



Competition Law consultation Paper 1: Market Studies

Consultation Paper:

Contents

<i>Introduction</i>	2
<i>Dedicated Competition Law framework for market studies</i>	3
<i>Initiation of a market study</i>	4
<i>Gathering information</i>	5
<i>Publication of draft report</i>	5
<i>Possibility of remedies if an adverse effect on competition is identified</i>	6
<i>Public interest considerations</i>	6
<i>Final market study report</i>	7
<i>Appeals</i>	7
<i>Relationship with mergers and acquisitions regime</i>	7

Introduction

1. The Jersey Competition Regulatory Authority (the **JCRA**) is responsible for the enforcement of the prohibitions in the Competition (Jersey) Law 2005 (the **Competition Law**) on anti-competitive arrangements and dominance abuse and the administration of the mergers and acquisitions regime.
2. Competition authorities often also have specific statutory powers to conduct market studies, including powers to collect information for the purposes of carrying out those studies.
3. Reviewing local markets is an important element of the JCRA's work. By gathering and analysing information, the Authority can make an assessment as to whether certain features of a market prevent it from functioning well and – if relevant – it may consider how problems may be best addressed. Market studies typically consider the relationship between consumer behaviour in a market, the behaviour of firms in that market, and the market's structure, rather than whether there could be a specific breach of the Competition Law. As such, market studies are helpful tools for the JCRA to examine markets outside the context of an antitrust investigation or merger review and complement the enforcement tools already available to it under the Competition Law.
4. Advancing the development of policies in area of market studies in Jersey is not something new. In 2002, the Industries Committee recommended that the (then) new Competition Law should include a general power for the JCRA to keep Island markets under review. It was the Committee's recommendation that this power should be cast widely, complementing the already existing power of the Minister under the Competition Regulatory Authority (Jersey) Law 2001 (the **CRA Law**) to request the JCRA to provide reports and information on certain matters.¹

¹ Article 6(2) and (4) of the CRA Law.

5. It should be noted at the outset of this paper that it is understood that the scope of the current framework does not provide the envisaged formal and general power for the JCRA to conduct market studies in a wide range of economic areas. Worth noting is also that international best practice suggests that it is more common for market study powers to be explicit legislative powers, rather than inferred from the general powers granted to a competition authority.² Furthermore, powers to initiate market studies are often available to both a Minister and the competition authority, whilst the CRA Law only outlines what the Minister can do.
6. As such, the current legal framework does not appear to fully implement the intention of the Industries Committee to create a general, statutory power in the Competition Law empowering the JCRA to conduct market studies and keep local markets under review. In addition, in 2021 economics consultancy Oxera provided advice to the Government on market studies broadly reflecting the Industries Committee’s recommendation to extend and enhance the legislative framework under which the JCRA can assess whether markets in Jersey are working well for consumers.
7. The purpose of this consultation is to seek views on a number of important improvements to the framework for market studies in Jersey. In particular, the Government is proposing to introduce a bespoke market studies framework in the Competition Law to support the JCRA’s important work exploring whether markets in Jersey are working well for consumers. This will increase clarity and transparency in respect of the role and powers of the JCRA and ensure it is appropriately equipped to effectively and efficiently conduct market studies in the Island. The aim is furthermore to develop the framework so that it strikes an appropriate balance between flexibility and discretion for the JCRA, on the one hand, and adequate procedural checks and balances in respect of any findings and remedies that might be introduced, on the other hand.
8. The JCRA supports the development of an overarching and tailored market studies framework in the Competition Law – including information gathering related powers – to provide a formal legal basis and statutory underpinning for future market studies.

Dedicated Competition Law framework for market studies

9. Getting the legal framework for market studies right will be a key determinant of the success of the regime as it will determine the types of competition problems that can be explored by the JCRA, the depth with which they can be reviewed, and the possible outcomes available.
10. Stakeholders will be aware that the JCRA has recently undertaken three market studies – absent a specified legislative framework – with further studies currently being conducted. As outlined, it is more common for market study powers to be explicit legislative powers, providing an authority a formal brief to undertake this type of work and ensuring that it is adequately equipped, whilst also providing transparency for stakeholders and appropriate procedural safeguards in respect of any findings. The Government takes the view this type of framework would be better for both the JCRA, and the parties affected (and for public confidence).
11. As such, in order to align Jersey legislation with international best practice and to implement Oxera’s recommendations, the Government proposes that an improved formal, transparent and tailored market studies framework is developed directly under the Competition Law, including appropriate powers for the

² See: Organisation for Economic Co-operation and Development, Market Studies Guide for Competition Authorities, 2018.

JCRA to collect information and sufficient procedural checks and balances to protect the rights of affected parties. The JCRA has advised the Government that it supports this proposal and believes it will positively influence its work to ensure that markets work well for consumers in Jersey.

12. Under the proposed modernised regime, the JCRA would be able to examine markets where certain features may be affecting competition, but which may not be directly caused by Competition Law infringements, and then take steps to resolve market-wide problems. In these cases, there may be no wrongdoing by individual businesses in terms of unlawful conduct under the statutory Competition Law prohibitions, but certain features of a market may still affect competition and give rise to consumer harm. Such features may include:

- market concentration;
- conditions for entry and exit;
- cost structures;
- degree of differentiation in products or offerings;
- availability of substitutes;
- search and switching costs;
- applicable laws and regulation;
- market growth and technological development;
- consumer and business behaviour; or
- access to information.

Initiation of a market study

13. Across jurisdictions, the initiation of a market study may often come from either the Government or a Minister or the competition authority itself after reviewing complaints, intelligence gathering, or initial desktop research and analysis. The Government proposes that a similar approach is taken under the envisaged, updated framework for market studies in Jersey, thus enabling both the JCRA and the Minister for Economic Development, Tourism, Sport and Culture (the **Minister**) to initiate a market study to be carried out by the JCRA.

14. For the purposes of the modernised framework, the Government envisages that a ‘market study’ shall mean “a study of any factors that may affect competition for the supply or acquisition of goods or services within Jersey”.³ A market study can be initiated when it is considered to be “in the public interest to do so”. Whilst ‘public interest’ is not defined in the Competition Law, the initiator must assess this by reference to the purpose of the Law, which is “to promote competition in the supply of goods and services in Jersey”. The JCRA and the Minister may have regard to a range of factors relevant to determine whether a study would be in the public interest, among other things, whether:

- there are indications the market may not be working as competitively as it could be (such as high prices or low levels of innovation);
- the market is of strategic importance to the economy or consumers in Jersey;
- it is likely there will be viable solutions to any issues that are found;
- a study is the most appropriate tool to assess whether there are competition issues in the market; and
- the JCRA is best placed to carry out the study.

³ This definition is taken from the new framework for market studies that was introduced in the New Zealand Commerce Act 1986, which has been described as “one of brevity and simplicity”, providing a useful example for a small jurisdiction such as Jersey.

15. The JCRA will formally begin a market study with the publication of a market study notice which must set out why the study is considered to be in the public interest, prescribe the terms of reference and include a timetable. If the Minister requires the JCRA to conduct a market study, the JCRA and the Minister must agree the terms of reference in advance. This ensures that agreement is reached with regard to the areas to investigate, it protects the JCRA's independence and ensures that the review would only be focussed on areas within the JCRA's remit. The JCRA will then carry out the market study independently, once the terms of reference have been set.

Gathering information

16. Competition authorities with the power to carry out market studies, generally also possess powers to collect information for the purposes of conducting those studies.⁴ Formal information gathering powers would however generally only be used by the JCRA when voluntary information collection strategies have proven unsuccessful or impractical.

17. It is envisaged that the JCRA will, wherever possible, adopt an informal approach with regard to information gathering, as the Authority's experience to date is that stakeholders often engage with market studies in a positive and cooperative way when approached by the Authority. However, if such informal approaches are not successful, the Government and the JCRA believe that there should be a formal power for the Authority to collect the information it needs to review a specific market in Jersey.

18. The envisaged formal information gathering power would be similar to the existing power in Article 27 of the Competition Law which enables the JCRA to require information and documents in the context of a Competition Law investigation. The Government considers that a similar power would be appropriate in the context of a market study if the Authority considers that collecting the information would be necessary for the purposes of conducting the study.

19. Important to note is that information collected during a market study would be, in general, subject to legal protection, particularly confidential information collected from businesses or other stakeholders. Furthermore, for the avoidance of doubt, the Government does not see a case for permitting the JCRA to apply any of the other powers of investigation as outlined in Part 5 of the Competition Law (e.g. power to obtain information stored on a computer, or to enter premises etc.) in the context of a market study.

20. However, it should be noted that if formal information gathering powers are used and a person fails to comply with a request or attempts to mislead or deceive the JCRA – for example by supplying information knowing it to be false, misleading or incomplete – they would be liable to a fine in the same way as they would be under Article 27 of the Competition Law.

Publication of draft report

21. Once the JCRA has analysed the information it has collected during the information gathering phase, it must prepare a draft market study report. The draft report must be made publicly available, and the JCRA must allow a reasonable time for comments on it.

⁴ See: Organisation for Economic Co-operation and Development, Market Studies Guide for Competition Authorities, 2018.

22. The draft report might dispel views that competition is restricted or distorted, thus giving the market a so-called 'clean bill of health'. Alternatively, the draft report might confirm there are competition issues in a market, and it may include recommendations as to how competition could be improved. In addition, if the JCRA considers that a feature, or combination of features, of a market for goods or services in Jersey impedes, restricts or distorts competition in that market, it may establish a so-called 'adverse effect on competition'.

Possibility of remedies if an adverse effect on competition is identified

23. It is proposed that if the JCRA establishes an adverse effect on competition, the draft report may outline that certain action is needed to influence the conduct of those businesses whose practices raise concerns and remedy, mitigate or prevent the adverse effect on competition.

24. If the JCRA proposes to impose any remedies upon establishing an adverse effect on competition, the action it intends to take should be outlined in its draft report and must be reasonable and practicable and take into account relevant factors such as:

- the nature and extent of the adverse effect on competition;
- the nature and extent of the remedial action;
- the relation between the adverse effect on competition and the remedial action;
- the likely effect of the remedial action on competition in the market that is the subject of the market study and any related markets;
- the availability of less restrictive means to remedy, mitigate or prevent the adverse effect on competition; and
- any other relevant factor arising from any information obtained by the JCRA during the market study.

25. In addition, instead of progressing to the remedies phase, the JCRA may also accept so-called 'undertakings in lieu'⁵ from market operators that would address the issues identified. Such 'undertakings in lieu' should be outlined in the draft report that is published for comment.

26. It is anticipated that imposing remedies – particularly structural remedies (i.e. divestiture of assets) – would generally only be considered by the JCRA when all other avenues to address any issues identified have been examined and exhausted. It is proposed that the JCRA will publish detailed guidance on its approach to remedies in new guidelines.

Public interest considerations

27. The starting position is that at the end of a market study, the JCRA should be able to impose legally enforceable behavioural and structural remedies, without Government intervention, so as to protect the independence of the Authority. However, it is the Government's view that the Minister should maintain some powers to intervene in clearly delineated sectors in the economy.

28. More specifically, the Government takes the view that there should be a role for the Minister if the JCRA proposes to impose any structural remedies in a market that raises one or more specified public interest considerations. Options that are being considered include a power of veto for the Minister or requiring the Minister to approve the decision as to whether (or not) any proposed remedies may be imposed by the

⁵ I.e. the JCRA may accept formal pledges from businesses that are considered appropriate to address any competition issues identified, instead of progressing to the remedies stage.

Authority. To enable the Minister to potentially intervene on public interest grounds, the JCRA will have a duty to bring any structural remedies – proposed in cases that raise public interest issues – to the attention of the Minister at the earliest opportunity.

29. As regards the types of market studies that may be subject to Ministerial intervention at the remedial stage, it is proposed that the Minister will have powers to specify these by Order. For the purposes of this consultation, a firm decision on this is therefore not yet needed as this will form part of secondary, rather than primary legislation. However, it is the Government's provisional view that the Minister should be able to exercise intervention powers with regard to any structural remedies in so-called sectors of 'critical national infrastructure' and / or if the JCRA's market study relates to a States of Jersey controlled company.
30. In order to define critical national infrastructure for the purposes of the new market studies regime, alignment may be sought with the Government's [Cyber Security Strategy](#) which lists 'Electricity', 'Gas', 'Telecoms', 'Transport (including Ports and Airport)' as 'Critical National Infrastructure operators'. In addition, the Government considers that it would be appropriate to add 'Water' to this list as well for the purposes of the proposed Competition Law framework for market studies. Additionally, States of Jersey controlled companies are: Jersey Electricity plc, Jersey New Waterworks Company Limited, JT Group Limited, Jersey Post International Limited, States of Jersey Development Company Limited, Andium Homes Limited and Ports of Jersey Limited.⁶
31. This type of public interest intervention is considered consistent with the public interest clauses that many countries have included in their market study and merger control regimes, and which allow governments to intervene under a public interest clause.

Final market study report

32. After having consulted on its draft market study report, the JCRA will be required to produce and publish its final report. The JCRA shall be required to make its report available to the Minister and, following that, to make it publicly available on its website.

Appeals

33. At the outset of a market study, it will not always be clear whether JCRA imposed remedies may be needed and consequently the process will need to include sufficient procedural safeguards in respect of any findings and remedies that might be introduced. Therefore, it is proposed that the new legislative framework for market studies will establish that any person to whom any JCRA-imposed remedies are addressed may, within a prescribed period, appeal against those remedies.

Relationship with mergers and acquisitions regime

34. To conclude this paper, the Government also wishes to draw attention to the way that the various provisions of the modernised Competition Law would interlock.
35. As is explained in Consultation Paper 2 on mergers and acquisitions, the introduction of a new turnover test is intended to allow the JCRA to focus on those transactions that may have the greatest negative impact on competition in the local economy. Stakeholders may be aware that the JCRA has attracted criticism in the

⁶ Office of the Comptroller and Auditor General, The States as Shareholder - Follow-up, 14 March 2019 ([States-as-Shareholder-Follow-up-Report.pdf](#) [\(jerseyauditoffice.je\)](#))

past for its review of international mergers and concerns were raised that some of its activities were not relevant to the Jersey economy. The proposed new turnover test may however lead to less merger control by the JCRA as fewer transactions may be notifiable.

36. As such, adequately equipping the JCRA under an updated, modern and broad market studies framework is considered very important as it cannot be excluded that – as a result of potentially less merger control by the JCRA – more activity is required in other areas, in particular market studies to assess whether competition in a market in Jersey is working efficiently.

Questions

1. Do you support the proposal to develop an enhanced formal and transparent framework for market studies under the Competition Law, including powers for the JCRA to collect information?
2. Do you consider the JCRA should be empowered to impose binding remedies at the end of a market study (beyond making recommendations to Government or other stakeholders)?
3. If the JCRA is given remedial powers, do you believe the sectoral scope of the proposed Ministerial public interest intervention power – i.e. linking this to ‘critical national infrastructure’ and States of Jersey controlled companies – is correctly drawn? If you think this should be wider or narrower, please explain why.