Economy

Consultation the Draft Competition (Jersey) Amendment Law 202-

Response Paper

Response Paper:

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A. Background

1. On 3 October 2024, the Government of Jersey published a public consultation inviting views on the Draft Competition (Jersey) Amendment Law 202- (the **draft Law**) which, if approved, would amend the Competition (Jersey) Law 2005 (the **2005 Law**). In 2023, the Government consulted on the principles underpinning the legislative proposals set out in the draft Law.

2. The draft Law is intended to update Jersey's competition legislation and ensure the Island has a modern, but balanced, legal framework that is supportive to businesses and protects consumer interests. In particular, it focusses on enhancing the operation of the Island's mergers and acquisitions regime, improving the Authority's ability to conduct market studies in a wide range of economic sectors and supporting efficient and effective enforcement in certain cases by enabling the Authority to accept legally binding 'commitments'.

3. As part of the consultation process, Government officials directly engaged with various local stakeholders to obtain input from a wide and varied group of interested parties. This included representatives from the Jersey Competition Regulatory Authority (the **JCRA**), the legal industry, the Jersey Consumer Council and Jersey Business.

4. The consultation closed on 1 November 2024 and five responses were received. All responses have now been carefully considered and the Government would like to thank those who have taken the time to respond to this consultation. This paper summarises the feedback received and sets out the Government's response to the consultation. Further questions or comments relating to this consultation response may be directed to:

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Publication date: 5 December 2024

B. Feedback and Government response

5. On balance, the feedback received in response to the consultation of was positive and does not require any major changes to the proposals set out in the consultation paper. In light of the feedback received, a small number of adjustments has however been made to improve the draft Law. The below sections highlight the main points raised by respondents and set out the Government's response to each.

1) Mergers and acquisitions

6. The majority of proposals in the mergers and acquisitions area was supported. In addition, a small number of technical comments was submitted in relation to certain specific provisions.

7. It was questioned whether the reference to 'individuals' in Article 2(1)(b) is intentional. The respondent pointed out that this term is not defined in the Interpretation (Jersey) Law 1954 and its natural meaning is to refer to natural persons.

> ***Government response:***
> *This is an intentional change and aligns the position in the 2005 Law with the European Union Merger Regulation and other domestic merger regimes in European countries. It clarifies that control may also be acquired by natural persons, if those persons themselves carry out further economic activities (and are therefore classified as economic undertakings in their own right) or if they control one or more other undertakings.*[1]

8. Two respondents provided detailed comments on the proposed changes to Article 20 of the 2005 Law which contains one of the core principles of Jersey's competition rules. Namely, that certain mergers and acquisitions may not be executed unless the transaction has been approved by the JCRA. If there is a breach of this obligation, title to Jersey company shares or property shall not pass in accordance with terms of the merger or acquisition.

9. The draft Law proposes two changes to Article 20 of the 2005 Law. The first is of a technical nature and would introduce the words "purport to" in Article 20(1) of the 2005 Law. As such, this provision would read "[a] person must not purport to execute a merger or acquisition of a type prescribed by an Order made under paragraph (3) except with and in accordance with the approval of the Authority". Feedback from one of the respondents was:

> *[...] the use of "purport to execute" could inadvertently enable a party to a foreign transaction above the level of any Jersey undertaking (i.e. so that there is an indirect change of ownership or control of a Jersey undertaking but no direct transfer of legal or beneficial title to Jersey situs assets) to argue that they have not breached Article 20(1) of the Amended Law. This is on the basis that the parties would, as a matter of fact and foreign law, have executed (i.e. put into effect) the merger or acquisition rather than purported to do so, and Article 20(2) of the Amended Law may not therefore operate to void such a merger or acquisition under the foreign*

[1] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

law (based on the manner in which the relevant foreign jurisdiction applies private international law).

10. Whilst this respondent acknowledged that there are other jurisdictions with mandatory merger and acquisition regimes that use a similar or identical forms of language, they suggested that the wording "execute or purport to execute (or similar) is used in Article 20(1) (and consequentially in other provisions elsewhere in the 2005 law).

> ***Government response:***
> In order to avoid any uncertainty with regard to the wording and scope of Article 20(1) of the 2005 Law, such as referenced by the respondent, it has been decided to retain the current language in this provision, thus stating that "[a] person must not execute a merger or acquisition of a type [...]" It is considered that this is sufficiently clear as to the prohibition imposed, is familiar to industry and avoids any uncertainty which may arise as a result of the wording in the draft Law, as consulted on.

11. The other respondent who commented on Article 20, raised a concern with regard to the proposed wording in paragraph (2) which would render a notifiable merger or acquisition void if there has been a breach of the notification requirement in paragraph (1). In particular, this respondent flagged potential wider implications, in particular in 'international' cases with limited Jersey nexus. Their view was that the current wording in Article 20(2), which is limited to Jersey situs assets (Jersey company shares or property), is clearer and more appropriate.

> ***Government response:***
> The Government's intention is that where the draft Law refers to a merger or acquisition being void as a result of a breach of the notification requirement in Article 20(1) the effect relates to Jersey situs assets. Jersey legislation only relates to property within the Bailiwick. However, the comments received in response to the consultation are acknowledged and in absence of any strong views favouring the proposed new wording, Government intends to retain the current wording in Article 20(2)(a) and (b). However, to modernise the language in this provision where it states that title "shall" not pass, this will be changed to "does" not pass.

12. Further comments in the mergers and acquisitions area related to draft Article 22(3A)(c) which, in the opinion of the respondent, should refer to the condition the JCRA intends to vary, remove or substitute as otherwise a breach of any condition would permit the Authority to vary, remove or substitute any other unconnected condition.

> ***Government response:***
> *It is not considered necessary to amend draft Article 22(3A)(c). Moreover, it should be noted that in circumstances where there has not been a failure to comply with a condition, the JCRA may (under draft Article 22(3A)(a)) vary, remove or substitute a condition if it has reasonable grounds to believe that there has been a material change in circumstances since the approval was given.*

13. A comment was also received in relation to the proposed changes to Article 23 which relate to the Minister's power to exempt a merger or acquisition from the requirement that it must be approved by the JCRA. Whilst this respondent did not have any objection to the proposal to permit the Minister

to attach conditions to a public policy exemption, they consider that the Minister's power to require a person to provide information and documents in draft Article 23(1C) is unconstrained. The respondent proposed that constraints similar to those in proposed Article 54D(1) are incorporated in Article 23.

Government response:
The Minister's power under proposed Article 23(1C) is not considered unconstrained as it is limited to "information and documents relating to the merger or acquisition that the Minister needs to enable them to determine whether to grant an exemption or attach a condition". However, a minor change to the wording will be made to enable the Minister to "require a person to provide information and documents relating to the merger or acquisition that the Minister considers they require".

2) Commitments procedure

14. The proposed commitments procedure was generally supported. A small number of comments was received to improve the proposed framework.

15. Draft Article 34A enables the JCRA to engage with parties with a view to agreeing binding commitments if it has begun an investigation into alleged anti-competitive behaviour but has not made a decision in relation to that conduct. One respondent commented that draft Article 34A(1)(b) should cross-refer to the whole of Article 35 of the 2005 Law, as Article 35(2) (as is currently referred to in this provision) relates to a proposed decision, not a decision.

Government response:
Article 35(2) provides that the JCRA 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. As such, it does not only relate the JCRA's proposed decision, but also provides for the JCRA to make the actual decision. As such, it is not considered necessary to change the wording in draft Article 34A.

16. The Government was also requested to consider whether in draft Article 34A(4)(b)(1), which clarifies that a commitment remains in effect until the expiry date, an 'expiry event' (for example, an objective being achieved by the undertaking subject to the commitment) could be added.

Government response:
Having reviewed this comment, an amendment to the draft Law is not considered necessary. If parties subject to a commitment take the view that a commitment should no longer be in effect because a certain goal has been achieved, they may request the JCRA to release the commitment in accordance with draft Article 34A(5)(a).

17. A comment was also received in relation to draft Article 34B(3) which sets out the remit of a commitments decision and allows the JCRA to take action in relation to competition concerns that are not addressed by commitments accepted by it. In relation to this provision, it was suggested that the reference to "concerns that are not addressed by commitments" should also refer to those concerns intended or purported to be addressed (for example using the wording "concerns that are

not addressed or intended or purported to be addressed by commitments"), otherwise it could be argued that the JCRA's power to take action is limited to where the competition concern was actually addressed (i.e. dealt with) by the commitments.

Government response:
It is Government's view that the term "addressed" should not be read as narrowly as "dealt with". It may for example take some time before competition law concerns are fully removed as a result of commitments being accepted. This would not mean that in the meantime the JCRA would not be able to take action in relation to any other type of competition concerns it may have. It should also be noted that the term "addressed" is also applied in the equivalent section in the UK Competition Act 1998 (Section 31B(3)), and using different wording in the 2005 Law could cast some doubt on whether the provision in Jersey is intended to do the same as the equivalent provision in the Competition Act 1998.

18. Additionally, Article 34B(4) provides that the JCRA's investigation into alleged anticompetitive behaviour ceases to be suspended in the scenarios set out in sub-paragraphs (a)-(c). One of the respondents suggested that in the references to "material change of circumstances" and "information" in these provisions, it should be clear that the change in circumstances or the information (as applicable) must be relevant to the commitment.

Government response:
It is Government's view that the provisions are adequately drafted. Article 34B(4)(a) refers to a "material change of circumstances since the commitments were accepted". This implies that no consideration should be given to changes of circumstances that are not relevant to the commitments accepted. Along the same lines, with regard to Article 34B(4)(c), in determining whether or not to accept commitments, the JCRA will only have regard to information to that is relevant to the case. So, it would only want to continue its investigation if information on the basis of which it accepted the commitment, thus relevant information, was incomplete, false or misleading. The proposed wording is furthermore consistent with equivalent provisions in the UK Competition Act 1998 and thus provides a familiar framework.

19. It was also suggested that the draft Law should prescribe the minimum period in which representations can be made after the JCRA publishes its draft commitments. A four-week period was suggested as a suitable minimum period in this context.

Government response:
Government shares the view that four weeks appears to be an appropriate minimum period to enable interested parties to submit views on proposed commitments. However, Government takes the view that such procedural detail is best outlined in new Guidelines on the commitment procedure which the JCRA intends to adopt.

3) Market studies

20. The proposed provisions to create a formal and transparent framework for market studies were supported by all stakeholders. A number of comments and suggested improvements to the draft framework was received.

21. With regard to draft Article 54A(3), which sets out the circumstances the JCRA *must* and *may* have regard to in determining whether it is in the public interest to carry out a market study, a number of suggestions was made.

    1. Draft Article 54A(3)(b) provides that the decision-maker may have regard to "any other matter the decision-maker considers relevant". It was suggested this is amended to read "any other matter the decision-maker reasonably considers relevant".
    2. It was suggested that in Article 54A(3)(b)(ii) "could" is replaced with "should".
    3. It was queried whether in draft Article 54A(3)(b)(iii) "likely" is too high a standard given the available information at the time a market study is considered may be limited, and whether "reasonably possible" (or similar wording) may be more appropriate.
    4. It was also queried whether in draft Article 54A(3)(b)(iv) "the most appropriate" is too high a standard for the same reasons as set out above, and "an appropriate" or similar may be more appropriate.

Government response:

*In response to the **first** point, draft Article 54A(3)(b) provides that the initiator of the market study may have regard to any other matter they consider relevant in determining whether it is in the public interest to carry out a market study. The provision furthermore provides a non-exhaustive list of matters that may be considered relevant. Introducing an additional reasonableness test into this provision is not considered necessary for, nor conducive to, the operation of the proposed regime.*

*In response to the **second** point, the word "could" is considered more appropriate in this provision instead of the more subjected term "should".*

*In response to the **third** point, it should firstly be noted that Article 54A(3)(b) is characterised by its discretionary nature. Government is furthermore not convinced that replacing the word "likely" by "reasonably possible" would enhance the operation of this provision. Before a market study is launched, a person may equally not know whether it is "reasonable possible" that there are viable solutions to any issues identified. Furthermore, likelihood is seen as the better test because if it is unlikely there will be viable solutions, that would be an indication that it would not be in the public interest to proceed.*

*In response to the **fourth** point, it should again be noted that this is just one of the factors the decision-maker may consider. The present drafting is considered appropriate in this regard.*

22. Furthermore, with regard to draft Article 54B(3), it was suggested that the underlined wording is added in this provision. The revised provision would then read: "[b]efore requiring the Authority to carry out a market study under Article 54A(2) the Minister must publish a notice [...]".

Government response:

The proposed change is not considered needed for this provision to be effective as the only provision under which the Minister may require the JCRA to conduct a market study is Article 54A(2).

23. In addition, with regard to draft Article 54C(3) which allows the JCRA to consider certain ancillary matters, Government was recommended to make clear that the JCRA must "reasonably" consider this in the public interest to do.

Government response:
Article 54C(3) will be amended to require that the JCRA must be satisfied it is in the public interest to consider ancillary matters.

24. In relation to draft Article 54D one of the respondents reiterated their previously expressed view that imposing penalties and/or causing people to commit a criminal offence when they are responding, or fail, to respond to a request for information and/or documents is disproportionate.

Government response:
Government officials met with this respondent to explain the rationale for these provisions, namely to ensure that there is a clear incentive to comply with a request for information. Moreover, to ensure the provisions are proportionate, a person would only commit a criminal offence if "without reasonable excuse they knowingly or recklessly provide information [...] that is false, misleading or incomplete". The wording "without reasonable excuse" is also important in this regard. However, if a person, without reasonable excuse, simply fails to comply with a request for information, they would not be guilty of an offence, but the Authority may impose a financial penalty, up to a certain level.

In light of Government's views with regard to the need for a sanction regime to ensure compliance, the respondent urged Government to consider the following changes:

1. *In draft Articles 54D(2)(a) and (b), references to information and documents should be to information and documents within the person's possession or control.*
2. *In draft Article 54D(2)(b), "immediately" should be replaced by "as soon as reasonably practicable".*
3. *In draft Articles 54D(2)(a) and (b), the place specified in the notice should be a place in Jersey and the time a time during normal working hours on a working day; the recipient must be given reasonable time to comply taking into account the anticipated volume of documents or information requested.*
4. *In draft Article 54D(8), in the context of an investigation in which a person has not been formally accused of any wrongdoing, the offence should be limited to knowingly providing false or misleading information (and not extend to reckless provision or provision of incomplete information).*

*In response to the **first** point, as it is clear from draft Article 54D(1)(a), paragraph (2) only applies if it appears to the JCRA that a person is in possession of information or documents that are, or are likely to be, relevant to a market study. As such, no further changes are needed.*

*In response to the **second** point, Government agrees with the respondent that "immediately" can be replaced by "as soon as reasonably practicable".*

*In response to the **third** point, the Government considers that this type of procedural detail is best set out in new JCRA market study guidelines. Moreover, whilst the comment seems to be intended*

to provide procedural safeguards for those involved in a market study, some may, for example, prefer a meeting outside of normal working hours.

*In response to the **fourth point**, it is imperative that the proposed market studies regime strikes an appropriate balance between, on the one hand, the need to ensure the framework is sufficiently robust and, on the other hand, prevent the proposed sanctions from being disproportionate in the circumstances of a market study. Therefore, further legal analysis is due to take place with regard to the proposed offence in draft Article 54D(8) and this will determine the scope of the provision in the final draft of the Law to be lodged for States Assembly consideration.*

25. Lastly, with regard to draft Article 54E(3)(b), which states that the JCRA must allow a reasonable time for comments on the draft market study report, it was suggested that the law includes a minimum period of, for example, eight weeks.

Government response:
In relation to the suggestion that the Law includes a minimum period during which recommendations can be made, six weeks is considered appropriate.

4) Other proposed amendments

26. A question was raised as to why a settlement procedure has not been included in the draft Law. This responded referenced the 2018 "Review of the circumstances around the Jersey Competition Regulatory Authority's Decision on ATF Fuels" by Kassie Smith KC[2] which recommended the establishment of a formal settlement procedure.

Government response:
Settlement, as a principle, has not been omitted, as this is considered a helpful tool for the JCRA. However, it is Government's view that settlement can proceed without any legislative changes. This has been considered in light of the existing provisions in the 2005 Law and having regard to the legal position both in the EU and UK.

There are two relevant EU Regulations in this regard.

1. *Regulation (EC) No 1/2003 provides the powers and procedures of the European Commission in the investigation of competition matters.*
2. *Regulation (EC) No 773/2004 sets out the procedural framework for the application of Regulation 1/2003 and governs how the European Commission deals with cartels and anti-competitive practices. It sets out the procedures which must be followed when it investigates allegations of such behaviour, such as, access to information, right to be heard, access to the file, time limits, participation of complainants in proceedings etc. Regulation (EC) No 773/2004 also bestows on the Commission the discretion whether to explore the settlement procedure*

The 2005 Law does not contain similar provision to that included in Regulation 773/2004 in relation to the procedure to be followed when the JCRA conducts an investigation. In Jersey, this

[2] See: 2024-11-01 C-002 Authority response .pdf.

type of procedural detail is set out in JCRA Gudelines, in particular Competition Guideline 10: Investigation Procedures.

It is therefore Government's view that it would be inconsistent to specify on the face of the Law that JCRA can follow an expedited "settlement" procedure when certain conditions are met, given that the "regular" procedure is not set out in the Law. Rather, settlement can proceed without legislative support, since it is, in effect, an infringement decision by consent and the amount of the penalty is at the JCRA's discretion (up to the maximum set out in Article 39(2) of the 2005 Law).

The position in the UK is similar where procedural detail in relation to competition investigations is set out in The Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014.

For the avoidance of doubt, the commitment procedure, on the other hand, requires a statutory basis. This is a new power for the JCRA, whereby it may, without taking a final decision finding an infringement, nevertheless make undertakings ("commitments") given by the parties binding on them. Such commitments create legally binding obligations for parties which are enforceable by the JCRA.

27. A question was also raised on the rationale for proposing to remove the term "commercial entity" throughout the 2005 Law and instead use the term "undertaking" where appropriate.

Government response:
Article 1 of the Competition Law contains a definition of the term 'commercial entity'. A 'commercial entity' means "a company, the States, a Minister and a body created by Act of the States".

Article 4 of the Competition Law underlines that the focus of the assessment of whether an entity is an 'undertaking' is on the nature of the particular activity undertaken, not the nature of the entity that undertakes it. Article 4 clarifies that the term 'undertaking' can apply equally to public sector bodies; the States, a Minister, a body created by Act of the States and any States Authority all fall within the definition of undertaking, insofar as they are "carrying on a business" (thus act as an 'undertaking' as defined in Article 1).

Article 4 aligns the 2005 Law with the EU competition rules. The EU Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.[3] The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities.

Given the fact that Article 4 provides that the 2005 Law applies to the States, a Minister and a body created by Act of the States insofar as these entities carry on a business, there is no need for a separate definition of the term 'commercial entities'. In line with Article 4, a 'commercial entity' is either an 'undertaking' to which the Competition Law applies or does not constitute an undertaking and its activities fall outside the scope of the 2005 Law.

Therefore, the definition of 'commercial entity' can be repealed in Article 1 of the Competition Law and the term 'undertaking' (or 'business') can be consistently used where reference is made to an

[3] See e.g. Judgment of the Court of Justice of 12 September 2000, Pavlov and Others, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428.

entity engaged in economic activity (including in the definitions of 'officer' and 'director' in Article 1).

28. One of the respondents furthermore disagreed with the proposal to delete Article 10(3) of the Law. This responded emphasised the importance of having the opportunity consider and respond to draft advice issued by the JCRA to the Minister on the introduction of a block exemption.

Government response:
In light of the feedback received, Article 10(3) of the 2005 Law is to be retained in its current form.

C. Next steps

29. The Minister has approved and authorised the publication of this paper setting out the Government's response to the Competition Law consultation that was published on 3 October 2024.

30. Once final changes have been made to the draft Law, in accordance with the Government's response set out in this paper, preparations will be made to lodge the draft Law 'au Greffe' for debate in the States Assembly in early 2025.

31. As outlined in the consultation paper, work is ongoing to review and revise the Competition (Mergers and Acquisitions) (Jersey) Order 2010 and, in particular, the merger notification thresholds set out therein. Once draft proposals have been finalised, stakeholder engagement will take place, enabling interested parties to submit any comments.