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By email

28th April 2023

Dear Chair,

Jersey Competition Law

Thank you for your letter of the 19th April, in which you provide a number of questions with regards to the Competition (Jersey) Law 2005. I have set out below answers to each of these in turn:

1. *The Competition (Jersey) Law 2005 is now 18 years old, reviews took place in 2015 and 2018: why are changes being formed now?*

Following the 2015 and 2018 reviews, further work was undertaken in 2021 and 2022 to prepare the proposals set out in the consultation papers. This involved obtaining further advice from Oxera Economics, Kassie Smith KC, the Jersey Competition Regulatory Authority (the 'JCRA') and the Law Officers' Department.

As outlined in the press release of 22nd February, there is also a cost-of-living dimension that is driving this consultation. At a time when Islanders' household budgets are under significant pressure as a result of the high levels of inflation seen in recent months, it is more important than ever that competition in the market works well.

As I noted in my letter to you of 4th April, maintaining an attractive and competitive business climate, with a robust, transparent, and supportive (wherever possible light-touch) regulatory environment, is essential for the Jersey economy. This helps to create healthy markets and lower prices and more choice for local consumers.

- a. *Are there any specific examples that indicate the necessity for the proposed changes?*

The proposals have been prepared with a view to aligning the Competition (Jersey) Law 2005 (the '2005 Law') with international best practice. By way of example:

In the area of market studies

The market study guide¹ of the Organisation for Economic Co-operation and Development stipulates that it is more common that market study powers are explicit legislative powers, rather than inferred from the general powers granted to an authority. Similarly, competition authorities with the power to conduct market studies generally also possess powers to collect information.

In the area of enforcement

The 2005 Law does not provide for so-called commitments and settlement procedures, such as found in equivalent UK and EU legislation. Kassie Smith KC (in her 2018 review) suggested Government to consider the introduction of such provisions in Jersey legislation which, in certain cases, could assist the JCRA to address harmful conduct under the 2005 Law.

In the area of merger control

As regards the mergers and acquisitions regime, both Oxera and the JCRA have previously issued recommendations to improve the operation of the framework. Oxera recommended that "the merger regime should be changed so that only mergers that affect the local economy, and which the JCRA can actually do something

¹ See: <https://www.oecd.org/daf/competition/OECD-Market-Studies-Guide-for-Competition-Authorities-2018.pdf>.

about, are investigated".² Stakeholders have previously also expressed similar concerns about the current framework.³

2. *Noting the demerger of the Channel Islands Competition & Regulatory Authorities (CICRA), will the proposed changes allow reformation of that body in the future?*

The proposals outlined in the consultation papers do not concern the arrangements for pan-Channel Islands competition law cooperation. It should be noted that since the CICRA administrative arrangement was terminated in 2020, both Authorities have continued to cooperate and work closely together, where appropriate, under a memorandum of understanding. Department officers also work cooperatively with their counterparts in Guernsey and have, for instance, shared the competition law consultation with them for information.

3. *What powers do the Jersey Competition Regulatory Authority (JCRA) currently have if they identify issues in a specific market, merger or acquisition and how will this potentially change?*

At a high-level, the JCRA's powers under the 2005 Law can be summarised as follows:

In the area of merger control

The 2005 Law requires mandatory notification of mergers and acquisitions that meet the thresholds set out in the Competition (Mergers and Acquisitions) (Jersey) Order 2010. As part of its assessment, the JCRA may require parties to provide information. On an application for the approval of a merger or acquisition under the 2005 Law, the Authority may either approve the transaction, with or without attaching conditions, or may refuse to approve it.

As regards merger control, the proposals do not involve any major changes to the JCRA's powers when assessing notified mergers and acquisitions (noting the proposed introduction of a new turnover and discretionary share of supply test to determine JCRA jurisdiction). It is however proposed to remove the JCRA's (theoretical) right to grant approval to mergers and acquisitions that would substantially lessen competition in Jersey.

When conducting investigations under the Law

Where the JCRA has a 'reasonable cause' to suspect an infringement (of one of the provisions listed in Article 26 of the 2005 Law), the Authority may carry out an investigation. The investigatory powers of the JCRA are set out in Part 5 of the Law and include a power to demand information and documents, a power to obtain information stored on a computer and a power to enter premises.

In the area of market studies

The 2005 Law does not currently include a framework for market studies. As such, the JCRA does not have any formal information gathering in the context of a market study under the 2005 Law. Similarly, the JCRA does not currently have any formal powers to address any competition issues identified in a market study (beyond making non-binding recommendations).

In the area of compliance with the 2005 Law

Jersey's current competition law framework does not include penalties aimed at the individual responsible for the breach (as opposed to the corporate entity). Studies have shown that, in terms of the sanctions which motivate competition compliance, businesses are particularly concerned by sanctions that hold individuals accountable. Two proposals are included in the consultation to increase deterrence, namely, the introduction of a so-called criminal cartel offence and a power for the JCRA to seek disqualification Orders against directors whose businesses have breached the 2005 Law.

- a. *Will this vary across different sectors?*

The JCRA is Jersey's general competition authority, and the 2005 Law, in principle, applies to all sectors of the economy.

² See: <https://www.oxera.com/wp-content/uploads/2018/07/A-review-of-the-Jersey-regulatory-and-competition-framework-1.pdf-1.pdf>.

³ See: <https://www.jcra.je/cases/2015/m1144gj-review-of-mergers-and-acquisitions-law/>.

b. Will there be changes in the economic regulation of the telecom, ports and postal sectors?

The consultation does not relate to the JCRA's economic regulation of the ports, postal and telecommunications sectors and so does not include proposals to amend any of the following laws:

- Air and Sea Ports (Incorporation) (Jersey) Law 2015;
- Postal Services (Jersey) Law 2004;
- Telecommunications (Jersey) Law 2002.

4. Potential increases in powers to require provision of commercial information to JCRA are proposed. What assurances will be provided to businesses on the protection of such information? For example, what consequences for JCRA, its directors and employees will be established should breaches in confidentiality occur?

Part 7 of the 2005 Law sets out rules for the disclosure of information. It is considered appropriate that these provisions will equally apply in the context of a market study.

In particular, Article 44(2) of the 2005 Law provides that a person commits an offence if he or she discloses specified information unless in the circumstances permitted by the Law or if the information is already in the public domain or framed so as to not to enable information relating to a particular person to be ascertained from it.

5. How will the proposed changes impact upon JCRA staff resourcing and will there be financial implications for the Government of Jersey?

It is not expected, at present, that there will be substantial financial implications for the Government of Jersey resulting from the proposed legislative changes.

By way of example, as a result of the proposed changes in the mergers and acquisitions area, fewer transactions may be notifiable, reducing the JCRA's workload in this area. However, at the same time, there may be more activity in other areas (e.g. market studies) that are funded by Government. Furthermore, it is acknowledged that, if the proposed new criminal cartel offence is introduced, the JCRA may require assistance in order to pursue criminal charges (for instance from the States of Jersey Police).

Any potential financial implications for Government will be duly considered before proceeding with any of the proposed changes.

a. Noting that both the JCRA and yourself as Minister, will be able to initiate a market study, will there be different lines of funding in either circumstance?

The JCRA receives an annual grant from Government which it uses to finance its market studies programme, regardless of whether the JCRA initiates a market study at its own initiative or following a Ministerial request.

6. How will independence be maintained when initiating market studies and other reviews?

Under the proposed new regime for market studies, the independence of the JCRA will be maintained, even in contexts where the study is requested by the Minister, by requiring the Minister to provide his or her reasons for requesting the study and consulting the JCRA on the terms of reference for the market study. This is similar to the model adopted by New Zealand's Commerce Commission for market studies. This scoping exercise would ensure that the JCRA agrees with the areas to investigate and that the review would only be focused on areas within its remit. The JCRA would then carry out the review independently once the terms of reference have been set.

7. *The Panel understands that a turnover test will be used when establishing reviews of mergers and acquisitions. Could you further clarify how turnover will be calculated?*

a. *What elements will be included, for example locality of turnover or specific product lines and will the calculation be based on purely the acquired assets or gross turnover of both or one of the parties?*

In line with international best practice, the aim is to adjust turnover in such a way as to enable it to reflect the real economic strength of a business. It is proposed that for the purposes of merger control, the 'applicable turnover' of a business shall consist of the amounts derived by the undertaking in the preceding business year from the sale of products and the provision of services falling within the ordinary activities of the undertaking to businesses or consumers in Jersey, after deduction of sales rebates and taxes (i.e. 'net' turnover).

The intention is to ensure that mergers only become notifiable to the extent that they have a local impact. Thus, for example, if a Jersey company makes a sale to a UK customer, the turnover generated through that sale would be deemed to be UK turnover rather than Jersey turnover.

For the avoidance of doubt, in cases where only a part of a business is acquired by another business, the turnover of the acquired part(s) of the target undertaking will be taken into account, but the remaining part(s) of the seller will not be relevant for the purposes of determining whether the transaction must be notified to the JCRA for approval.

In addition, given the specific nature of the sector, it is proposed to introduce specific rules for the calculation of turnover of credit institutions, financial institutions and insurance undertakings. In this area, the proposals broadly build on EU precedent as the EU Regulations in the banking sector are based on years of legal and economic assessment.

It is important to note that further stakeholder engagement will take place in relation to the structure of the turnover test once this has been developed in more detail. This will give stakeholders a further opportunity to provide input, for example on the proposed levels of turnover, the location of turnover (e.g. Jersey and Channel Islands turnover) and the number of parties involved in the merger or acquisition that need to achieve a certain turnover in Jersey.

8. *We note that a press release on the Jersey Competition Law consultation was issued 22 February 2023: what other actions are taking place to promote the consultation?*

a. *Have you directly contacted individual businesses in the Island?*

Following the publication of the consultation in February, Department officers have brought the consultation to the attention of the Chamber of Commerce, the Law Society, the Institute of Directors, the Consumer Council and a number of local law firms. This included an offer to speak to representatives to explain the legislative proposals in more detail.

On 26th April Department Officers gave a presentation to the Consumer Council, explaining the proposals in clear and simple terms and asked the Council to submit any feedback they may have. Presentations have also been given to the Association of Restructuring and Insolvency Experts and the Jersey Association of Trust Companies. In addition, on 1st of May officers will also give a presentation to Sure (following a request received).

b. *Have you had any responses to the consultation so far and, if so, what particular concerns are being raised?*

The consultation closed on Friday 21st April. 12 responses have been received, which are currently being analysed. Sure and the Consumer Council have been given some additional time to consider the proposals and their feedback (if any) is expected in the first half of May.

9. *Following the closure of the consultation, scheduled for 21 April 2023, will the Panel be provided with the findings and when can these be expected?*

Yes, a summary of the feedback received, a Government response and the proposed next steps will be published. It is anticipated that the findings will be published by the end of Q2 / start of Q3.

- a. *When are law drafting instructions expected to be completed and will indicative and final drafts be forwarded to the Panel?*

If any of the proposals are taken forward following the review of the feedback received, law drafting instructions will be finalised in Q3/Q4 and these can be provided to the Panel. As outlined in the consultation papers, further stakeholder engagement will take place once draft legislative changes have been prepared.

At a later stage, further law drafting instructions will be needed to update secondary legislation, in particular the Competition (Mergers and Acquisitions) (Jersey) Order 2010. Stakeholders will again be given an opportunity to comment on the draft legislation.

- b. *When is it anticipated that an updated Competition (Jersey) Law will be debated and when do you seek it to be in effect by?*

Given that there are still a number of steps to complete prior to any debate in the States Assembly, it is difficult to give a clear indication on timings at this stage. However, the intention is to lodge any proposed changes to the 2005 Law in the first half of next year. Subject to approval by the States Assembly, these amendments would then go before the Privy Council before entering into force.

I would welcome the opportunity to provide a further update to the panel in advance of lodging any proposed amendments.

I hope the above provides clarity to the areas you have raised.

Yours sincerely,



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