a better outcome from the court on the substance and/or just delaying implementation of the decision.[14]

[14] See also Chapter 7 of the Oxera November 2015 Report.

Conclusion

90. As I explain in my consideration of **Issue (d)** below, ATF made it quite clear throughout the investigation that it did not consider that its refusal to supply fuel to ABP for resale was unlawful, nor did it consider that its pricing to ABP was unjustified. ATF also made it clear that it would not refrain from the conduct in issue voluntarily. In those circumstances, the Authority, having concluded that ATF's conduct breached Article 16 of the 2005 Law, decided that the only way in which it could be resolved was by the Authority making a decision under the 2005 Law.

91. The Board properly took into account that such decision was likely to be appealed. The Board also properly considered the potential litigation costs of such an appeal. The nature of the appeal process in Jersey and the way in which this particular appeal was litigated may very well have increased the costs of that litigation. However, such matters were not within the sole control of the JCRA.

92. In all the circumstances, I consider that it was not unreasonable for the Board to have concluded that it should nevertheless make the Decision and not be dissuaded from carrying out its law enforcement functions on the basis that its Decision was likely to be appealed or the potential litigation costs of such an appeal.

Recommendation

93. I have highlighted above various concerns raised by Oxera in its report to the Government of Jersey of November 2015 as to the funding of the JCRA and the appeals process in Jersey. These concerns have been highlighted again by the process in the present case. As a result, the Government may wish to revisit the recommendations made in the Oxera report, particularly, Recommendations 7, 8 and 18,[15] which provided as follows:

> "7. The appeals process in Jersey should be reviewed, with a view to introducing a new 'unreasonableness' test that takes account of the legal system.
>
> 8. There should be a way for the Royal Court to gain access to, and appoint specialists, to help it deal with technically complex matters. …
>
> The government should consult with Treasury and provide an explicit commitment that it will fund the JCRA as necessary if the Authority faces a legal challenge. If the government does not want to provide the resources to defend an appeal (under competition law), it should give a reasoned decision explaining why it is not in the Island's interest to do so.".

[15] *A review of the Jersey regulatory and competition framework*, Oxera, 16 November 2015. Pages 76 to 77.

Issue (d). Alternative avenues available to remedy the conduct

94. I am asked to consider whether the JCRA had reasonably examined and exhausted all avenues available to remedy the behaviours it considered problematic before making a final decision. In order to address this issue, I need first to identify what alternative avenues were available to the Authority in the present case, and then to consider whether the Authority had reasonably examined and exhausted such alternatives.

Alternatives available to the JCRA

95. In the UK, there is a formal settlements procedure introduced by Rule 9 of the Competition and Markets Authority Competition Act 1998 Rules ("**the CMA Rules**"). This states that the CMA may decide to follow a settlement procedure in respect of an investigation under the Competition Act but only where a party to that investigation:

    a. Admits that it has been a party to an agreement or has been engaged in conduct which infringes one or more of the Chapter I prohibition, the Chapter II prohibition, the prohibition in Article 101(1) and the prohibition in Article 102 in relation to that investigation; and

    b. Agrees to an expedited administrative procedure for the remainder of the investigation.

96. Furthermore, under section 31A of the Competition Act 1998, in a case where the CMA has begun an investigation but has not yet made a decision, the CMA may accept commitments from a party being investigated which are appropriate to address the competition concerns it has identified. Commitments are offered voluntarily by the party concerned (but made binding upon acceptance by the CMA) and, unlike settlement, avoid an infringement decision. They are also subject to a transparent consultation process.

97. Similar settlement and commitments procedures exist in the EU. However, no such settlements or commitments procedures are available in Jersey to address conduct under the 2005 Law. I also understand that there is no formal power on the part of the Authority to compel parties to engage in mediation or independent arbitration in order to resolve disputes and/ or to address particular conduct. Therefore, the only alternative avenue available to the Authority to address ABP's complaint would have been some form of informal, voluntary mediation.

98. A number of stakeholders have told me in their written submissions and in meetings that they considered that there were alternatives avenues open to the Authority to address the complaint brought by ATF, and that these should have been used by the Authority in preference to a formal investigation under the 2005 Law. When asked by me what these alternative avenues might be, it was suggested for example that "*there could have been other roundtable discussions with the various parties involved. That could have been on a purely voluntary basis. It could have been mediated by a third party*."[16]

[16] Meeting with Andrew Boustouler, Chief Financial Officer of the Ports of Jersey.

Did the JCRA reasonably examine and exhaust the alternatives available to it?

99. Having concluded that the only alternative open to the Authority was some sort of informal, voluntary discussions or mediation between the parties, I now consider whether the Authority reasonably examined and exhausted such alternatives. In this regard, I will consider, first, the situation as at the time the Authority decided to commence the investigation into ATF's conduct in February 2015 and, then, the situation obtaining during the Authority's investigation leading up to the final Decision on 30 March 2016.

100. I address the Authority's decision to commence an investigation into ATF under Article 26 of the 2005 Law in paragraphs 44 to 61 above. I made some initial comments on the particular issue of how the Authority addressed the consideration of whether ABP's complaint was amenable to private resolution in paragraphs 59 to 61 above.

101. In June 2014, FSCI/ Rubis gave notice that it would cease supply of aviation fuel at Jersey Airport in three months' time. On 27 June 2014, ATF signed a Fuel Operators Agreement with Jersey Airport engaging ATF to supply aviation fuel at the airport. On 1 October 2014, FSCI/ Rubis stopped supplying aviation fuel at Jersey Airport.

102. Negotiations between ABP and ATF began about or shortly after FSCI/Rubis gave notice in June 2014 that it would cease supply of aviation fuel at Jersey Airport. These negotiations continued until shortly after ABP made its complaint to the Authority in January 2015. Mrs. Barnes told me that ABP had a number of meetings with ATF and exchanged e-mails and correspondence with them during that period. She explained that, by the time ABP contacted the JCRA in January 2015, it had been unable to reach an agreement with ATF. However, she explained that she continued to attempt to negotiate with ATF until about March 2015. However, she received a letter from ATF on 17 March "*saying that we were breaking various laws and giving that as a reason for not allowing third-party sales*".

103. Mrs. Barnes also explained that she had had discussions with PoJ[17] in an attempt to get them to assist in brokering an agreement with ATF, and that Mr. Bannister of PoJ had suggested that ABP "*offer a banding fee for how much fuel that we uplifted*". ABP made such an offer to ATF, but "*they did not want to know*".

104. Mrs. Barnes explained that by the time she approached the Authority in January 2015, "*... we [had] exhausted all avenues. We tried to negotiate with ATF. We tried to get Ports of Jersey to get involved and we tried to get everybody round the table and nobody was having any of it. So by the time we got to see CICRA we were at the end of our tether. We thought we are not getting anywhere*".

105. ATF did not make any written submissions to me on my Terms of Reference, nor did they request a meeting. However, I have seen the affidavits prepared for the appeal to the Royal Court by Mr. Patel of ATF. His first affidavit dated 8 July 2016 exhibits a spreadsheet setting out what he describes in paragraph 19

[17] She identified Doug Bannister, Paul Holley and Steve Driscoll as having been at her meeting with PoJ.

of his affidavit as "*the history of the supply and pricing discussions with ABP*". This shows discussions starting in August 2014 and carrying on until 17 March 2015. The e-mail and letter correspondence between ABP and ATF are also exhibited to Mr. Patel's first affidavit.

106. The exhibited correspondence includes a letter from Steven Briddon of ATF to Mrs. Barnes of ABP dated 17 March 2015. In that letter, ATF says that it is not prepared to supply fuel to ABP for onward sale to third parties as had previously been agreed between FSCI/Rubis and ABP on the basis *inter alia* that ABP "*does not have a licence to supply aviation fuel at the Airport*" and that such supply would be in breach of various Laws and Regulations, including asserting a failure by ABP to pay the correct rate of GST. The letter repeats a number of times the assertion that "*ATF will not participate in a breach of the applicable laws or regulations*" by providing aviation fuel to ABP for resale. The concluding paragraph of the letter states "*ATF are willing to consider supplying aviation fuel to AvB based on a volume discount basis to PAP on fixed or non-fixed volumes (AvB aircraft only and not including AvB's customers' aircraft) with no right to resell to AvB's customers*".

107. It therefore appears clear that, by the beginning of 2015, the negotiations between ABP and ATF had reached deadlock, at the very least, regarding ATF supplying ABP with aviation fuel for resale to third parties.

108. As I have indicated in paragraphs 59 to 61 above, when it considered whether or not to commence an investigation in February 2015, the Authority explained to me that it had particularly examined whether ABP's complaint might be amenable to private resolution, but concluded that it was not. The possibility of the parties being able to negotiate a settlement was also specifically considered in the Authority's Board Paper of 6 February 2015.

109. Whether this matter could be dealt with by alternative means was clearly considered by the Authority before deciding whether to commence the investigation. In my view, given the circumstances outlined above, it was reasonable for the Authority to conclude in February 2015 that ABP's complaint was not amenable to private resolution.

110. Throughout the subsequent course of the Authority's investigation, ATF strongly maintained the position that it was not prepared to supply aviation fuel to ABP for resale to third parties on the basis that such supply would be unlawful and/or contrary to the terms of its Fuel Operator's Agreement with Jersey Airport. ATF's position on the prices which it charged to ABP for fuel for its own use was that such prices were justified *inter alia* on the basis of the higher costs of supplying ABP. See, for example, ATF's written submission to the JCRA of 12 October 2015; its submissions at the oral hearing on 3 December 2015; and its written submissions on abuse of 16 December 2015. ATF strongly and repeatedly reiterated to the JCRA its position that the previous arrangements between FSCI/ Rubis and ABP were "*unlawful, tax evasion and a fraud on ABP's customers*".[18] It made it clear that it would not enter into any resale arrangements with ABP.

[18] Page 17 of ATF's letter to the JCRA of 12 October 2015.

111. I have not seen any evidence that ATF suggested to the JCRA at any time that it would be prepared to engage in some form of voluntary mediation or discussions with ABP, nor any suggestion that the JCRA should facilitate such mediation. Nor does it appear that ATF ever approached or suggested that a third party, such as Ports of Jersey, could have facilitated such mediation. Of course, it would have been open to ATF to suggest such a course of action at any time during the investigation.

112. Dr. Marsden of the JCRA explained to me that he would have been wary in a law enforcement context to seek to resolve a case such as the present "*informally through non-transparent discussions*". However, "*this party [ATF] was definitely not open to any sort of discussions. Had they been, I am sure we would have been able to try to find some way of discussing this with them. If they had given any indication that: "Look, let us talk about this", but they never*" did so.

113. It does not appear, however, that the JCRA ever proactively sought to open discussions with ATF either, nor did it specifically propose to ATF that ATF might engage in voluntary, informal mediation or discussions in order to resolve the issues raised by ABP. In its letter to ATF of 11 September 2015, accompanying its draft Decision, the JCRA did draw ATF's attention to the final section in Chapter 4 of the Investigations Guideline and to the notes on closing an investigation. The JCRA set out the following passage from the Guideline:

> "We may also decide to close an investigation without reaching a draft decision and/or final decision if parties decide to cease conduct that might constitute an infringement of the competition laws. When considering whether to proceed to a draft or final decision in such circumstances, we will consider a range of factors, including whether a financial penalty is likely to be appropriate (in which case a final decision will need to be prepared), the degree of confidence that CICRA has that the infringing conduct will not reoccur, and extent to which a final decision could provide guidance to business on what is, and is not, acceptable under the law, or play an important role in developing the law where there is limited case law or precedent."

114. In referring to this passage from the Investigations Guideline, the JCRA appears to have been inviting ATF to enter into some sort of informal settlement or commitments process, akin to those which I describe in paragraphs 95 and 96 above, rather than proposing that ATF should engage in informal mediation or discussions directly with ABP. However, ABP does not appear to have reacted to that aspect of the JCRA's letter of 11 September 2015.

115. In their written and oral submissions to me, various stakeholders criticised the JCRA for taking too legalistic an approach and said that they had the impression that, once the JCRA had embarked upon the investigation process, it became blinkered and unable to take a flexible approach to ABP's complaint. I have some sympathy with these concerns in that, although the JCRA said that it would have considered informal discussions with ATF, it never proactively suggested this to the parties. Further, in my view, the JCRA's letter of 11 September 2015 was not entirely clear as to what the JCRA was suggesting to ABP regarding closing the investigation.

116. However, I also have sympathy with the JCRA's view that it would not have been appropriate for the JCRA, as an independent public regulator engaged in law enforcement activities, to deal with complaints of unlawful activity (i.e. breach of Article 16 of the 2005 Law) in a non-transparent, informal way. Nor would it have been appropriate for the JCRA to seek to compel or to put pressure on parties to engage in discussions, particularly where the allegations of unlawful conduct concern an abuse of a dominant position: by definition, in such a situation there is an imbalance of bargaining power which may lead complainants to agree to proposals to which they do not wish to agree or which are not in their commercial interests. In such situations, it would be better for both the JCRA and the parties (and for public confidence in the system) if there were a formal, transparent settlement or commitments procedure such as that found in the UK or EU: see paragraphs 95 to 97 above.

117. Moreover, it appears quite clear that, given the position strongly held by ATF that its conduct was justifiable and, in particular, that it was not prepared to supply aviation fuel to ABP for resale to third parties, no informal discussions were likely to have addressed ABP's complaint.

118. It appears to be the case that the JCRA had in mind throughout the investigation whether ABP's complaint could be dealt with by alternative means. However, it was never suggested by ATF that it was prepared to engage in such alternative means or that they should be employed by the Authority. On the contrary, ATF made it quite clear that it was not prepared to supply fuel to ABP for resale and that it would not change its pricing which it considered to be justified. It is therefore highly unlikely that ABP's complaint could have been dealt with by alternative means. Thus, once it had concluded that ATF's conduct was in breach of Article 16 of the 2005 Law, it was reasonable for the JCRA to proceed to make a formal decision under that Act rather than to seek to resolve ABP's complaint by alternative means.

Conclusion

119. As I have indicated, the only alternative avenue open to the Authority under Jersey law for addressing the complaint made to it by ABP (other than proceeding under the 2005 Law) was for the parties to engage in some form of voluntary, informal mediation or discussions to seek to resolve the issues between them. On balance, and for the reasons set out above, I consider that the Authority reasonably examined and exhausted these alternative avenues before making the final Decision.

Recommendations

120. For the reasons which I set out above, I consider that (instead of relying on informal, voluntary mediation or discussions), it would be better for both the JCRA and for parties to an investigation (and for public confidence in the system) if there were a formal, transparent settlement or commitments procedure in Jersey such as that found in the UK or EU (see paragraphs 95 to 97 above). The JCRA and the Government should consider whether a formal settlement and/or commitments procedure would be appropriate for Jersey.

Issues (b) and (e). The evidence before the Board and whether the JCRA's decision was reasonable and proportionate

121. First, I am asked to consider whether the evidence available to the Board was of sufficient quality and scope and appropriately considered and applied (**Issue (b)**) and, second, whether the decision that the JCRA took was reasonable and proportionate in the circumstances (**Issue (e)**). I will answer these questions together as they raise various overlapping issues.

122. It is important to bear in mind, however, that the JCRA undertook a 12 month investigation in the present case using their statutory powers under the 2005 Law to gather a substantial amount of evidence. They then subjected that evidence to scrutiny and analysis over an extended period, including a process of consultation with ATF.

123. I have seen some, but not all, of the evidence that was available to the JCRA in carrying out the investigation and reaching the Decision. It would be neither appropriate nor feasible for me to seek to redo the JCRA's investigation or to retake the Decision. Therefore, in answering the questions put to me under Issues (b) and (e), I will focus on the following matters: did the Authority ask the right questions and focus on the correct issues in carrying out its investigation and reaching the Decision, and did the Authority give the parties, particularly ATF, a reasonable and proper opportunity to put in evidence and make submissions on all matters relevant to the investigation.

124. I also bear in mind that I am considering these issues with the benefit of hindsight and having seen the judgment of the Royal Court of 8 January 2018. However, for the purposes of answering the questions put to me under Issues (b) and (e), it is appropriate to focus on whether the approach taken by the JCRA was reasonable and proportionate at the relevant time bearing in mind what was known by it at that time.

The issues in the case

125. As I have indicated above, the Authority received a complaint from ABP in January 2015 to the effect that it was being treated unfairly by ATF in respect of the supply of aviation fuel at Jersey Airport. ABP raised two issues in its complaint to the Authority: third party sales and the price of fuel purchased for ABP's own use. In the Decision, the Authority decided that ATF had contravened Article 16 of the 2005 Law by abusing a dominant position in the market for the supply of aviation fuel at Jersey Airport by (a) refusing to supply aviation fuel to ABP for the purposes of supplying that fuel to its third party customers at Jersey Airport; and (b) unfairly discriminating in its pricing in respect of sales of aviation fuel to ABP by charging ABP higher prices than other comparable customers.

126. By the time of the appeal, ABP did not dispute that it held a dominant position in the relevant market. However, it did dispute that it had abused that dominant position in either of the two ways alleged by the JCRA. The Royal Court held in its judgment that ATF "*has not abused its dominant position in the market for the supply of aviation fuel at Jersey Airport during the period in question, whether as a result of its refusal to sell to ABP for the purposes of resale or by the pricing structure offered to ABP …".*[19]

[19] Paragraph 142, Judgment.

127. In summary, the Court held that:

a. ATF's refusal to supply aviation fuel to ABP for resale did not restrict competition in the market for the sale of aviation fuel: see paragraphs 71 to 75 of the judgment.

b. Nor did the refusal to supply restrict competition in the downstream market for ground-handling services: see paragraphs 76 to 83 of the judgement.

c. Therefore, ATF had satisfied the Court that it had not abused its dominant position by refusing the sell aviation fuel to ABP for resale to third parties: see paragraphs 84 to 85 of the judgment.

d. The Court went on to consider the issue of objective justification. However, its conclusions in that regard are strictly *obiter dicta* as it had already concluded that there was no abuse (and therefore no breach of Article 16 of the 2005 Law) as a result of ATF's refusal to supply: see paragraph 86 of the judgment.

e. However, the Court held that ATF was objectively justified in refusing to supply ABP because that company had no permit or licence from Ports of Jersey Limited to act as a re-seller of the fuel at wing-tip: see paragraph 120 of the judgment.

f. The court rejected the JCRA's contention that ATF was guilty of abusive price discrimination: see paragraphs 127 to 140 of the judgment.

128. In paragraph 141 of its judgment, the Court stated as follows:

> "It must not be uncommon in appeals of this nature in other jurisdictions that new evidence arises at the time the Appeals Tribunal hears the appeal than was available at the time when the decision taker originally took its decision. Furthermore the nature of the argument which is presented is bound to become more refined. We think that this has occurred in this case, albeit some of the arguments advanced by the Appellant have been consistently advanced from the outset".

The JCRA's investigation of these issues

129. I have set out a summary of the JCRA's investigation process in paragraphs 20 to 27 above. As can be seen from that summary, the JCRA sent out a number of information requests (both formal requests under Article 27 of the 2005 Law and informal follow up requests) to ATF and one information request to PoJ.

130. On 2 March 2015, the JCRA issued a formal request to ATF under Article 27 of the 2005 Law. This was an extensive request for, in summary, any supply agreements, contracts or other arrangements between ATF and counterparties for the sale of aviation fuel in Jersey; any correspondence or other documents relating to the sale of aviation fuel in Jersey by ATF; details of volumes sold and pricing for such sales. This information and these documents were primarily relevant to the issue of unfair/ discriminatory pricing.

131. ATF provided the information sought with a letter dated 17 March 2015. In that letter, ATF expressed surprise at the JCRA's letter, made submissions about what it had already done to reduce fuel prices in Jersey, and stated that the supply of fuel at Jersey airport was out for competitive tender.

132. By e-mail from Jonathan Tooley[20] of the JCRA to Steve Brisson of ATF of 19 March 2015, the JCRA asked various further questions arising from the information provided with ATF's letter of 17 March. In that e-mail, Mr. Tooley referred to a call with Mr. Brisson of that morning and indicated that he would be happy to meet once he had had an opportunity to review the information provided by ATF.

133. By e-mail dated 23 March 2015, ATF provided further information to the JCRA, including spreadsheets and contracts, and various explanations of the information already provided.

134. On 31 July 2015, the JCRA sent a letter to ATF indicating that it had "*identified a number of concerns arising from its investigation of fuel supplies at Jersey airport*" and setting out "*the factual background to its findings to enable any issues of fact to be challenged as appropriate and any errors corrected prior to the JCRA issuing a decision in respect of its findings*". The facts set out in this letter related primarily to the prices charged and volumes of fuel sold by ATF to its customers at Jersey airport, including details of the PAP and Platts based pricing. The letter also asked some further questions arising from the investigation, including asking ATF to explain the terms of its licence with Ports of Jersey and to provide a copy of its operating agreement and licence. The JCRA also asked: "*Are there any restrictions on the sale of fuel to third parties? If so, are they imposed by ATF or by Jersey airport?*"

135. ATF replied on 14 August 2015 setting out a detailed and extensive response to the points made in the JCRA's letter. ATF supplied a copy of its Fuel Operators Agreement and Licence Agreement with Jersey airport. In response to the question about restrictions on the sale of fuel to third parties, ATF stated "*We have supplied fuel to every aircraft that has requested fuel, hence there are no restrictions*". In light of ATF's refusal to supply ABP with fuel for resale, this answer may have been technically correct, but did not fully answer the question asked.

136. On 28 August 2015, the JCRA issued a formal information request under Article 27 of the 2005 Law *inter alia* asking ATF to provide full and unredacted copies of any agreements between it and Jersey airport which permit the company to supply fuel at Jersey airport, including any schedule, annexes, appendices, etc., and correspondence which pertains to the operation of such agreement. ATF provided such agreements and licences by letter of 4 September 2015.

137. On 11 September 2015, the JCRA issued its draft Decision to ATF. The draft Decision set out the JCRA's initial conclusion that ATF had abused a dominant position in the market for the "into plane" supply of aviation fuel in Jersey Airport by (a) restricting sales to third parties and (b) engaging in

[20] Then Head of Policy & Consumer Affairs at the JCRA.

discriminatory/ unfair pricing. The JCRA indicated that ATF had one month to respond to the draft Decision.

138. ATF submitted its detailed response to the JCRA's draft Decision on 12 October 2015. In that document, ATF complained that the JCRA had failed to set out any facts relating to its case on restricting sales to third parties in its letter of 31 July 2015, and so "*ATF has not been able to explain its position [in this regard] before JCRA prepared its draft decision*". ATF further complained that the "*JCRA has failed to engage with PoJ, the operator of and licensor for fuel supply and storage at Jersey Airport, and therefore proper, complete investigations have not been conducted*".

139. In light of my remit to consider whether the Authority asked the right questions and focussed on the correct issues, and whether it gave the parties, particularly ATF, a reasonable and proper opportunity to respond on these issues, it is necessary for me to consider this criticism by ATF.

140. I have some sympathy for ATF's criticism as, up until the date of the draft Decision, the main focus of the JCRA's correspondence with and requests for information from ATF was on whether the prices charged by ATF for aviation fuel at Jersey airport were unfair and/or discriminatory. As I have indicated above, in its letter of 31 July 2015, the JCRA did ask ATF about "*restrictions on the sale of fuel to third parties*" at Jersey airport. Nevertheless, the reason for asking that question was not explicitly spelt out by the JCRA to ATF.

141. However, it is important to bear in mind that, at this stage, the JCRA's investigation was still only at the 'minded to' stage. That is, the JCRA had only indicated its initial, provisional view to ATF, in the form of a draft Decision, in order for ATF to respond to it. I will therefore consider, first, whether ATF was given an adequate opportunity subsequently to address the issue of restrictions on third party sales/ refusal to supply, and, second, the JCRA's subsequent engagement with the PoJ on that issue.

142. As to the first matter:

a. ATF made full and detailed submissions in its response of 12 October 2015 on the draft Decision's provisional finding of an abuse arising from restrictions on third party sales/refusal to supply. In summary, ATF explained that it had not continued the Rubis-ABP arrangement because, in its submission, ABP was not legally permitted to supply or sell fuel at Jersey airport; ABP had historically abused its dominant position; ABP had historically committed fraud on its customers; and ABP had possibly evaded tax.

b. At a hearing with the JCRA on 3 December 2015, ATF (assisted by Alistair Lindsay, an English barrister) explained its case on why its refusal to supply ABP with fuel for resale to third parties was not an abuse for the purposes of Article 16 of the 2005 Law and/or that it was objectively justified.

c. On 16 December 2015, ATF submitted a paper to the JCRA entitled *Aviation Fuel Supplies in Jersey – Submission by ATF on Abuse*. In that paper, ATF explained "*why there has been no abuse within the two categories identified in the draft Decision of 11 September 2015*",

I.e. restrictions on sales to third parties and unfair/ discriminatory pricing. Regarding restrictions on sales to third parties, ATF explained that such restrictions were not an abuse because there is no duty to supply a mere reseller[21] and that, in any event, the refusal to supply was objectively justified because "*ABP is lawfully permitted to make its own supplies of aviation fuel at Jersey airport if it has a fuel operator's agreement with the Ports of Jersey and … ABP does not have such an agreement*".[22]

d. In its covering letter to the JCRA of 16 December 2015, ATF referred to the meeting on 3 December and stated "*in respect of the other matters identified for submission, having considered the full explanations and documents already provided to JCRA, we do not consider they need to be to be provided*".

e. On 26 January 2016, JCRA sent a further letter to ATF stating that, at the meeting on 3 December, ATF had indicated that it would provide further material *inter alia* on pricing and costs. The JCRA asked ATF to "*confirm whether or not [it] intends to provide any information or evidence in relation to the items identified above or in respect of any other issue …*".

f. On 16 February 2016, ATF wrote to the JCRA and stated that "*ATF have provided all the information it intends to provide to CICRA*".

143. In the circumstances, I conclude that ATF was given an adequate opportunity to address the issue of restrictions on third party sales/ refusal to supply before the JCRA made its final Decision.

144. As to the second issue of the JCRA's subsequent engagement with PoJ on that issue, on 18 January 2016, the JCRA issued an information request to PoJ under Article 27 of the 2005 Law. The JCRA asked for information comprising in essence all agreements and licences between ATF and PoJ, and any documents discussing the "*conditions under which ATF supplies fuel at Jersey airport, including any restrictions on ATF fuel's ability to resell such fuel to third parties*".

145. The JCRA also asked PoJ a number of specific questions, including the following:

a. "*What provision if any is made to restrict the provision of fuel by 3rd parties where (i) the third party carries out into aircraft fuelling operations; (ii) fuelling is carried out by an existing supplier of aviation fuel at Jersey airport and the third party is responsible for payment for fuel and charges to its customers*?"

b. "*Are there provisions in any statutory or contractual provision relating to the supply of fuel at Jersey airport which permit fuel suppliers to limit or restrict the provision of fuel at Jersey airport, or to refuse to provide fuel*

[21] In this regard, the paper cited the extract from O'Donoghue and Padilla, *The Law and Economics of Article 102 TFEU*, which was subsequently cited by the Royal Court in paragraph 74 of its judgment.
[22] Para 25.

to particular aircraft, classes of aircraft or other customers or service providers?"

146. PoJ responded to the JCRA's request on 1 February 2016 and provided extensive documentation. In response to the first question highlighted above, regarding restrictions on the provision of fuel to third parties, PoJ stated that it had in place an interim FOA (Fuel Operators Agreement) pending its public tender process, and that this interim POA "*is non-exclusive*". PoJ also stated that the "*interim FOA makes no provision for commercial terms between a chosen operator and their customers (whether direct or via third parties)*". In response to the second question highlighted above, as to whether there are any statutory or contractual provisions which permit fuel suppliers to limit or restrict the provision of fuel at Jersey airport, PoJ stated that "*There are no provisions, either statutory or contractual, relating to the supply of fuel at Jersey airport which permit fuel suppliers to limit or restrict the provision of aviation fuel at Jersey airport*".

147. It is notable that, in response to the JCRA's question about the provision of fuel to third parties and/ or its question about restrictions on the provision of fuel at Jersey airport, PoJ did <u>not</u> clearly state that only fuel suppliers with a licence or FOA with PoJ would be permitted to supply fuel at the Airport. This is the position which PoJ took subsequently in Mr Bannister's affidavits to the Court. Nor did PoJ say that ABP was not licensed or authorised to supply fuel at the Airport.

148. I also note, however, that in my view the questions which the JCRA asked about the provision of fuel to third parties at the Airport were not particularly clear or to the point. The JCRA could simply have asked PoJ whether ABP required a licence or authorisation from PoJ to resell fuel to third parties at the Airport. Such a question would have more clearly addressed the objective justification defence which had been raised by ATF in its submissions to the JCRA.

149. I was told by the JCRA that they did not ask such a question in their request to PoJ because they were concerned not to disclose the identity of the complainant, i.e. ABP. In this regard, I note that the JCRA's early Board Paper of 6 February 2015, which recorded the complaint, indicated that ABP "*would prefer that specific details and origin of the complaint remain confidential from the Jersey Airport authorities/ Ports of Jersey at this time*". Given that it had to continue to operate at the Airport, such a concern and desire for confidentiality on the part of ABP is entirely understandable.

150. In conclusion, I consider that the JCRA could have engaged more explicitly and clearly with PoJ on the issue of restrictions on third party sales and licensing of fuel suppliers at the Airport. However, I understand the JCRA's concern about not disclosing the identity of ABP as complainant at that stage, and this concern explains their approach to some extent. I also consider that ATF and PoJ were not as clear as they could have been in explaining to the JCRA the situation as to licensing of fuel suppliers at Jersey Airport. I consider that issue in further detail in paragraphs 196 to 211 below in my consideration of **Part 2** of my Terms of Reference, i.e. the role of PoJ in clearly confirming the need or otherwise for a licence. On balance, however, I conclude that the JCRA engaged adequately with the PoJ on the relevant issues before making its final Decision.

Conclusion

151. I conclude that the Authority gave ATF a reasonable and proper opportunity to put in evidence and make submissions on all matters relevant to the investigation. I do consider that the JCRA could have engaged more explicitly and clearly with PoJ on the issue of restrictions on third party sales and licensing of fuel suppliers at the Airport. However, I understand the concern it had about disclosing the identity of the complainant to PoJ. In those circumstances, on balance, I conclude that the Authority asked the right questions and focussed on the correct issues in carrying out its investigation and reaching the Decision.

Part 2: Substantive principles established in the Judgment

152. In the second part of my Terms of Reference, I am asked whether, looking at the substantive principles in the judgment:

a. There are any significant deficiencies in how the competition law has operated and if so how these might be addressed, and

b. The Royal Court indicated that whilst there are no statutory grounds to require a licence for the resale of fuel the Court considered that there was nevertheless a requirement for a licence because of the Ports of Jersey's role in operating an aerodrome. The Government of Jersey is keen to understand whether this is an accurate representation of the EU acquis on this issue and to consider the role of the Ports of Jersey in clearly confirming the need or otherwise for a licence.

Issue (a). Significant deficiencies in how the competition law has operated

153. I understand the reference in my Terms of Reference to "*the competition law*" to be a reference to the 2005 Law. I am asked to consider whether there are any significant deficiencies in how the 2005 Law has operated in this case and, if so, how these might be addressed. In this regard, I will consider, first, the substantive provisions of the 2005 Law and, second, the procedural provisions.

The substantive provisions of the 2005 Law

154. As I have explained above, the substantive provisions of the 2005 Law reflect the relevant provisions of EU competition law. In particular, Article 16 of the 2005 Law, which prohibits abuse of a dominant position in a relevant market or markets in Jersey, reflects Article 102 TFEU, which prohibits abuse of a dominant position in a relevant market or markets in the EU.

155. Abuse of a dominant position is a well-known concept which is found in many other competition law regimes. These include, in the UK, the Chapter II Prohibition in the Competition Act 1998 and, in Guernsey, section 1(1) of the Competition Ordinance 2012, which prohibits "*any conduct on the part of one or more undertakings which constitutes the abuse of a dominant position within any market in Guernsey for goods or services*".

156. There is no suggestion that this case highlighted any problems arising from the operation of Article 16 of the 2005 Law itself. However, some stakeholders suggested to me that the way in which the Court and/or the Authority interpreted

and applied Article 16 in the particular context of Jersey may have been problematic. In particular, certain stakeholders pointed to the operation of Article 60 of the 2005 Law in this context.

157. Article 60 of the 2005 Law provides that "*[t]he Authority and the Court shall attempt to ensure that so far as possible questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under European Union law in relation to competition within the European Union*". Therefore, in applying the provisions of the 2005 Law, including the Article 16(1) prohibition on abuse of a dominant position, the Authority and the Court were required to attempt to ensure that they acted consistently with EU case-law.

158. Article 60 of the 2005 Law is similar, but not identical, to section 60 of the UK Competition Act 1998, which provides as follows:

> "(1) The purpose of this section is to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.
>
> (2) At any time when the court determines a question arising under this Part, it must act (so far as is compatible with the provisions of this Part and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between—
>
> (a) the principles applied, and decision reached, by the court in determining that question; and
>
> (b) the principles laid down by the Treaty and the European Court, and any relevant decision of that Court, as applicable at that time in determining any corresponding question arising in Community law.
>
> (3) The court must, in addition, have regard to any relevant decision or statement of the Commission.".

159. Section 60 of the 1998 Act requires a UK court to act so as to ensure that "*there is no inconsistency*" between its application of the principles of UK competition law and the European Court's application of principles of EU competition law. In my view, this imposes a stricter requirement of consistency on a UK court, than Article 60 of the 2005 Law, which simply provides that a Jersey court must attempt to ensure that it acts consistently with EU case-law.

160. Article 60 of the 2005 Law is also similar, but again not identical, to section 54 of the Guernsey Competition Ordinance 2012. Section 54 provides that the Court in Guernsey must, when determining questions arising in relation *inter alia* to an abuse of a dominant position in Guernsey, "*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 …*".

161. In my view, section 54 of the Guernsey Competition Ordinance 2012 imposes a less stringent obligation on the Guernsey Court than that imposed on the Jersey court by Article 60 of the 2005 Law. By section 54, the Guernsey Court is simply required to "*take into account*" the principles laid down by and any relevant decisions of the European Court.

162. In his meeting with me, Mr. McDermott of Jersey Telecom said that Article 60 should be "*immediately removed*" from Jersey law. He said this on the basis that "*CICRA have blindly looked at some precedent from the European courts and applied it locally, and it removes the flexibility that I think they should have as a local competition authority …*". However, after further discussion, he conceded that his concerns were probably not about the existence of Article 60 in itself, but "*maybe my point is more a behavioural one than a pure legal one*". He said that "*Article 60 … is not a straightjacket but that is how [the JCRA] have treated it*".

163. By contrast, the JCRA expressed the view to me that, in the ATF appeal, Article 60 did not "*contribute to the efficiency of the appeal process*" as the JCRA had hoped that it would. The JCRA said that they had seen Article 60 as meaning that the Royal Court had pre-existing precedent from the European Court to which it could refer and rely upon as a generalist court addressing issues of competition law. However, in the JCRA's view, the Court did not treat EU case-law as a "*strong reference touch point*" or, indeed, give it much weight at all.

164. Article 60 of the 2005 Law is cited in paragraph 39 of the Royal Court's judgment, and, in paragraph 41 of that judgment, the Court states that "*a proper construction of Article 60 of the Law requires us to consider, before looking for consistency with European Union decisions, whether such decisions have as their focus inter-state trade and the internal market across the European Union as opposed to a much smaller market such as might exist in Jersey, or in any part of Jersey*".

165. It is not entirely clear what the Court meant by this statement. It is of course the case that Article 102 TFEU concerns abuse of a dominant position "*within the internal market or in a substantial part of it*" and that such abuse is only prohibited "*in so far as it may affect trade between Member States*", whereas Article 16 of the 2005 Law prohibits abuse of a dominant position "*in trade for any goods or services in Jersey or any part of Jersey*". The respective provisions have different territorial scope.

166. However, I do not consider that this affects the interpretation of Article 60 of the 2005 Law. Nor do I consider that EU case-law can be ignored by the Jersey Court because it has as its focus inter-state trade and the internal market across the EU, rather than a market in Jersey. I do not understand that this was what the Court was suggesting. When applying provisions of the 2005 Law, including Article 16(1) thereof, the Jersey Court is required by Article 60 to attempt to ensure that it acts consistently with EU case-law. It should therefore give considerable weight to EU case-law. The intention of Article 60 must have been to ensure that the Court (as well as business in Jersey) was able to refer to and rely upon an extensive, pre-existing body of case-law and precedent when seeking to apply (and comply with) a new and unfamiliar competition law regime in Jersey.

167. However, Article 60 clearly contains an element of flexibility. The Jersey Court (unlike, say, UK courts) is not bound by EU case-law. It is simply required by Article 60 to "*attempt to ensure that so far as possible*" questions of Jersey competition law are dealt with consistently with the way in which the EU courts have addressed equivalent questions of EU competition law. In my view, this means that the Court (and the JCRA) can take into account the particular circumstances of markets and the economy in Jersey when applying EU case-law to particular cases.

168. As I indicate above, criticisms have been made of both the Court's and the JCRA's approach to Article 60.

169. In its judgment, the Court clearly referred to and relied upon EU case-law in determining whether or not the particular breaches of Article 16 of the 2005 Law found by the JCRA should be upheld on appeal. In certain instances, the Court distinguished particular EU Court judgments on their facts: see, for example, paragraphs 123 and 126 of the Royal Court's judgment addressing the *Akcenta* and *Hilti* cases. However, the Court's treatment of those cases was not obviously inconsistent with its obligation of consistency under Article 60 of the 2005 Law. On the contrary, the Court explicitly recognised that "*we are charged by Article 60 of the Law to secure consistency if possible with European Union decisions in matters of competition*" even if it found such judgments "*surprising*". The Court's particular treatment of those cases (i.e. whether it should in fact have distinguished those cases) was not appealed.

170. As regards the JCRA's approach to Article 60 of the 2005 Law, I have seen no evidence that the JCRA treated it as a "*straightjacket*" or that the JCRA applied EU case-law with no regard to the local situation in Jersey. In paragraph 25 of the Decision, the JCRA referred to Article 60 of the 2005 Law and correctly indicated that it simply required them to "*attempt to ensure that, so far as possible, questions arising in relation to competition are dealt with in a manner which is consistent with the treatment of corresponding questions arising under Community law*". The JCRA's subsequent treatment of questions of dominance, abuse and objective justification in the remainder of the Decision are clearly based on and informed by the local situation obtaining in Jersey at the relevant time.

The procedural provisions of the 2005 Law

171. Part 5 of the 2005 Law sets out the powers which the JCRA may exercise during an investigation into alleged unlawful anti-competitive behaviour. These include a power to require provision of information and documents (Article 27); a power to obtain information stored on a computer (Article 28); and powers to enter and search a premises (Articles 29 to 31). A person who fails to comply with notices under these provisions, or who knowingly or recklessly provides false, misleading or incomplete information to the JCRA may be guilty of an offence and liable to a fine. These powers are similar to those afforded to the UK Competition and Markets Authority ("**CMA**") by Part 1, Chapter III of the UK Competition Act 1998.

172. As I set out above, the JCRA exercised its powers under Article 27 in the present case by making information and document requests of ATF and PoJ. The JCRA told me that "*our investigatory powers are broadly similar to what*

you would find in the UK" and that it did not feel that the law itself was "*problematic*" in this regard. However, the JCRA did consider that its resourcing was a constraint in this regard, for example, its ability to carry out such a resource intensive process as a dawn raid, i.e. to exercise its powers to enter and search a premises under Articles 29 to 31 of the 2005 Law.

173. I have set out my views on the JCRA's resourcing issues in paragraphs 76 to 93 above. I also refer to what I say in paragraphs 115 to 120 above, regarding the desirability of a formal commitments and/or settlement regime in Jersey.

Conclusion and Recommendations

174. In conclusion, I have not identified any significant deficiencies in how the substantive provisions of the 2005 Law, including Article 60, have operated in this case. As regards the procedural provisions of the 2005 Act, I have not identified any particular lacunae in the JCRA's investigatory powers, except regarding the availability of a formal commitments and/or settlement regime in Jersey (see paragraphs 115 to 120 above). Moreover, it does appear likely that resource constraints may affect the JCRA's ability fully to utilise its investigatory powers under the 2005 Law, such as its powers to enter and search a premises under Articles 29 to 31 of the 2005 Law. I have set out my views on the JCRA's resourcing issues in paragraphs 76 to 93 above.

Issue (b)(i). The Court's finding on the requirement for a licence for the resale of fuel

175. My Terms of Reference in this regard provide as follows:

> "The Royal Court indicated that whilst there are no statutory grounds to require a licence for the resale of fuel the Court considered that there was nevertheless a requirement for a licence because of the Ports of Jersey's role in operating an aerodrome. The Government of Jersey is keen to understand whether this is an accurate representation of the EU acquis on this issue …".

The Royal Court's findings on the need for a licence

176. In paragraph 18 of its judgment, the Court indicated that "*the question as to whether ABP required a licence for the re-sale of aviation fuel at Jersey Airport is one on which we need to make a finding*".

177. In paragraph 19, the Court acknowledged that *"[t]he communications between the JCRA and Ports of Jersey Limited on this subject were perhaps not as constructive as they might have been and indeed we think that this might have caused a misunderstanding on the part of the JCRA as to what the Ports of Jersey Limited contentions were in relation to that company's power to license re-sellers of aviation fuel*".

178. However, the Court considered and accepted the evidence that was then before it from Mr. Bannister of PoJ and concluded that "*the evidence before us persuades us that whether as landlord or as the licensed operator of the Airport, Ports of Jersey Limited did in practice have an ability to require re-sellers of aviation fuel to be licensed*".

179. In paragraphs 43 and 44 of its judgment, the Court considered Article 2 of the Petroleum (Jersey) Law 1984 and Article 132 of the Air Navigation (Jersey) Law 2014, which imposed various safety and licensing requirements on the keeping of petrol or fuel.

180. In paragraph 45, the Court referred to Article 7 of the Air and Sea Ports (Incorporation) (Jersey) Law 2015 ("**the Airport Law**") which provides that no person is permitted to carry out port operations in Jersey unless that person has a licence granted by the JCRA. However, the JCRA had exempted from the requirement to hold a licence all port operations other than those carried out by the PoJ at the Airport.

181. The Court therefore held, in paragraph 47 of its judgment, that, had it not been for the exemption, both ATF and ABP would have had to obtain a licence from the JCRA. Further, the Court held that the "*legislation confers on the JCRA and not upon Ports of Jersey Limited the statutory power to grant licences in relation to airport operations*". The Court concluded that "*in terms of strict law therefore, we do not think that Ports of Jersey Limited had a statutory power to grant a licence either to the Appellant [ATF] or to ABP for the sale of aviation fuel*" (emphasis added).

182. However, in paragraph 48, the Court said that this "*does not conclude the issue*". The Court noted that Jersey Airport had been transferred to the PoJ in 2015, which therefore became owner of the land. It then went on to say that "*[g]iven that its primary object as set out in Article 5 of the Airport Law is to provide or to ensure the provision of safe, secure and efficient port operations for Jersey, and given that it is the owner of the land in question, it seems to us to follow inexorably that in practice Ports of Jersey Limited were in a position to permit or not to permit any undertaking for the sale or re-sale of aviation fuel on the land of Jersey Airport*".

183. However, the Court also stated that "*The Airport Law under discussion clearly contemplated that licensing would be effected by the JCRA, subject to exemptions, and as those exemptions have been granted, the practical consequence is that it is Ports of Jersey Limited which has the legal power and duty to be concerned with trading operations at the Airport including the operation of the sale of aviation fuel*.".

184. By this stage in the judgment, therefore, it would appear that the Court had held that (a) PoJ did not have a statutory power to grant a licence to either ATF or ABP for the sale of aviation fuel at the Airport, but (b) because it was the owner of the land and because of its object to ensure the provision of safe, secure and efficient port operations, in practice, PoJ could decide to permit or not to permit any undertaking to sell fuel at the Airport. However, the Court went further and stated that, (c) because the JCRA had granted exemptions to the requirement for a licence under the Airport Law, PoJ had "*the legal power and duty to be concerned with … the sale of aviation fuel*" at the Airport. I find point (c) in the Court's reasoning difficult to follow, and its finding that PoJ had a "*legal power and duty*" in this regard difficult to reconcile with its prior finding that it was the JCRA (rather than the PoJ) who had the statutory power to grant licences.

185. Later in its judgment, and in the light of its previous findings, the Court considered whether ATF was objectively justified in refusing to supply fuel to

ABP because ABP did not have a licence to resell that fuel at the Airport. In paragraph 115 of the judgment, the Court accepted Mr. Bannister's evidence and stated *"[w]e proceed on the factual basis therefore that it was necessary for ABP, both as a matter of law (see paragraphs 46 – 48 above) and as a matter of practice to have a licence from Ports of Jersey before it could engage in any reselling"*.

186. In paragraph 119, the Court stated "*[w]e accept that there is no statutory provision which prohibited the Appellant from selling aviation fuel to a third party for re-sale, but we do not think that it is reasonable, as a result, to conclude that the Appellant should be required to do so even in circumstances where the re-seller would be acting illegally by re-selling the fuel to one of its customers*".

187. Therefore, the Court concluded in paragraph 120 of its judgment that "*we accept the Appellant's contention that it was objectively justified in refusing to supply ABP because that company had no permit or licence from the Ports of Jersey Limited to act as a re-seller of the fuel at wing-tip*".

Analysis of the Court's finding on the need for a licence

188. I am asked whether the Court's finding on the need for a licence is an "*accurate representation of the EU acquis on this issue*".

189. The question of whether, as a matter of fact and law, ABP required a licence from PoJ to resell aviation fuel at Jersey Airport is a question of Jersey law not a question of EU law. In particular, it is a question of the correct interpretation of the relevant Jersey statutes and of the impact of PoJ's ownership of the Airport land on its right to demand that suppliers of fuel at the Airport be licensed.

190. In considering the Court's approach to the licensing issue, it is important to recall that my role in this review is not to second-guess the Court's judgment. The Court's judgment was not appealed, and it is not for me to act as a quasi-Court of Appeal. Nor is it necessarily appropriate for me to opine on matters of Jersey law.

191. However, I do consider that the Court's reasoning on this issue has real practical implications for the operation of the Airport and for those businesses that may operate at the Airport. I have noted above the Court's reasoning that PoJ's ownership of the land at the Airport, together with its obligation to ensure the provision of safe, secure and efficient port operations under Article 5 of the Airport Law, and the fact that the JCRA had granted exemptions to the requirement for a licence under the Airport Law meant, both as matter of law and in practice, that ABP was required to obtain a licence from the PoJ in order to resell fuel at the Airport.

192. The Court characterised this both as a "*legal power and duty*" on the part of the PoJ. In other words, the PoJ had not only the power, but also the duty, to require ABP to obtain a licence.

193. On the facts that were before the Court, ATF personnel carried out all the physical aspects of transporting and handling the aviation fuel and of fuelling

particular aircraft. ABP was not involved in any of the physical aspects of refuelling. Title to the fuel passed from ATF to ABP at the wing-tip. ABP simply carried out the administrative tasks of billing the aircraft and collecting payment for the fuel. In those circumstances, the practical safety implications of ABP's resale of fuel at the Airport are extremely limited.

194. The Court's judgment therefore begs the question: what other operations at the Airport require a licence? On the basis of the Court's reasoning as set out above, it is difficult to see why the licence requirement would be limited to the resale of fuel as carried out by ABP.

Conclusion and Recommendation

195. The question of whether, as a matter of fact and law, ABP required a licence from PoJ to resell aviation fuel at Jersey Airport is a question of Jersey law not a question of EU law. I have indicated that I have some difficulty in following certain aspects of the Court's reasoning in this regard and that it is difficult to reconcile certain aspects of the Court's reasoning with others. However, it is not for me to second guess the Court's findings on issues of Jersey law which have not been appealed. However, the Court's reasoning has real practical implications for those businesses operating at the Airport and it is not clear exactly which operations require to be licensed by PoJ and which do not. In those circumstances, I would recommend that the situation as to licensing of operations at the Airport could usefully be clarified by the States and/or the PoJ.

Issue (b)(ii). The role of PoJ in confirming the need or otherwise for a licence

196. I am asked to "*consider the role of the Ports of Jersey in clearly confirming the need or otherwise for a licence*".

197. I have set out in the previous section of this report the reasons given by the Court for its decision that ABP required a licence from the PoJ to resell aviation fuel at the Airport. The Court itself acknowledged in paragraph 19 of its judgment that *"[t]he communications between the JCRA and Ports of Jersey Limited on this subject were perhaps not as constructive as they might have been and indeed we think that this might have caused a misunderstanding on the part of the JCRA as to what the Ports of Jersey Limited contentions were in relation to that company's power to license re-sellers of aviation fuel*".

198. It is necessary for me to consider the case that was put to the JCRA by the PoJ (both directly and indirectly via ATF) on the need for a licence at Jersey Airport before it reached its Decision and to compare that with the case that was ultimately put to the Court on that issue.

199. The following case was put by ATF to the JCRA on the need for a licence at Jersey Airport before the JCRA reached the Decision. It would appear that ATF had discussed this issue with the PoJ before making its submissions to the JCRA.

    a. In its response dated 12 October 2015 to the JCRA's draft Decision, ATF stated that "*ABP is not legally permitted to supply or sell fuel*" and that "*POJ has confirmed to ATF that it has not granted a licence to ABP to allow ABP to supply or sell fuel at Jersey Airport*". ATF further stated that

it will supply fuel to ABP if ABP acts as an agent for its customers. However, for ATF to supply fuel to ABP for resale would be *inter alia*:

i. "*A breach of ATF's operating agreement with POJ*";

ii. "*A* breach *of the laws and regulations which ATF is obliged to operate under*". It then set out a list of various Laws and Regulations.

b. At the meeting with the JCRA on 3 December 2015, ATF stated that "*ABP is not licensed to supply fuel*", and that if ATF is required to supply ABP it would be committing "*an offence under the list of legislation*" that ATF had previously provided to the JCRA. ATF's barrister explained ATF's position as being that "*the fact that we are the only licensed operator … gives [us] an objective justification for refusing to supply somebody who doesn't have a licence … It's a clear objective justification that they don't have a licence and [we] are entitled to say, well, you can't have the fuel to resell illegally …*".

c. In its *Submission by ATF on Abuse*, which was provided to the JCRA on 16 December 2015, ATF stated that "*ABP needs an authorisation from Jersey Airport to sell aviation fuel to aircraft operators at Jersey Airport. It does not have one at present, so far as ATF is aware, and therefore could not lawfully make sales*". ATF stated that there was an objective justification for ATF's refusal to supply ABP as "*ABP is not lawfully permitted to make sales of aviation fuel at Jersey Airport. ABP is lawfully permitted to make its own supplies of aviation fuel at Jersey Airport only if it has a fuel operator's agreement with the Ports of Jersey and, as noted above, ABP does not have such an agreement*". There is no mention in this document of the argument previously made by ATF that for it to supply ABP with fuel for resale would be "*a breach of <u>ATF's</u> operating agreement with POJ*" (emphasis added), nor is there any mention of the list of laws and regulations upon which ATF previously relied.

d. In its letter of 15 February 2016, ATF stated to JCRA that it had "*provided all the information it intends to provide to CICRA*".

200. As I have described in paragraphs 144 to 146 above, on 18 January 2016, the JCRA issued an information request directly to the PoJ. The PoJ responded to that request on 1 February 2016.

201. In its information request, the JCRA asked PoJ *inter alia* for any documents discussing the "*conditions under which ATF supplies fuel at Jersey airport, including any restrictions on ATF fuel's ability to resell such fuel to third parties*". The JCRA also asked PoJ a number of specific questions, including, "*What provision if any is made to restrict the provision of fuel by 3rd parties …*" and "*Are there provisions in any statutory or contractual provision relating to the supply of fuel at Jersey airport which permit fuel suppliers to limit or restrict the provision of fuel at Jersey airport, or to refuse to provide fuel to particular aircraft, classes of aircraft or other customers or service providers?*".

202. In PoJ's response to the first question above, regarding restrictions on the provision of fuel to third parties, it stated that it had in place an interim FOA (Fuel Operators Agreement) pending its public tender process, and that this interim POA "*is non-exclusive*". PoJ also stated that the "*interim FOA makes no provision for commercial terms between a chosen operator and their customers (whether direct or via third parties)*".

203. In response to the second question highlighted above, as to whether there are any statutory or contractual provisions which permit fuel suppliers to limit or restrict the provision of fuel at Jersey airport, PoJ stated that "*There are no provisions, either statutory or contractual, relating to the supply of fuel at Jersey airport which permit fuel suppliers to limit or restrict the provision of aviation fuel at Jersey airport*".

204. It is notable that PoJ did not state (contrary to the position taken previously by ATF) that for ATF to supply fuel to ABP would be "*a breach of ATF's operating agreement with POJ*". Nor did the PoJ state that such a supply by ATF would be "*a breach of the laws and regulations which ATF is obliged to operate under*".

205. On the contrary, the PoJ stated that "*There are no provisions, either statutory or contractual, relating to the supply of fuel at Jersey airport which permit fuel suppliers to limit or restrict the provision of aviation fuel at Jersey airport*". This would appear to be inconsistent with the position previously taken by ATF in its submissions to the JCRA to the effect that, for ATF to supply fuel to ABP at Jersey Airport, would be (a) a breach of ATF's operating agreement with PoJ, and (b) in breach of various Laws and Regulations.

206. It is also notable that, in response to the JCRA's question about the provision of fuel to third parties and/ or its question about restrictions on the provision of fuel at Jersey airport, PoJ did <u>not</u> clearly state that only fuel suppliers with a licence or authorisation from PoJ would be permitted to supply fuel at the Airport. This is the position which PoJ took subsequently in Mr. Bannister's affidavits to the Court. Nor did PoJ say that ABP was not licensed or authorised to supply fuel at the Airport.

Conclusion

207. As can be seen, therefore, the explanation of the licensing issue given to the JCRA by ATF and the PoJ changed throughout the course of the investigation and was sometimes inconsistent. First, ATF asserted that supplying ABP would be in breach of ATF's operating agreement with PoJ, but appears subsequently to have dropped this argument. Second, ATF asserted that to supply ABP would be in breach of a list of laws and regulations, but none of these were subsequently relied upon by the Court (or, for that matter, by Mr. Patel of ATF or Mr. Bannister of PoJ in their affidavits). In any event, these two arguments appear to have been contradicted by PoJ's statement that "*There are no provisions, either statutory or contractual, relating to the supply of fuel at Jersey airport which permit fuel suppliers to limit or restrict the provision of aviation fuel at Jersey airport*".

208. As a result, and as was recognised by the Court in paragraph 19 of its judgment, "*this might have caused a misunderstanding on the part of the JCRA as to what the Ports of Jersey Limited contentions were in relation to that company's power to license re-sellers of aviation fuel*". Moreover, PoJ's case in its affidavit evidence to the Court, which ultimately formed the basis of the Court's decision that ABP required a licence to resell fuel at Jersey Airport, was quite different from the explanation given by PoJ and ATF to the JCRA during the course of the investigation.

209. However, as I have noted above, the full merits appeal which is provided for by Article 53 of the 2005 Law means that, on such a rehearing, the Court may receive and consider evidence and information that was not before the JCRA when it made its decision. That is what appears to have happened in the present case regarding the licensing issue.

210. PoJ and ATF were entitled under Article 53 of the 2005 Law to put forward a different case and different evidence on the licensing issue before the Court. As the Court recognised, in paragraph 141 of its judgment:

> "It must not be uncommon in appeals of this nature in other jurisdictions that new evidence arises at the time the Appeals Tribunal hears the appeal than was available at the time when the decision taker originally took its decision. Furthermore the nature of the argument which is presented is bound to become more refined. We think that this has occurred in this case, albeit some of the arguments advanced by the Appellant have been consistently advanced from the outset".

211. As I have indicated in paragraphs 79 to 89 above, the nature of the appeal process under the 2005 Law and, in particular, the ability of appellants to introduce new evidence and arguments at the stage of the appeal under Article 53 of the 2005 Law create incentives for those disadvantaged by a JCRA decision to appeal that decision in the expectation that the Authority will decide not to defend it given the risks and costs involved and/or the hope of getting a better outcome from the court on the substance and/or just delaying implementation of the decision.[23]

Recommendation

212. As a result, the Government may wish to revisit the recommendations made in the Oxera report, particularly, Recommendation 7,[24] which provided as follows:

> "7. The appeals process in Jersey should be reviewed, with a view to introducing a new 'unreasonableness' test that takes account of the legal system.

[23] See also Chapter 7 of the Oxera November 2015 Report.

[24] *A review of the Jersey regulatory and competition framework*, Oxera, 16 November 2015. Pages 76 to 77.

Summary of recommendations

213. For the reasons set out in detail in my report above, I make the following recommendations:

a. In future, the JCRA should specifically record and explain (perhaps in its Annual Reports)[25] how it has applied its prioritisation principles to its decisions whether or not to commence investigations under the 2005 Law.

b. The Government may wish to revisit the recommendations made in the Oxera report, particularly, Recommendations 7, 8 and 18,[26] which provided as follows:

> "7. The appeals process in Jersey should be reviewed, with a view to introducing a new 'unreasonableness' test that takes account of the legal system.
>
> 8. There should be a way for the Royal Court to gain access to, and appoint specialists, to help it deal with technically complex matters. …
>
> 18. The government should consult with Treasury and provide an explicit commitment that it will fund the JCRA as necessary if the Authority faces a legal challenge. If the government does not want to provide the resources to defend an appeal (under competition law), it should give a reasoned decision explaining why it is not in the Island's interest to do so.".

c. The JCRA and the Government should consider whether a formal settlement and/or commitments procedure would be appropriate for Jersey.

d. The situation as to licensing of operations at the Airport could usefully be clarified by the Government and/or the PoJ.

KASSIE SMITH Q.C.
September 2018

[25] See, by analogy, paragraph 4.6 of the CMA's Prioritisation Principles (CMA 16).
[26] *A review of the Jersey regulatory and competition framework*, Oxera, 16 November 2015. Pages 76 to 77.

Annex A: Terms of Reference

The Jersey Competition Regulatory Authority ("the JCRA") may conduct an investigation under the Competition (Jersey) Law 2005 if it has reasonable cause to suspect the abuse of a dominant market position.

In March 2016, having concluded its investigation, the JCRA determined that ATF fuels had abused a dominant market position by:

i. Refusing to supply fuel to ABP for resale;

ii. Charging prices to ABP that were higher than those paid by customers purchasing similar volumes, and this was therefore discriminatory.

ATF appealed the decision and the case was heard by the Royal Court in October 2017. The Royal Court overturned the decision of the JCRA.

The Royal court reported that no questions of procedural unfairness or concerning the vires of the JCRA arose.

The Government of Jersey is now seeking a review of whether the JCRA has discharged its legal responsibilities and duties appropriately in this case.

Key stages in the case include:

1. The decision of the JCRA to conduct an investigation in March 2015;

2. Submissions made to the JCRA and the resulting judgment exercised by the Authority on the substantive points being raised;

3. The draft decision issued in September 2015;

4. The hearing meeting in December 2015;

5. The determination made by the JCRA in March 2016 that ATF had abused a dominant position.

A review is now required of the circumstances leading up to the decision and whether:

1. The JCRA exercised its discretion reasonably in deciding to conduct an investigation. How did the Authority use its prioritisation principles and were they appropriately and proportionately applied?

2. The evidence available to the Board was of sufficient quality and scope and appropriately considered and applied?

3. The Board had properly considered the risks of taking the decision that it did in terms of the potential for appeal and quantified the level of litigation costs associated with that?

4. The JCRA had reasonably examined and exhausted all avenues available to remedy the behaviours it considered problematic before making a final decision, and

5. Overall the decision that the regulator took was reasonable and proportionate under the circumstances?

The Royal Court commented that "*It must not be uncommon in appeals of this nature in other jurisdictions that new evidence arises at the time the Appeals Tribunal hears the appeal than was available at the time the decision taker originally took its decision. Furthermore the nature of the argument which is presented is bound to become more refined. We think that has occurred in this case, albeit some of the arguments advanced by the Appellant have been consistently advanced from the outset.*".

Looking at the substantive principles established in the judgment, whether:

1. There are any **significant deficiencies** in how the competition law has operated and if so how these might be addressed, and

2. The Royal Court indicated that, whilst there are no statutory grounds to require a licence for the resale of fuel, the Court considered that there was nevertheless a requirement for a licence because of the Ports of Jersey's role in operating an aerodrome. The Government of Jersey is keen to understand whether this is **an accurate representation of the EU *acquis on this issue*** and to consider the role of the Ports of Jersey in clearly confirming the need or otherwise for a licence.

The reviewer is invited to consider any other matter necessary and appropriate to answering the questions in this terms of reference.

In carrying out the review it is expected that evidence would be invited from stakeholders.

It is expected that a Report will be published to the States of Jersey and so it may be necessary to go through a redaction process to remove any confidential information.

Annex B: Stakeholders from whom written representations were received and/or with whom meetings were held

Aviation Beauport Limited

Carey Olsen

Fuel Supplies Channel Islands Limited

Jersey Competition Regulatory Authority

Jersey Telecom

Mr. Philip Ozouf, former Assistant Chief Minister

Ports of Jersey.