



# Consultation Paper: Draft Competition (Jersey) Amendment Law 202-

## Consultation Paper:

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### Introduction

- 1 Following a [consultation](#) in 2023 (the **2023 consultation**), the Government of Jersey is now seeking views on the draft Competition (Jersey) Amendment Law 202- (the **draft Law**) which, if approved, will make a number of important changes to the [Competition \(Jersey\) Law 2005](#) (the **2005 Law**).

### Background

- 2 Maintaining an attractive and competitive business climate with a robust, transparent and supportive regulatory framework, is essential for our economy. Competitive and well-functioning markets help create the right conditions for entrepreneurial activity and dynamic businesses to grow, which in turn improves productivity in the economy. The role of the Jersey Competition and Regulatory Authority (the **JCRA**) is important, to ensure fair competition and well-functioning markets and address behaviour that could cause harm to consumers.
- 3 The 2023 consultation invited views in four areas:
  - Market studies
  - Mergers and acquisitions
  - Appeals and compliance
  - Miscellaneous amendments
- 4 After careful consideration of the input received, the Government published a [response paper](#) in August 2023 summarising the feedback and outlining which legislative proposals it intends to take forward.
- 5 This consultation now seeks feedback on the draft Law which has been prepared having regard to the input received in the context of last year’s consultation. The following sections of this consultation document provide some further information on the main features of the draft Law; however, the exact and full legal detail of the proposed amendments can only be found in the draft Law which is attached per Appendix A.

### **Market studies**

- 6 The draft Law, if approved, would introduce a formal market studies framework with enhanced powers for the JCRA. A market study is an in-depth and independent study into the factors affecting competition for particular goods or services, to find out how well competition is working and whether it could be improved.
- 7 Unlike the JCRA's existing competition enforcement tools and merger investigations, market studies look at the structure, conditions and performance of the market itself rather than whether there could be a breach of the law. By gathering and analysing information on a market, the JCRA can identify whether there are features preventing it from working well and it can then look at the effects of those features and consider how they can best be addressed using proportionate means.
- 8 It is critical that the JCRA is well-equipped to gather the information it needs to review a specific market in Jersey. That is why the draft Law includes appropriate information gathering powers for the JCRA to collect the information it needs to properly assess local markets, noting that businesses can claim confidentiality for business secrets, and other confidential information that should not appear in the public report.
- 9 However, in light of the feedback – and as explained in the 2023 response paper – the proposed regime does not include any formal remedial powers for the JCRA. Rather, the JCRA's market study report may contain recommendations to Government or market operators. In addition, the proposed regime sets out a requirement for the Minister to formally respond to the JCRA's report.

### **Mergers and acquisitions**

- 10 Additionally, it is important that Jersey focusses on maintaining and enhancing the competitive landscape to support innovation and improve productivity. This is why the aims of the draft Law are wholly aligned with the ambitions in the [Future Economy Programme](#) to ensure that the right conditions are set for sustainable economic growth for the whole economy.
- 11 One of the overarching goals of the draft Law is to ensure that Jersey's mergers and acquisitions regime is supportive and light-touch, but also robust where it needs to be, as merger control is one of the most powerful tools available to the JCRA to regulate market power. The 2023 consultation, in particular, invited views on the introduction of a new a new mandatory, local turnover test to determine whether a particular merger or acquisition needs to be notified to the JCRA for approval.
- 12 The jurisdictional test for mergers and acquisitions is set out in the Competition (Mergers and Acquisitions) (Jersey) Order 2010 which is outside the scope of the draft Law. However, work is underway to develop a new jurisdictional test to replace the current mandatory share of supply test and this will be subject to further consultation in due course. Key elements of the new test will be the focus on local competition, providing certainty to businesses and reducing administrative requirements.
- 13 The 2023 consultation also invited views on the introduction of a "call-in" power for the JCRA to review certain "small" mergers and acquisitions. This proposal was generally supported. The draft Law therefore includes the ability for the Minister to introduce a "call-in" power by Order which would enable the JCRA to review a merger or acquisition below the mandatory thresholds within a certain

period of time. Work is underway to develop the detail of the proposed call-in power which will be consulted on together with any proposed changes to the jurisdictional test.

- 14 As regards compliance, Government considers that putting a merger or acquisition into effect without obtaining JCRA clearance is a serious breach of the 2005 Law as it undermines the effective functioning of the merger control framework. Article 20(2) was included in the 2005 Law from the outset to incentivise compliance. This provision states that if there is a breach of the requirement to obtain prior JCRA approval of certain types of mergers and acquisitions, as set out in Article 20(1), title of any Jersey company shares, or Jersey property, shall not pass.
- 15 However, a transaction may, for example, also involve non-Jersey companies and it is Government's view that any potential uncertainty regarding the scope of Article 20(2) should be removed. The draft Law therefore proposes to amend Article 20(2) and clarify that if there is a breach of Article 20(1) the merger or acquisition is void. This is a term already used elsewhere in the 2005 Law<sup>1</sup> and it is the Government's view that this provides the required clarity and ensures that there is a strong incentive to comply with Jersey's merger regime.
- 16 However, there may, exceptionally, be situations where a merger or acquisition that triggers the mandatory notification requirement, is not notified to the JCRA, or implemented before clearance is obtained. The 2005 Law does currently not state whether a merger that is executed prior to clearance is subject to the Article 20(2) sanctions for all time, or only until such time as the Authority issues a clearance determination.
- 17 To improve the operation of the merger control framework, the draft Law makes explicit provision enabling the JCRA to review retrospective merger applications for approval. The proposed legislative changes clarify that if there is a breach of the requirement to notify the JCRA and obtain its approval, the transaction in question remains void *unless and until* it is approved by the JCRA. The 'voidness sanction' would also remain in place if the JCRA decides, following its assessment, that it cannot approve the transaction under the 2005 Law.
- 18 Furthermore, to ensure that the JCRA can properly assess those types of transactions that could substantially lessen competition in Jersey, the draft Law, if adopted, makes a small number of technical changes to the definition of "merger" or "acquisition" within the meaning of Article 2 of the 2005 Law. This includes a new power for the Minister, by Order, to prescribe any class of transaction that is not to be treated as a merger or acquisition. All of the proposed changes were consulted on in 2023 and are intended to improve the operation of Jersey's mergers and acquisitions regime.
- 19 The draft Law also proposes an amendment to Article 23 of the 2005 Law. Under Article 23 the Minister may, after consulting the JCRA, exempt a particular merger or acquisition from the requirement that it must be approved by the JCRA before it may be executed. The purpose of Article 23 is to allow a merger or acquisition to proceed on the basis that there are exceptional and compelling reasons of public policy for so doing which trump the competition reasons which JCRA may rely upon for its decision.

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<sup>1</sup> See Article 8(4) which provides that an arrangement is void to the extent that it is, or contains or is tainted by an anti-competitive arrangement.

20 Under Article 23, as currently drafted, the Minister is given no express powers to attach any legally binding conditions to an exemption granted under this provision. This is in contrast to the express powers given to the JCRA in Article 22(2) of the 2005 Law. The draft Law, if adopted, would amend Article 23 of the 2005 Law to give the Minister similar powers to attach conditions to any exemption under that provision.

### ***Appeals and compliance***

21 Efficient and credible enforcement of Jersey's competition rules is essential to ensure the achievement of competition policy objectives. As outlined in the consultation, one particular enforcement tool which currently is not available to the JCRA is the adoption of legally binding commitments to address certain conduct under the 2005 Law.

22 In light of the generally supportive feedback, the draft Law proposes to remedy this and, if adopted, will introduce a formal, transparent commitments regime. Whilst not every case would be suitable for a commitments decision, the introduction of such a procedure is seen as a helpful addition to the JCRA's enforcement 'tool-kit'. This would also align the 2005 Law with UK and EU best practice in competition law.

23 The 2023 consultation also invited views on the introduction of a so-called settlement procedure, which could be initiated if a business that is being investigated is prepared to admit that it has breached competition law. If settlement proceedings are successful, a business' cooperation will be rewarded by a reduction in the financial penalty that would otherwise be imposed.

24 However, it is understood that no legal changes are needed to introduce a settlement procedure since a settlement decision is, in effect, an infringement decision "by consent". The level of financial penalty to be imposed in such cases (to a certain maximum) is in any event at the discretion of the Authority. The JCRA furthermore has a power under Article 7 to publish guidelines on any aspect of the Law. This is a broad power under which it has produced various guidelines, and which can be used to provide further detail on the settlement procedure.

25 Furthermore, as outlined in the response paper, the draft Law does not propose to make any changes to the test for appeals as set out in Article 53 of the 2005 Law. Additionally, at this time, the Government does not intend to proceed with the introduction of a criminal cartel offence and enhanced powers for the JCRA to seek competition disqualification orders against directors. Whilst generally there was support for these proposals, the Government first wants to make the changes outlined in the draft Law and further consider whether additional incentives to ensure competition law compliance are needed.

### ***Miscellaneous amendments***

26 The draft Law furthermore proposes a number of other technical and miscellaneous amendments, as well as several consequential amendments which are needed as a result of the introduction of a market studies framework, changes to the mergers and acquisitions regime and the introduction of a formal commitments procedure.

### ***Conclusion and next steps***

27 The Government welcomes feedback to this consultation on the draft Law and is grateful for the support in developing the approach to competition law in Jersey.

28 Upon consideration of responses, the intention is to finalise the draft Law for lodging 'au Greffe' before the end of the year and subsequent States Assembly debate in early 2025.

***How to respond to this consultation***

Question: **Please provide comments on the draft Law attached per Appendix A.**

Responses to the question above can be submitted no later than 1 November:

- a) online by going to [Consultations \(gov.je\)](https://www.gov.je/consultations)
- b) by email to [L.Ament@gov.je](mailto:L.Ament@gov.je) with the subject line "Competition Law Consultation"
- c) in writing to:  
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