Economy

Competition Law consultation Paper 3: Appeals and Compliance

Consultation Paper:

Contents

Introduction

1. Consultation paper 3 seeks views on a number of proposed changes to the Competition (Jersey) Law 2005 (the **Competition Law**) that are intended to:

    1) introduce a more balanced framework for Competition Law appeals;
    2) enable the Jersey Competition Regulatory Authority (the **JCRA**) to deal with (suspected) breaches of the Law more efficiently; and
    3) ensure that the Law provides appropriate incentives to individuals to ensure that their conduct is in order.

Section A: Competition Law appeals

2. The JCRA can take decisions, give directions and impose financial penalties that are appealable under the Competition Law. The legal basis is set out in Article 53(1) of the Law which provides that a person may appeal against a decision, direction or fine imposed by the JCRA.

3. Article 53(3) of the Competition 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". Article 53(4) establishes that 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".

4. As such, an appeal under Article 53 of the Competition Law is in the nature of a full rehearing and full review of the merits of the case. In essence, this allows the court to substitute their decision for that made by the JCRA, even when the JCRA's decision was reasonable. As emphasised by Kassie Smith KC in her 2018 review of the JCRA (the **Kassie Smith review**), "on 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".

5. In 2015 Oxera was asked to review Jersey's competition framework (the **Oxera review**) which identified several concerns with regard to a full merits review. It was highlighted that, in a number of jurisdictions, there has been a move away from appeals mechanisms on the merits of a case to a narrower set of reasons that would allow an appeal to succeed. Oxera however acknowledged that "getting the appeals process right is not simple" and the importance of striking the right balance is reflected in their review. This is evidenced

as Oxera recognised that some form of appeal on the substance against the decisions of the JCRA is necessary, particularly if the decision is unreasonable or capricious. Oxera however also recognised that "given the judgement involved [in competition law cases], different bodies can come up with different answers, which may all be reasonable".

6. Oxera therefore recommended the introduction of an 'unreasonableness' test that takes account of the Jersey legal system. Under this test, the court would be able to substitute their decision for that made by the Authority, only if the JCRA's decision is not reasonable. The Kassie Smith review also highlighted the various concerns raised by Oxera and recommended Government to revisit Oxera's recommendations in this area.

7. Appeal rights based on grounds of unreasonableness are tried and tested within Jersey legislation and so come with a helpful body of local case law as to the nature of the test and what is meant by a decision being unreasonable.[1] [2] In line with established Jersey precedent, under the proposed new unreasonableness test, the court would be able to interfere:

   (a) if the JCRA's decision was wrong to such an extent that the court would categorise it as unreasonable; and
   (b) if the JCRA's decision was wrong to such an extent that it goes beyond merely being unreasonable and becomes a decision to which no reasonable decision-maker could have come, i.e. "Wednesbury unreasonable" or "irrational".

8. However, if the court's conclusion is simply that the JCRA's decision was wrong in the sense that it is not the decision which the court would itself have reached – but not unreasonable (as outlined above) – then the court should dismiss the appeal.

9. Oxera's recommendation to amend the current appeals framework and introduce a new 'unreasonableness' test, is supported by the Government and the JCRA. The objective of the proposed amendment is to ensure that appeals focus on where the JCRA has come to an unreasonable decision. The court would still examine the merits of the JCRA's decisions, thus retaining an important check and balance. However, the proposed 'unreasonableness' test would confine appeals to decisions that are 'unreasonable' having regard to all the circumstances of the case. The new 'unreasonableness' test would replace the full merits appeal which is currently provided for in Article 53 of the Competition Law.

Question

1. Do you support the proposal to amend the appeals framework in the Competition Law, confining appeals to JCRA decisions, directions and fines that are unreasonable having regard to all the circumstances of the case?

Section B: Settlement procedure for Competition Law cases

10. In the UK and EU, settlement proceedings can be initiated if a business that is being investigated is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the investigation. If settlement proceedings are successful, a

[1] See for example: Article 41(2) of the Control of Housing and Work (Jersey) Law 2012, Article. 11(1) of the Places of Refreshment (Jersey) Law 1967 and Articles 23(9) and 25C(3) of the Financial Services (Jersey) Law 1998.
[2] See for example cases: [2003] JLR 524, [2017] JRC 015, [2016] JRC 127 or [2017] JRC2 03A.

business' cooperation will be rewarded by a reduction in the financial penalty that would otherwise be imposed. As such, settlement proceedings allow authorities to achieve efficiencies, culminating in the earlier adoption of an infringement decision, and resource savings.

11. The Kassie Smith review recommended the Government to consider the introduction of a formal settlement procedure such as found in the UK and EU. The Government and the JCRA support this recommendation as this would allow the Authority to deal more quickly with cases if a business under investigation is willing to admit its liability in relation to an alleged infringement. This would give the JCRA an additional and efficient tool to address competition law violations, whilst settling businesses not only obtain a discount on the financial penalty, but are also able to draw a line under unacceptable business practices as fast as possible. Since its introduction in the EU, settlement in cartel cases has become an established practice.

12. Under the proposed settlement procedure, the JCRA would, in principle, be able to consider settlement for any case falling within the Article 8(1) ('anti-competitive arrangements') or Article 16(1) ('dominance abuse') prohibitions. As a result, the proposed Competition Law settlement procedure would broadly reflect the procedure that exists in the UK. The Government takes the view that it is important that the settlement procedure is included in law (rather than JCRA guidelines) so as to provide legal certainty to businesses and the JCRA, and ensure the procedure is transparent (to support public confidence). Guidelines with additional detail about the procedure would be developed by the JCRA.

13. Important to note is that parties will not enjoy a right to settle. Rather, the decision whether or not to engage in settlement discussions will be for the JCRA to make. It is proposed that the JCRA will be able to initiate settlement discussions either before or after the issuance of a so-called Statement of Objections under the Competition Law, so long as the JCRA considers that the evidential standard for giving notice of its proposed infringement decision is met. If settlement discussions are commenced, the business(es) involved must provide a clear and unequivocal admission of liability in relation to the nature, scope and duration of the infringement. This is important as it:

    - underlines the seriousness of the behaviour and creates the necessary finality in an investigation;
    - avoids the public perception of a 'nuisance settlement' in which the business(es) can argue that they settled not because they breached the law, but because they wanted to avoid incurring expenses (e.g. litigation), buy peace and move on; and
    - a settlement without the admission of guilt may reduce exposure to private actions for damages by third parties under Article 51 of the Competition Law.

14. Settling business(es) must ensure the suspected Competition Law infringement (as alleged by the JCRA) is ceased from the moment settlement discussions with the Authority are commenced. They must also confirm that they have been informed of the case against them, that they have been given adequate opportunity to make their views known and that they do not envisage requesting access to the file or requesting to be heard orally again. Additionally, parties must confirm that they will not file an appeal against the JCRA's settlement decision finding the Competition Law infringement.

15. In the event settlement discussions between the JCRA and the parties involved are successful, the JCRA will proceed to issue an infringement decision against the settling business(es). The infringement decision will reflect the admission made by the settling business(es) and include findings of fact and law and the amount

of the penalty imposed. It is proposed that settlement discounts will be capped at 20% for settlement pre-Statement of Objections and at 10% for settlement post-Statement of Objections. Parties may therefore wish to approach the Authority early on during an investigation to discuss the possibility of exploring settlement.

Question

2. Do you support the introduction of a formal settlement procedure in the Competition Law aimed at simplifying and expediting the procedure leading to the adoption of a JCRA decision?

Section C: Commitment procedure for Competition Law cases

16. The Kassie Smith review also recommended Government to consider the introduction of a formal commitment procedure such as found in the UK and EU. It is proposed to take this recommendation forward and introduce a commitment procedure in the Competition Law, which will complement the JCRA's powers to take infringement decisions to bring a breach of the law to an end. The commitment procedure will provide the possibility for businesses to offer commitments to the JCRA that are intended to address any competition concerns that the JCRA has identified. If the JCRA is satisfied that the commitments offered adequately address its concerns, it may adopt a decision which makes them binding on the parties.

17. In order to provide legal certainty to businesses (and their advisors) and the JCRA, the Government proposes that the new commitment procedure is introduced in the Competition Law, with the JCRA to develop Guidelines which will contain further detail in relation to procedural matters. The proposed procedure would build on precedent in UK and EU law, in particular the commitment procedure as outlined in the UK's Competition Act 1998. As such, the JCRA would, in principle, be able to consider adopting a commitment decision in any case falling under the Article 8(1) or 16(1) prohibitions.

18. The main difference between a commitment decision and an infringement (including settlement) decision is that the latter contains a finding of an infringement while the former makes the commitments binding without concluding whether there was or still is a breach of the law. The benefits for businesses are clear as when they offer commitments, they will not pay a fine, although commitments agreed with the JCRA can equally be costly. Commitments may, for example, involve a business agreeing to cease or modify its conduct, terminating an arrangement, removing a particular clause from an agreement, withdrawing from a particular activity, or even divesting itself of part of its business. However, agreeing commitments will likely be an appealing option as this allows businesses to close a case faster and – importantly – without any acceptance of wrongdoing which in many cases is easier to justify than receiving a penalty.

19. The commitment procedure also benefits the JCRA, allowing it to conclude cases quickly which, in turn, will result in resource savings and may prevent a potentially lengthy legal case. However, not all cases will be suitable for commitment decisions. The JCRA will unlikely consider commitments suitable where it intends to impose a financial penalty and commitments are, hence, unlikely to be used in cases of hardcore cartels or a serious abuse of a dominant position. The JCRA will likely only consider accepting commitments in cases where its competition concerns are readily identifiable, will be addressed by the commitments offered, and they can be implemented effectively and, if necessary, within a short period of time.

20. Businesses may offer commitments at any time during the investigation, until a decision on infringement is made. However, they do not have a right to a commitment decision, as it will be at the JCRA's discretion

whether or not to accept commitments. If the JCRA takes the view cooperation with the business involved is not satisfactory, it can at any time revert to the to the usual administrative procedure (i.e. infringement path). Additionally, the JCRA must make sure that any commitments proposed are tailored to the identified competition concerns. To ensure this is the case, the JCRA must conduct a so-called 'market test' (i.e. consultation) of the commitments before making them binding on the parties so as to enable interested third parties to submit their observations.

21. Under the proposed commitment procedure, the starting position will be that once commitments have been accepted, the JCRA may not continue its investigation, make an infringement decision, or give a direction in relation to aspects of the alleged infringement which are addressed by the commitments. However, in order to monitor compliance with agreed commitments, the JCRA may impose reporting obligations on the business(es) involved so as to enable the Authority to verify whether they act in accordance with their pledges. In addition, the JCRA shall not be prevented from taking action in relation to competition concerns that are not addressed by the commitments it has accepted.

22. Additionally, the JCRA will be permitted to reopen proceedings where the Authority has reasonable grounds for (1) believing that there has been a material change in any of the facts on which the decision was based, (2) for suspecting that the business(es) concerned act contrary to their commitments or (3) for suspecting that the decision was based on incomplete, incorrect or misleading information. It is furthermore proposed that if an undertaking breaks legally binding commitments, the JCRA may impose a penalty not exceeding 10% of the turnover of the undertaking during the period of the breach up to a maximum period of 3 years.

Question

3. Do you support the introduction of a formal commitment procedure in the Competition Law enabling businesses to offer commitments to the JCRA that are intended to address the competition concerns that the JCRA has identified?

Section D: Criminal cartel offence

23. The Competition Law does currently not criminalise infringements of the competition rules, nor does it enable the JCRA to seek so-called competition disqualification orders (**CDOs**)[3] or accept competition disqualification undertakings (**CDUs**), which are discussed in Part E below. In countries where such penalties are available, they provide a strong incentive for businesses and individuals to ensure that their conduct is in order. Studies have shown that, in terms of the sanctions which motivate competition compliance, businesses are particularly concerned by sanctions which operate at the individual, as opposed to the corporate, level.

24. The purpose of a criminal cartel offence is to deter the most serious forms of anti-competitive arrangements, often referred to as 'hard core cartels'. These are anti-competitive arrangements between competitors that aim to rig bids, fix and raise prices, restrict supply and divide or share markets, thereby causing substantial economic harm. Criminal cartel offences have existed in some countries (e.g. Canada and USA) for a number

[3] Notwithstanding Article 56 of the Competition Law which covers disqualification orders against individuals guilty of an offence under the Competition Law. The Government's proposal is intended to expand on this and enable the JCRA to seek CDOs against directors whose undertakings have breached competition law (irrespective of whether an offence is committed).

of years, but they have become more prominent over the last few years and are now in place in the majority of European countries.

25. The Government believes that criminal sanctions should be reserved for the most serious and damaging violations of competition law. In this regard, the Government shares the view of the UK Competition and Markets Authority (the **CMA**) that there is an inherent public interest in individuals involved in such hardcore cartels being prosecuted. The Government would therefore like to use the opportunity presented by this consultation to invite views on the on the introduction of a criminal cartel offence in the Competition Law to deter and challenge hardcore cartels and bring Jersey law in line with most other (European) jurisdictions.

26. The proposed criminal offence would be modelled on the offence that currently exists in the UK Enterprise Act 2002. If introduced, participation by an individual in the types of arrangements mentioned above may lead to the imposition of a prison sentence of up 5 years, unlimited fines, or both. Building on UK precedent is considered sensible as the UK's cartel offence is based on several years of legal assessment and has benefited from important amendments made through the Enterprise and Regulatory Reform Act 2013. Most significantly, the 2013 Act removed the dishonesty requirement that was originally included. It had been argued that since its creation, the criminal cartel offence had only rarely been used because it was difficult to establish that someone had acted dishonestly.

27. The Government also believes that it is appropriate to include a number of exclusions in the Law, which make provision for circumstances where the offence will not be committed, and statutory defences to the offence, mirroring those in the Enterprise Act 2002.[4] The proposed carve-outs generally apply to situations where parties have brought an arrangement to the attention of the public. As was emphasised by commentators in the UK, "[t]he quid pro quo for exclusion from criminal liability is transparency and presumably, with this, a concomitant need to justify the benefit of what the parties propose".[5] Important to note is that this does not make the arrangements in question legal, but only that they are no longer subject to criminal law sanctions.

28. The Enterprise Act 2002 also contains a defence which applies if a person can show that, before making the agreement, they took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purpose of obtaining advice about them before they were made or implemented. The Government is not proposing to include a similar defence in the Competition Law, as it appears from the way that this defence is worded in the Enterprise Act 2002 that it could lead to undesirable outcomes.[6] For example, "if an individual obtains advice that the behaviour is clearly a criminal offence and they should not embark on that course of action, but chooses to go ahead regardless - it is still a good defence".[7] The Government is also of the opinion that this defence is not needed as the exclusions proposed give protection to persons who believe their behaviour is legitimate, irrespective of why they take that view.

29. If a cartel offence is introduced, appropriate investigatory powers are required make the threat credible and the Government takes the view that the powers of investigation in Part 5 of the Competition Law should equally be available in the context of a cartel investigation. However, as the JCRA is a small competition

[4] See Section 188A and B of the Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act.
[5] David Corker, Opinion: Criminal Cartel Offence Revision, Competition Law Journal, Volume 13, Issue 3, 2014.
[6] Commentators in the UK have described this defence as a 'get out of jail free card' (Angus MacCulloch), a 'manifest absurdity' (Andreas Stephen) and 'particularly troubling' (Peter Whelan).
[7] Angus MacCulloch, "*The Quiet Decline of the UK Cartel Offence: A Principled Victory in the Face of Practical Failure*", 2021.

authority (compared to the CMA) with limited resources, it is anticipated that it may occasionally require assistance in order to pursue criminal charges. Moreover, due to the severity of sanctions that can be imposed, competition authorities need to invest significant resources to ensure their case is going to stand the judicial scrutiny. Therefore, in order to bring prosecutions, it may be necessary for the JCRA to obtain the assistance of the States of Jersey Police which has a statutory function of investigating, detecting and preventing crime and so may be called upon to assist in order for the offence to be capable of enforcement.

30. As regards investigation powers (in addition to those in the Competition Law), the JCRA is currently listed in the Regulation of Investigatory Powers (Jersey) Law 2005 (the **RIPL**) as a public authority for which the Attorney General (the **AG**) may grant authorisation for the carrying out of 'directed surveillance' and the conduct or the use of a covert human intelligence source. The JCRA is currently not listed as an authority that can apply for authorisation for 'intrusive surveillance', which is covert surveillance that is carried out in relation to anything taking place on residential premises or in any private vehicle. Looking at the UK, the CMA Chair may also grant authorisation for the carrying out of intrusive surveillance, if it is necessary for the purpose of preventing or detecting the cartel offence. The Government however does not propose to amend the RIPL as this Law does allows the Chief Officer of the Police to apply to the AG for authorisation to carry out intrusive surveillance which is considered a more appropriate route having regard to the skill base and experience needed to apply the RIPL.

31. Additionally, the Government acknowledges that whilst many countries have the ability to impose criminal penalties for participation in criminal cartels, actual enforcement to date has been rare. However, the rationale behind criminalisation is, in part, that the threat of sanctions against an individual could be a more effective deterrent than the threat of corporate sanctions. Furthermore, as indicated, in the UK, the dishonesty requirement was removed in 2014. Therefore, it is possible that the enforcement of the criminal cartel offence by the CMA will become more successful as its focus moves on to agreements which were made after 1 April 2014. An additional consideration is that the threat of personal liability may make it easier for the JCRA to detect cartels if individuals are allowed to use a leniency policy for their own benefit.

32. Considered on balance, the Government believes that having a criminal cartel offence in Jersey would provide additional incentives to act in accordance with the competition rules and encourages transparency and, as such, would be a helpful addition to the enforcement 'toolkit' available to the JCRA under the Competition Law. For the avoidance of doubt, no further criminal sanctions for Competition Law infringements are currently being considered.

Question

4. Do you support the introduction of a criminal cartel offence to deter the most serious and most damaging forms of anti-competitive behaviour, so-called hardcore cartels?

Section E: Additional powers for the JCRA to seek director disqualifications

33. A hardcore cartel is not the only type of conduct that is prohibited by the Competition Law, and which may cause harm to consumers. To provide a strong message to directors regarding the need to ensure that their businesses comply fully with the competition rules, the Government is of the opinion that the JCRA should also be able to seek CDOs from the court and accept CDUs from directors under the Competition Law. The

sanction would not be limited to hardcore cartels but could be imposed for any breach of the following prohibitions:

- Article 8 ('anti-competitive arrangements'); and
- Article 16 ('dominance abuse').

34. The proposed powers would be modelled on equivalent powers the CMA has under the UK Company Directors Disqualification Act 1986. Over the past years, the CMA has significantly intensified its programme of director disqualifications and since 2016 there have been 25 director disqualifications arising out of CMA investigations.[8] This has marked a clear change in CMA policy towards greater use of disqualification as a means of enforcement and deterrence.

35. It is proposed that the JCRA would be empowered under the Competition Law to seek CDOs from the court to ensure individual accountability for wrongdoing. This regime would exist in addition to the general director disqualification framework set out in the Companies (Jersey) Law 1991, which, if certain conditions are met, allows the Chief Minister, the Jersey Financial Services Commission or the AG to apply for a disqualification order. Under the proposed new framework, on application by the JCRA, the court shall make a CDO against a person if the court considers that both below conditions are met:

1) an undertaking, which is a company of which that person is a director, or a former director, commits a breach of competition law; and
2) the court considers that person's conduct as a director makes him or her unfit to be concerned in the management of a company.

36. When deciding whether the second condition is satisfied, the court shall have regard to whether:

- the director's conduct contributed to the breach of the Competition Law (it is immaterial whether the person knew that the conduct of the undertaking constituted the breach);
- the director's conduct did not contribute to the breach but he or she had reasonable grounds to suspect that the conduct of the undertaking constituted a breach and he or she took no steps to prevent it; or
- the director did not know but ought to have known that the conduct of the undertaking constituted the breach.

37. A CDO may be imposed for a period not exceeding 15 years and during that period the person may not:

- be a director of or in any way whether directly or indirectly be concerned or take part in the management of a company;
- be a member of the council of a foundation incorporated under the Foundations (Jersey) Law 2009 or in any other way directly or indirectly be concerned or take part in the management of such a foundation; or
- in Jersey in any way whether directly or indirectly be concerned or take part in the management of a body incorporated outside Jersey.

38. A person who acts in contravention of a CDO would be guilty of an offence and liable to imprisonment for a term of 2 years or a fine, or both. In addition, it is proposed that the provisions of Article 79 of the Companies

[8] Information correct as at 24 March 2022.

(Jersey) Law 1991 regarding the personal responsibility for liabilities where a person acts while disqualified, shall also apply.

39. For the purposes of deciding whether, or not, to apply for a CDO, it is necessary that the JCRA is sufficiently equipped to gather information. First of all, the JCRA may, in any event, rely on information obtained for the purpose of an investigation under Article 26(1) of the Competition Law. In addition, if the JCRA has reasonable grounds for suspecting that a breach of the Competition Law has occurred, it may carry out an investigation within the meaning of Part 5 of the Competition Law specifically for the purposes of deciding whether to apply for a CDO.

40. It is proposed that the JCRA may also accept a CDU from a director either instead of applying for a CDO or, where a CDO has been applied for, instead of continuing with the application for a CDO. A CDU has the same effect as a CDO. A director can offer to give a CDU at any time during an investigation or during court proceedings. The JCRA will normally consider a reduction in the disqualification period where a director offers a CDU in terms acceptable to the JCRA. In the UK, the majority of director disqualifications been obtained by the CMA by means of a disqualification undertaking.

Question

5. Do you support the introduction of enhanced powers for the JCRA to seek competition disqualification orders against directors and accept competition disqualification undertakings from directors?