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# A review of the Jersey regulatory and competition framework

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Government of Jersey

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## Contents

<b>Foreword by Professor Sir John Vickers</b>	<b>1</b>
<b>Executive summary</b>	<b>2</b>
<b>1 Introduction</b>	<b>15</b>
1.1 Background	15
1.2 Terms of reference for the review	15
1.3 Approach to the review	16
1.4 Structure of the report	17
<b>2 Best practice in competition and regulatory authorities</b>	<b>18</b>
2.1 General best-practice principles for competition and regulatory authorities	18
2.2 Implications for competition and regulatory authorities in small jurisdictions	19
<b>3 Organisational structure of the JCRA</b>	<b>21</b>
3.1 Operation of the combined JCRA	21
3.2 Resources	24
3.3 Communication with stakeholders (excluding government)	35
3.4 Summary of recommendations	40
<b>4 Interaction and relationship with government</b>	<b>42</b>
4.1 Role of government in setting the policy framework	42
4.2 Duties of government and the JCRA	43
4.3 Defining sectoral policy	45
4.4 Role of government as shareholder	49
4.5 Summary of recommendations	51
<b>5 Competition</b>	<b>53</b>
5.1 Prioritisation of cases	53
5.2 Duration of cases	56
5.3 Anti-competitive agreements and abuse of dominance	57
5.4 Mergers	59
5.5 Market investigations	63
5.6 Summary of recommendations	64
<b>6 Sectoral regulation</b>	<b>66</b>
6.1 Legal framework	66
6.2 Proportionality	68

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<b>6.3</b>	<b>Summary of recommendations</b>	<b>71</b>
<b>7</b>	<b>Appeals mechanism</b>	<b>72</b>
7.1	General structure of appeals	72
7.2	Funding	74
7.3	Summary of recommendations	75
<b>8</b>	<b>Conclusions and recommendations</b>	<b>76</b>
<b>A1</b>	<b>List of stakeholder interviews</b>	<b>79</b>
Box 3.1	Specialisation of authorities	23
Box 3.2	Resourcing strategies in competition and regulatory authorities	28
Box 3.3	Best practice in funding for regulatory and competition authorities	34
Box 3.4	Performance assessment regime and metrics in New Zealand	38
Box 3.5	Role of advocacy in international authorities	39
Box 4.1	Delineation of duties of the telecommunications regulator in selected countries	44
Box 4.2	Attributes of a sound policy framework	46
Box 4.3	Taxi regulatory reform	47
Box 4.4	Interaction between the government and regulator in the financial services sector	48
Box 5.1	Prioritisation principles	54
Box 5.2	Merger regimes	61
Box 7.1	Best-practice principles	74
Figure 3.1	JCRA's income, 2003–14	33
Table 3.1	Staff in international competition and regulatory authorities	25
Table 3.2	Staff and consultancy costs in international organisations	26
Table 3.3	Board structure and role in international competition and regulatory authorities	31
Table 3.4	Cost of international authorities	34

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## **Foreword by Professor Sir John Vickers**

In small-island economies, such as Jersey, it is just as important that markets work well as it is in larger economies. But in smaller jurisdictions competition policy, and regulation where competition is not possible, faces particular challenges. First, in some markets not exposed to international competition, there is not as much scope as in larger economies for there to be effective competition. Second, there are economies of scale in regulation and competition policy itself, so their cost per resident is greater than in large economies. This underlines the importance of the institutions that carry out competition and regulatory policy working as effectively as possible.

The States of Jersey demonstrated the importance it places on well-functioning markets by founding the Jersey Competition and Regulatory Authority 14 years ago as a regulatory body and 10 years ago as a competition authority. This review of its operation is timely and important. It will help to ensure that residents and businesses in Jersey can get the best out of their economy from competition working as well it practically can, and, in areas where it cannot (yet) reach, that regulation is efficient and effective.

Two themes are worth stressing. The first is the importance of principled pragmatism. All competition authorities have a duty to make best use of scarce resources, but in small jurisdictions this is especially important and challenging. Effective prioritisation is the key here, and that should take account of what other authorities (e.g. in the UK or Brussels) are doing anyway. The task is to focus effort on the most important issues that are not otherwise being addressed. Institutional innovations, such as the administrative combination of the Jersey and Guernsey Authorities to form the Channel Islands Competition and Regulatory Authority, are also a good example of such pragmatism at work. More innovations like this will be needed, and this review can help start that ball rolling.

The other point to stress is that competition policy is not just a task for the competition authority. Many institutions—above all, the government in various ways—have major effects on how well markets work in the local economy. Without care, government intervention can be anti-competitive. If smart, it can be pro-competitive, and therefore reinforcing of the legislative intent, manifested in the founding of the JCRA in the first place, to make competition work to get the best out of the local economy for residents and businesses. Moreover, government needs to continue to ensure that it creates the right environment for the JCRA itself to safeguard and promote competition efficiently and effectively. By commissioning this review, the government has signalled that it will play its role.

Conducting competition and regulatory policy well is hard, but the economic benefits can be substantial. I hope this review will help Jersey to continue to improve what its institutions do so that residents and businesses can benefit from a more efficient and effective economy.

**Professor Sir John Vickers**

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## Executive summary

The Jersey Competition and Regulatory Authority (JCRA) has been in operation for 14 years (in respect of economic regulatory functions) and 10 years (in respect of general competition functions). The Government of Jersey has commissioned Oxera to review the JCRA and the regulatory and competition framework applied in Jersey.

This review is designed to identify whether, in order to improve the outcome for the Jersey economy in general, and Jersey consumers in particular, changes could be made to the way the JCRA functions, the framework under which it operates, and/or the way stakeholders interact with the JCRA. The review focuses on the operation of the JCRA itself, but it also considers the broader policy and institutional context in which the JCRA operates.

The JCRA and the Guernsey Competition and Regulatory Authority (GCRA) are administratively merged into the Channel Islands Competition and Regulatory Authority (CICRA). Legally, the JCRA and the GCRA are separate, and Oxera's review relates only to the activities and interventions undertaken by the JCRA. However, in reviewing the JCRA, the current cooperation and joint operation of the JCRA and the GCRA (as CICRA) are taken into account. Moreover, certain aspects can only be reviewed for CICRA as a whole, as the two organisations share a Board and staff. We specifically note in this report when we are referring to the JCRA or CICRA.

Oxera's review entailed an extensive consultation process with a range of stakeholders. In addition, we looked at the legal framework for competition and regulation, examined past reviews that have considered the role of the JCRA, and assessed information from publicly available sources, as well as literature on best-practice principles applicable to small economies. To highlight certain issues, and to determine whether there are lessons for the JCRA's future operation, we refer to specific competition and regulatory cases in Jersey. It is not within the scope of the review to look in detail at past investigations or outcomes of previous cases.

As part of the review, Professor Sir John Vickers acted as adviser to the Oxera team. We are grateful for his valuable contributions to the study.

For each area, specific recommendations are set out throughout the report. The intention is that these are considered as a package that could lead to significant improvements in the operation of the competition and regulatory regime in Jersey.

The findings and recommendations are structured around the following themes, each of which is addressed in turn below:

- the organisational structure of the JCRA;
- interaction and relationship with government;
- the competition framework;
- the regulatory framework;
- the appeals mechanism.

The recommendations are also summarised in terms of whether they require changes in legislation, can be implemented by the JCRA itself, or require government involvement.

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## **Organisational structure**

In December 2010 the JCRA was administratively merged with the GCRA to become CICRA. The merged authority is a very small independent competition and regulatory authority, reflecting the size of the jurisdictions it oversees. Looking at how other authorities operate, a key factor that emerges is that the resources needed to address competition and regulatory issues do not vary proportionately with the size of the jurisdiction. In addition, for very small competition and regulatory authorities, it may be difficult to find staff with the range of skills and expertise required to undertake the regulatory and/or competition tasks that arise.

The analysis suggests that the creation of CICRA has provided synergies, with the Islands often encountering quite similar issues. The merger also created access to a larger pool of resources as the staff are shared between the two Islands. There was no indication from our review that CICRA should be separated. We would therefore recommend that CICRA be maintained as an operationally combined authority between Jersey and Guernsey, and that the Islands seek to align more on policy, priorities and approaches, where possible.

In addition to being a combined authority in the sense of covering both Jersey and Guernsey, CICRA covers both competition and regulation, and deals with regulatory matters across a number of sectors. This is fairly common in smaller economies. The stakeholders did not raise any concerns about the combination of the regulator and competition authority, although some commented that the JCRA was too focused on the telecommunications sector and, as a result, may not undertake investigations or spend sufficient time focusing on other sectors where issues may arise.

We explored the extent to which there were benefits in institutional specialisation of competition and regulation functions. On the one hand, CICRA's scale of operation suggests that any such benefits are likely to be outweighed by the issues of scale. On the other hand, under a combined institution there is a risk that a thinly spread senior management might lead to reduced accountability and reduced scope for performance monitoring. The analysis suggests that maximising the benefits from being a combined authority requires strong prioritisation of the use of the (limited) resources that are available. On balance, at a purely structural level, we would recommend that the JCRA remains a combined regulatory and competition authority.

Although outside the direct remit of this research, it might also be worth giving consideration to achieving further economies of scale by more effective coordination between CICRA and other consumer protection bodies, but in a way that preserves the independence of the regulatory and competition functions. Better coordination could take the form of more explicit communication of aims and objectives when the JCRA and the Consumer Council create their strategic plans. It could also be useful to consider more formal agreements and/or merging CICRA, the Consumer Council and Trading Standards into a Markets Authority.

### ***Resources and the Board***

In terms of resources, the economies of scale in the application of competition law and utility regulation mean that, for smaller economies, these activities cost more per head of population than in larger economies.

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CICRA has the fewest staff of all the authorities considered in this review. However, in terms of number of staff as a proportion of population and staff costs relative to the authority's overall budget, it is in line with the others.

Most of the concerns expressed by the stakeholders were about skills rather than number of staff. From the review it emerges that the JCRA has been facing issues with recruiting suitably experienced staff, partly because there are a limited number of candidates with the required expertise in Jersey (or Guernsey), particularly for telecoms.

To address this issue, the JCRA outsources some projects to consultancy firms. Oxera understands that since 2014, the JCRA has had an expert panel of external consultancies and law firms in place to support its work. Outsourcing appears to have delivered benefits by providing access to expertise that may not be available in Jersey. This may also provide benefits as consultants can draw on their experience and knowledge of what has worked well, or less well, in other jurisdictions. That said, there are concerns that the consultancy firms are not based in Jersey and/or do not always have a good understanding of the local context.

While an outsourcing model has merits, the review suggests that there is still a need to ensure that sufficient expertise on individual issues is available within the JCRA, both to manage effectively any expertise bought in and, perhaps more importantly, to be able to ensure that the analysis undertaken can be effectively 'mapped onto' the specifics of the Jersey economy.

The trade-off between maintaining specific expertise within the authority and the potential underutilisation of that expertise is complex. We did not find any examples of small authorities solving this problem in a way that was clearly superior to the approach adopted by CICRA. However, there may be ways of making some improvements within the existing approach.

To help ensure that bought-in expertise is appropriately applied to the Jersey economy, the JCRA should continue using a panel with a small number of consultancy firms and technical advisers (e.g. specialising in telecoms and competition economics.) The JCRA should seek advice from these firms when it requires assistance to assess the relevance of issues being raised by external stakeholders, or to help in undertaking the analysis for particular cases. Over time, this arrangement, which has been in place for less than two years, should provide more stability and continuity in terms of (external) resources. The JCRA should retender the contract every three to five years to ensure that the firms continue to have incentives to perform well, but also sufficient time to build up the knowledge and understanding of the specific local context.

There is some cooperation between CICRA and the UK Office of Telecommunications and the UK Competition and Markets Authority. However, CICRA could explore the possibility of entering into more formal arrangements with its counterparts in other jurisdictions to get access to the expertise needed for specific projects and to develop some expertise relating to the situation in Jersey within those authorities.

In relation to the Board and the governance structure of the Authority, the model adopted by CICRA (where the Board fulfils a strategic and a decision-making role) is consistent with the approach adopted by other smaller jurisdictions.

The stakeholders were generally positive about the role of the Board and many commented on the high-calibre and expertise of its members. However, similar to the feedback with respect to the use of consultants, it was noted that it would

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be useful if the Board members had more local presence and/or a better understanding of the local economy.

While we do not consider that any changes are required to CICRA's current Board, as the Board members are replaced, it is important that they collectively continue to have as wide a range of relevant skills as possible. In other words, between the members, they should have the expertise in the areas where the JCRA may need to intervene. It is also important that the Board members have sufficient understanding of the local market and wider Jersey economy, which may be missing at the moment.

### ***Funding***

Most of the concerns about funding raised by the stakeholders did not relate to the absolute level of funding, but to uncertainty surrounding it. The stakeholders noted that the Ministers, to which the JCRA is accountable, can unilaterally decide to cut funding for the Authority. This would have a significant effect given that this is a source of more than one-third of the Authority's income. The more significant concern, however, was in relation to the uncertainty that the JCRA may encounter when it faces a legal challenge or an appeal when taking action under the Competition Law.

It is important that the JCRA has more certainty over its funding, particularly for appeals, so that it can be comfortable and proactive in undertaking investigations without being concerned that it might not have the resources to pursue an appeal by a company. This funding could be provided through an explicit contingent fund from government that will provide the JCRA with appropriate financial support if it faces a legal challenge. If the government does not want to refill this fund, it should provide a reasoned decision explaining why it is not in the Island's interest to do so. The JCRA should also be permitted a degree of 'carry-over' as part of the short-term matching of the funding of demands to the availability of resources. This would require better coordination and agreed government policy on these areas, as well as Treasury support.

### ***Communication with stakeholders***

Our analysis indicates that there is a real problem of perception about the effectiveness of the JCRA, which spreads across several sectors of the economy. Indeed, a common theme from the interviews was the poor credibility of the JCRA and the perception that it is ineffectual ('toothless').

This perception seems to arise, in part, as the JCRA does not appear to publicise its work or the relevant laws effectively or clearly to stakeholders. As a result, the beneficiaries of JCRA interventions do not always appear to be aware of the results of the interventions or that the JCRA has intervened at all. This diverges quite sharply from the JCRA's understanding of consumers' views.

The problem of perception, in turn, has an impact on how different stakeholders interact with the JCRA and government. To improve the perception of the Authority, and encourage more awareness and support for its work, the JCRA should provide more clarity on what it investigates, the questions or issues on which it is seeking views, its priorities, and the benefits of its investigations. If the JCRA becomes more consumer-facing then stakeholders would be likely to see it as more accessible and may be more likely to approach the Authority rather than the Ministers when issues first arise. Furthermore, given the apparent lack of awareness of its impact, the JCRA should provide a comprehensive report on how it has performed against the previous year's work plan, and produce some key indicators against which its performance can be measured. It should also

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engage in advocacy in terms of educating stakeholders about the need for competition law in general and the application of the laws in Jersey.

### **Interaction and relationship with government**

The success of regulatory and competition authorities, and the achievement of government policy objectives, can be materially influenced by the interaction between the authorities and their respective governments. A number of the issues that emerged from the review relate to the role of government in setting a policy framework within which the JCRA operates day to day, and the complexity introduced by the government's ownership of most of the companies regulated by the JCRA.

If the benefits of a competition regime are to be realised, government also has a more general role in getting competition to work effectively in the economy. This includes putting competition at the heart of government policymaking and, by implication, giving the competition authority the political authority it needs to carry out its functions. Although a relatively minor issue running through our stakeholder interviews, there was some perception that the political process did not take the JCRA very seriously. The proposed move of responsibility for the JCRA into the Chief Minister's Department could help address this concern.

#### ***Role of government in setting the policy framework***

A number of prominent themes emerged from the review:

- there is a perceived **lack of clarity of the Authority's duties** as regulator and the government within the legal framework. The lack of clearly delineated responsibilities for the government and the JCRA is particularly relevant in the telecommunications and postal sectors;
- there is a **lack of policy framework set by the government** within which the JCRA can operate, primarily in the regulated sectors (notably telecommunications), but also in relation to its competition functions;
- related to the above, there is a perception that the government has not provided sufficient guidance on what it expects the JCRA to be doing. Indeed, the stakeholders noted that there is a **lack of direction, clarity of objectives and expectations set for the JCRA by government**.

The lack of understanding of the delineation of duties between the regulator and the government within the legal framework suggests that work is required to ensure that stakeholders have a clearer understanding of the respective roles of the government and the JCRA both in the regulated sectors and in relation to the application of competition law and competition policy. As noted by some stakeholders, this has resulted in the following:

- it is not clear who interprets the consumer interest duties and balances short- and long-term interests, which raises concerns that actions may be driven by short-term political agendas;
- it is not possible to determine whether the duties of the JCRA and the Minister are substitutable or complementary, with the risk that (some) areas may not be covered by either the JCRA or the Minister.

These problems are compounded by the absence of a clear government policy for the sectors regulated by the JCRA and an apparent lack of sufficient coordination between the JCRA and the government.

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In addition to an improved policy framework and better coordination within the government, there needs to be better communication of this policy, and of all matters, between the government and the Authority. This is consistent with recommendations in the past in relation to the financial services sector, where there was no common position between government, industry and regulator in terms of seeking the best outcome for the Island.

### ***Role of government as shareholder***

The role of government as a shareholder is a separate point to that above about its policy-setting role. However, the two are linked, in that it would be difficult to be clear about the government's role as shareholder without clarity over its role as policy-maker.

The government needs to have a clear understanding of why it owns companies such as Jersey Telecom (JT) and Jersey Post, and clear objectives of what it wants to achieve through such ownership. It also needs to set out clearly (and resolve if necessary) any conflicts between the tasks it has set the regulator and the objectives it hopes to achieve through ownership.

The management of the shareholder role is important in terms of the environment in which regulation can operate. Within the shareholder's remit, there is currently a function that oversees the relationship between the Treasury and the company. However, as acknowledged in the latest Medium Term Financial Plan, such a function could be strengthened to enhance the shareholder's engagement with the Boards of the state-owned utilities, and provide the needed clarity on the role envisaged for the companies. The existing relationship between JT and government and the way in which the JCRA conducts its business have contributed to the perceived lack of effectiveness of the regulator noted earlier.

### **Competition functions**

The main areas covered in relation to the JCRA's competition functions were the prioritisation of cases; their duration; cases involving abuse of dominance/anti-competitive practices; mergers; and market investigations.

#### ***Prioritisation of cases***

Competition investigations involve complex analysis, regardless of the size of the economy. Case analysis has fixed costs, and authorities in small economies may need to do a similar amount of analysis as their counterparts in larger economies. Therefore, given the small size of the JCRA, and the resource issues discussed above, it is particularly important that the JCRA focuses on the most important issues affecting consumers and the economy.

Oxera understands that the JCRA developed and approved a set of prioritisation principles for market study investigations in November 2014. These principles are: actionable, meaningful, realistic, persuasive, conduct or structural, and communicable. However, these principles do not appear to be published by the JCRA and it has not clearly set out how it selected these principles or how it has used them in deciding which investigations to pursue. In addition, these principles only apply to market investigations. In order to ensure that it the JCRA is focusing on the most important issues, it should apply a set of principles to determine which cases to pursue across all areas, and publish how decisions have been taken in accordance with these principles.

Importantly, the JCRA should ensure that the criteria identify the issues where there is the most (potential) consumer detriment and where JCRA can have the

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greatest impact. They should ensure that the JCRA does not reinvestigate a market it has previously considered unless conditions in that market have changed materially. They should also ensure that the JCRA does not undertake an investigation if the issue in question is being considered by another, larger authority, and the effects are likely to be the same in Jersey, and/or any remedies applied by the larger authority will largely address any issues that are likely to arise in Jersey.

### ***Duration of cases***

Many stakeholders commented that, in some instances, by the time the JCRA investigates an issue or makes recommendations, changing market conditions or new developments mean that its work is no longer relevant. Stakeholders considered that this may be due to the resource constraints identified above.

The JCRA does have published timeframes for merger and acquisition reviews: one month for non-complex cases and up to six months for complex cases. However, it does not identify on its website whether cases are considered 'complex', making it difficult to determine whether the Authority has respected these timeframes. We would recommend that the JCRA clearly identifies whether merger cases are complex, and the criteria for doing so.

The JCRA does not specify in advance an expected timeframe for all market studies. For the market studies initiated by the government, the expected duration is specified in the terms of reference of the agreement between the government and the JCRA. In contrast, for the market studies initiated by the JCRA, timeframes were not indicated at the outset. We would recommend that the JCRA specifies clearly the expected timeframe for all market studies in advance.

The JCRA's timescales for investigating cases are in line with international practice. However, when it does undertake a competition case, the JCRA should ensure that the decision to look at the case, and the investigation itself are undertaken as quickly as possible. In addition, if there are changing market or other conditions during the period of investigation, the JCRA should ensure that these are taken into account. Better communication with stakeholders during the process would help to keep individuals informed and to alleviate the perception that cases take a long time to complete.

### ***Anti-competitive agreements and abuse of dominance***

Our review identified one potential concern with the current legislation with respect to anti-competitive agreements. Although there are mechanisms to exempt companies from prohibition of agreements that are anti-competitive but which benefit consumers, this exemption is available only if the JCRA has ruled, ex ante, that the agreement benefits consumers. There is therefore a risk that anti-competitive agreements that might be in the consumer interest could still result in significant penalties because they have not been 'approved'. There is a balance to be struck between creating a deterrence effect to prevent anti-competitive agreements and creating a climate where agreements beneficial to consumers are not entered into.

To overcome the problem of having to notify the JCRA about all agreements, CICRA has recently embarked on a consultation on the merits of introducing block exemptions, which the law allows and which is common practice elsewhere in Europe. Block exemptions would apply to agreements where it is clear that they would not be harmful to competition, or because they offer substantial benefits to consumers that outweigh any potential harm.

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Furthermore, such exemptions would allow for more effective use of CICRA's limited resources, and would reduce the resource costs to parties seeking individual exemptions.

### **Mergers**

The merger regime in Jersey requires mandatory notification in three situations, which are related to the market shares of the parties involved (referred to as the 'share of supply test'). Under current legislation, the JCRA must investigate mergers where one or more of these thresholds are met, even if they are between international companies for which Jersey is a very small part of their total businesses, and the impact on the local economy is negligible.

The JCRA attracted criticism in the past for its review of international mergers, as stakeholders were concerned that much of its activities were not relevant to the Jersey economy. This has improved more recently, with the JCRA aiming to focus on mergers that are of relevance to Jersey.

The JCRA has consulted and made recommendations to change the current test. However, the associated legal changes have yet to be made. We understand that this is related, at least to an extent, to the attempt to align the regimes in Jersey and Guernsey.

It is important that this process proceeds as quickly as possible. The current ambiguity about the regime creates considerable uncertainty about whether companies are required to notify. This has led to the continued notification of mergers where there are no competition issues in relation to Jersey.

Our review suggests that a structure should be put in place that:

- provides a filter based on easily verifiable characteristics of the merging parties where there is very little likelihood that the merger would create competition issues for Jersey residents. Such mergers would fall outside the merger control, as they would pass an exemption threshold;
- creates a simple short-form system whereby the JCRA allows a merger to proceed with very limited additional information and analysis if it is established that there is very little likelihood of the merger creating competition issues for Jersey residents.

Only those mergers remaining would be subject to Phase 1, and if necessary, Phase 2, scrutiny by the JCRA.

We understand that a short-form approach is being considered in Guernsey, and would recommend its adoption in Jersey as well. This would alleviate the stakeholders' concern that filing the merger form is an onerous and expensive task in itself, and would also increase alignment between the Islands.

Much like the prioritisation criteria suggested above, the JCRA should also develop criteria that determine whether a merger that would still need investigation is, or is likely to be, looked at in Brussels, another jurisdiction, or just Jersey.

Given the importance and size of certain sectors, and the international nature of the market supplied from Jersey (for example, financial services), it might also make sense (over time) to enable the JCRA to extend the exemption thresholds on a selective basis, or provide for a different set of procedures or thresholds for certain sectors.

### **Market investigations**

The JCRA has undertaken a number of market investigations over the last few years, some of which were initiated a result of requests by Ministers. While a detailed consideration of these decisions is not within the scope of Oxera's review, there is some indication that the substance of the market investigations undertaken may have been misguided or incorrect. The stakeholders indicated that at least some these investigations did not appear to have actually led to an improvement in outcomes for consumers, and might not have been undertaken using the most appropriate methods or with the appropriate focus.

To the extent that the market investigation process could be improved, this would be in the areas of the choice of markets to investigate, the duration of investigations, and the way in which the recommendations arising from such investigations are implemented. The prioritisation principles and publication of timelines, discussed above, should help to ensure the selection of appropriate cases and improve the perception about the long duration of cases.

Although a number of the JCRA's market investigations have recommended changes in legislation or other remedies, the Authority does not have the power to implement these changes itself. While it tends to get government support when it seeks to pursue cases, its recommendations are not always implemented by the government.

To resolve this problem, we would recommend that the States and the JCRA consider more fundamental changes. The fact that the JCRA has to rely on the government to implement remedies hampers the Authority's effectiveness, and the perception of its effectiveness. One possibility could be a two-tier system for implementing remedies. For behavioural changes the JCRA could be given powers to implement remedies itself. For structural (i.e. more significant) changes, the JCRA could make recommendations to the government. The JCRA's recommended structural remedies would then be subject to a negative resolution procedure, whereby they are implemented unless the government votes otherwise. If the government votes against implementation, it would need to explain its rationale.

### **Regulation functions**

Stakeholders noted that the general structure for the enforcement of licence conditions does not allow third parties (for example, competitors) to obtain damages for breaches of licence conditions, nor does it allow the JCRA to apply a penalty for the breach of a licence condition. These potential financial 'penalties' are available only for the breach of a decision that the Authority has issued once it has established that a licence condition has been breached. Given that decisions must specify what a licensee must do to remedy a breach of a licence condition, and give the licensee sufficient time to carry out the decision, third parties have to rely on quick action by the regulator to minimise any damage that may be caused by breaches of licence conditions. Particularly in a jurisdiction with limited resources, excluding third-party actions for damages with respect to licence breaches may be cutting off an effective mechanism that creates incentives for licensees to ensure they keep within their licence conditions at all times.

Another issue identified with the regulatory functions, is the time it can take to pursue regulatory action. Where the consultation and discussions under the provisional notice lead to a change in the proposed action, the reference back to provisional notice stage, combined with the two-stage consultation and the time needed to consider representations, means that the elapsed time between

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deciding that some regulatory action is needed and it actually coming into force can be lengthy.

The result of this structure is that many regulatory decisions take a long time to implement and the minimum time required to take even small and uncontentious regulatory decisions is longer than is necessary.

Due process is important to ensure that there are adequate checks and balances in the regulatory system. However, the lack of general flexibility in process timings which relate to complexity and contentiousness may be contributing to the perception of the JCRA being 'toothless'. It is also unlikely to be contributing to the efficiency of the overall regulatory process. A better recognition that different issues require different levels of consultation and different minimum times to solicit stakeholder responses would help improve the efficiency and effectiveness of the system. This is particularly the case where third parties are reliant on the completion of regulatory actions before they can take any restorative action.

Overall, therefore, a review of the regulatory processes for regulatory actions (including licence enforcement) would appear warranted, with a view to ensuring that the needs of different decisions, relating to their type, complexity and contentiousness, are met efficiently and effectively. The legal framework should provide for proportionate processes.

In addition, it is important that the JCRA is proportionate in the regulation applied. A number of stakeholders commented that the JCRA requests very detailed information from companies without providing clarity about why it requires this information, and sometimes without providing clear guidelines. This creates costs for companies in terms of responding to the JCRA's requests, diverting company resources. Also, it is not clear that the JCRA (effectively) uses the information provided to carry out its regulatory and/or competition functions.

### **Appeals mechanisms**

There have been three appeals against JCRA decisions since its creation, all in the telecoms sector. As a result, our review focused on appeals in that sector, although the recommendations apply more generally as well.

The JCRA can take decisions that are appealable under both its competition law powers and its specific regulatory powers. Although the precise legal basis of an appeal will vary by the type of decision and the legislation under which it is made, the general pattern in Jersey is for full appeals on the merit of the case. In essence, this allows the case to be reheard, and for the Royal Court to be able to substitute their decision for that made by the JCRA, even when the JCRA decision was reasonable.

On balance, the general movement away from regulatory and competition law appeals being allowable if any stakeholder simply dislikes the outcome, to a position where the grounds of appeal are more limited in other jurisdictions, suggests that Jersey should also consider such a move. Building on work already undertaken by the government, the appeals process in Jersey should be reviewed, with the aim of introducing a new 'unreasonableness' test that takes account of the legal system. Ideally, such a review should be coordinated with Guernsey, with a view to align the process in both jurisdictions if possible.

Another concern identified by our review was about the expertise of the Royal Court and their ability to deal with technical issues. The JCRA often considers technical issues in complex sectors such as telecoms. Therefore the Court need

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some level of expert knowledge to adequately determine such appeals and decide whether the JCRA made an error and/or implement its own decision.

One solution might be for the Royal Court to appoint specialists to help them deal with technically complex matters, whether this is with respect to competition law or the telecoms sector.

### **Summary of recommendations**

The recommendations are set out below, noting whether these require changes in legislation, can be implemented by the JCRA itself, or require involvement from the government.

#### ***Changes in legislation***

1. The JCRA should seek Treasury support for a degree of 'carry-over' of funds from one funding period to the next as part of the short-term matching of the funding of demands to the availability of resources.
2. Block exemptions for cases relating to anti-competitive agreements should be introduced so that cases that create consumer benefits which outweigh the harm to competition do not have to be approved ex ante.
3. The merger regime should be changed so that only mergers that affect the local economy, and which the JCRA can actually do something about, are investigated. It should be possible to move straight to phase 2, with the agreement of the parties. The thresholds and processes should be clear and easy to understand in order to reduce uncertainty for businesses.
4. A two-tier system for implementing remedies from market investigations should be considered, and, if appropriate, introduced, with the JCRA given additional powers to implement remedies for behavioural changes, while it would make recommendations to government for structural changes. These recommendations would be subject to a negative resolution procedure.
5. The current licence structure should be replaced with direct enforceability of licence conditions, with a penalty if the conditions are not met, and/or, if appropriate, allowing third parties to seek damages from breach of a licence condition.
6. A review of the regulatory processes for regulatory actions (including licence enforcement) would appear warranted, with a view to ensuring that the needs of different decisions, relating to their type, complexity and degree of contentiousness, are met efficiently and effectively.
7. The appeals process in Jersey should be reviewed, with a view to introducing a new 'unreasonableness' test that takes account of the legal system.
8. There should be a way for the Royal Court to gain access to, and appoint specialists, to help it deal with technically complex matters.

#### ***JCRA***

9. The JCRA should remain part of the combined authority, CICRA, and Jersey and Guernsey should seek greater alignment.
10. The JCRA should continue to use a panel or framework agreement with a limited number of consultancies and law firms so that the JCRA can buy in external expertise as and when needed. In return for being on the

framework, the consultancies should commit to developing their own in-house expertise in the specific features of the Jersey economy.

11. CICRA should explore the possibility of entering into broader and more formal arrangements with competition/regulatory authorities in another jurisdiction, such as the UK Office of Communications (Ofcom) and the Competition and Markets Authority (CMA), with the aim of getting access to the expertise needed for specific projects, and the development of some expertise relating to the situation in Jersey within those authorities.
12. The JCRA should coordinate more closely with the Jersey Consumer Council and Trading Standards—potentially by putting together formal agreements and/or merging the entities into one organisation.
13. The JCRA should ensure that, as far as possible, future appointments result in a Board composition which, between its members, has expert knowledge in the key areas in which the JCRA is likely to be involved, and that there is a greater degree of local knowledge among the members.
14. The JCRA should publish timeframes for all cases and make sure that all cases are considered within these timeframes. It should also take account of changing market conditions as part of its investigations.
15. The JCRA needs to improve communication with stakeholders on its actions and the results it achieves. In particular, it should consult on, and publish, an annual plan in advance of each financial year, and provide a comprehensive report on how it has performed against the previous year's work plan, using key indicators or metrics. It should also ensure that it explains clearly what is allowed and disallowed under competition law and why competition is important.
16. The JCRA should review and publish its prioritisation principles. It should ensure that it uses these principles to determine which cases to pursue and clearly explains its decisions. The government should also follow these principles in deciding whether to initiate a request for a market investigation.
17. The JCRA should publish general guidelines about why and when it will request information, and should explain why it requests certain information in particular cases and what it will do with the information. Once the data is collected the JCRA should ensure that it follows through with using the data for the proposed purpose.

### ***Government/Ministers***

18. The government should consult with Treasury and provide an explicit commitment that it will fund the JCRA as necessary if the Authority faces a legal challenge. If the government does not want to provide the resources to defend an appeal (under competition law), it should give a reasoned decision explaining why it is not in the Island's interest to do so.
19. To address the issues surrounding the respective roles of the JCRA and Ministers, a clear description of these roles should be produced by the government (in conjunction with the JCRA).
20. The government should develop a clear policy for each of the sectors regulated by the JCRA, including its policy for promoting competition or direct regulation.

21. Where the government retains ownership of regulated assets, it should clearly set out objectives for the regulated companies.
22. The government, regulator and industry should establish and maintain strategic alignment, while preserving the independence of the regulator. The best precise mechanism for this should be developed, potentially building on the experience of the Memorandum of Understanding between the government and the Jersey Financial Services Commission.
23. The function within the shareholder (i.e. the Treasury) that oversees the relationship between the Treasury and the company should be strengthened.

# 1 Introduction

## 1.1 Background

The States of Jersey set up the Jersey Competition and Regulatory Authority (JCRA) as a regulatory body in 2001 and as a general competition authority in 2005.<sup>1</sup> The JCRA has 'responsibility for promoting competition and consumer interests through economic regulation and competition law.'<sup>2</sup>

In 2010 the JCRA was administratively merged with the Guernsey Competition and Regulatory Authority (GCRA), formerly the Office of Utility Regulation (OUR), which carries out similar functions for the Guernsey economy.<sup>3</sup> The merged entity is known as the Channel Islands Competition and Regulatory Authority (CICRA).<sup>4</sup>

The Government of Jersey has commissioned Oxera to review the regulatory and competition framework applied in Jersey.

Legally, the JCRA and the GCRA are separate, and Oxera's review relates only to the activities and interventions undertaken by the JCRA. However, in reviewing the JCRA, the current cooperation and joint operation of the JCRA and the GCRA (as CICRA) is taken into account. Moreover, certain aspects can only be reviewed for CICRA as a whole, as the two organisations share a Board and staff. We specifically note in this report when we are referring to the JCRA or CICRA.

The JCRA has three main functions:

- it is responsible for administering and enforcing competition law in Jersey;
- it has an advisory role and can be called on to advise the Government of Jersey on matters of economic regulation and competition;
- it has economic regulatory functions, currently covering Jersey Telecom (JT) and Jersey Post.<sup>5</sup>

## 1.2 Terms of reference for the review

Having been in operation for 14 years (in respect of economic regulatory functions) and 10 years (in respect of general competition functions), this review is designed to identify whether the outcome for the Jersey economy in general, and Jersey consumers in particular, could be improved by making changes to the framework under which the JCRA operates, the way it functions, and/or the way stakeholders interact with it. While this review focuses on the operation of the JCRA itself, it also looks at the broader policy and institutional context in which the JCRA operates.

There are three separate (although linked) workstreams to this review.

1. Taking account of the experiences of the JCRA (and to some extent the GCRA) and the experience of regulatory and competition authorities in other

<sup>1</sup> Competition Regulatory Authority (Jersey) Law 2001 and Competition (Jersey) Law 2005.

<sup>2</sup> 'Memorandum of Understanding between the Jersey Competition Regulatory Authority and the Office of Utility Regulation'.

<sup>3</sup> Ibid.

<sup>4</sup> JCRA and GCRA operate under two different, but broadly similar, legal frameworks and two different political-sponsoring departments. Since the November 2014 elections, the JCRA now comes within the remit of the Assistant Chief Minister.

<sup>5</sup> CICRA (2014), 'Annual Report 2014'. Once the Air and Sea Ports (Incorporation) (Jersey) Law is enacted, the JCRA will have regulatory duties in relation to ports.

jurisdictions, are there modifications to the law (and related legal instruments) that could improve the operation of competition and regulatory functions in Jersey?

2. Taking account of the same experiences, are there changes to the organisational structure of the JCRA (within CICRA) or changes to the way JCRA interacts with key stakeholders (and vice versa) that could improve JCRA's operational efficiency?
3. With the benefit of hindsight, and the specific experience over the 14 years of JCRA's operation, are there lessons to be learned about the priorities, approach and available skill set, and can these lessons be translated into forward-looking improvements to JCRA's organisation (in the widest sense—including interaction with stakeholders) that could benefit the Jersey economy and Jersey consumers?

In all three areas, any conclusions drawn or recommendations made must take into account the resources that can reasonably be made available to an organisation such as the JCRA, given the size and nature of the Jersey economy.

### **1.3 Approach to the review**

Oxera's review entailed an extensive consultation process with a range of stakeholders. We conducted interviews with approximately 30 stakeholders with direct experience and interaction with the JCRA, including parties and representatives from the JCRA (current and past members), as well as regulated companies, companies that have interacted with the JCRA in the context of competition matters, lawyers, business and consumer bodies, government Ministers and officers.<sup>6</sup> The aim was to understand the key issues that stakeholders have encountered with the JCRA and the competition and regulatory framework, and to explore possible recommendations for improvements.

The interviews were conducted in person, in Jersey and London, or by phone. In some cases, we met with the organisations on more than one occasion, or more than one interview was conducted with individuals from the same organisation. To encourage open and honest discussion during the interviews, stakeholders' comments are not individually attributed in this report. Oxera is grateful to all those who took part for their cooperation and openness during the interviews.

The review draws on themes identified during the engagement process with stakeholders, as well as other material we have examined. In particular:

- we reviewed the legal framework for competition and regulation, including telecommunications and post. This included primary legislation and other legal instruments;
- we refer to specific competition and regulatory cases to highlight certain issues, and to identify any lessons for JCRA's future operation. It is not within our scope to review in detail past investigations or outcomes of past cases;
- we examined previous reviews and reports that have considered JCRA's role, and assessed information from publicly available presentations and

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<sup>6</sup> The organisations, departments and companies consulted are listed in Appendix 1.

submissions made by different stakeholders, as well as materials and reports published by the JCRA since its inception;

- we considered more general materials on best practice for competition and regulatory authorities. This included a review of the literature produced by organisations such as the OECD and the World Bank for authorities of all sizes, but also focused on literature that discusses best practice for smaller authorities, given the size of the Jersey economy and the JCRA. We also had regard to precedents from other (smaller) jurisdictions to compare certain aspects to the JCRA and understand whether there are any lessons that can be learned.<sup>7</sup>

As part of the review, Professor Sir John Vickers acted as adviser to the Oxera team. We are grateful for his valuable contributions to the study.

#### **1.4 Structure of the report**

This report is structured as follows:

- Section 2 gives an overview of best-practice principles for competition and regulatory authorities.
- Section 3 focuses on the organisational structure of the JCRA, including aspects related to its organisation, resources and interaction with stakeholders.
- Section 4 considers the interaction and relationship between the JCRA and the States of Jersey government, with a focus on the role of government in setting policy and guidance to the Authority, as well as the government's role as a shareholder of a number of companies.
- Section 5 presents our assessment in relation to the competition framework, including market investigations, anti-competitive agreements, abuse of dominance, and mergers.
- Section 6 presents our assessment in relation to the regulatory framework, with a focus on telecommunications.
- Section 7 contains our analysis in relation to the appeals mechanism for regulatory and competition decisions made by the JCRA.
- Section 8 concludes and summarises our recommendations to the government.

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<sup>7</sup> The precedents were selected based on a number of criteria, including the size of the economy; the level of GDP per capita; the degree of openness to trade; the institutional design of the respective regulatory authority, and whether the country is an island. We collected the most recent data from the authorities' websites, primary legislation (e.g. Competition Acts), secondary legislation (e.g. internal rules of procedures), guidelines, information material, and the latest publicly available documents (annual reports, strategic reports, business plans, etc.).

## 2 Best practice in competition and regulatory authorities

An accepted principle in public policy is that while governments are responsible for setting and delivering public policies, the achievement of many important economic, social and environmental objectives is frequently delegated to regulatory and competition authorities. As such, authorities play a significant role in ensuring that markets work properly and safeguarding the public interest.<sup>8</sup>

How an authority is set up, directed, resourced and held to account is critical to achieving effective regulatory outcomes, as noted by the OECD:

its design, structure, decision making and accountability structures, are all important factors in how effective it will be in delivering the objectives it was intended to deliver. The way that it interacts and communicates with its key stakeholders will be instrumental in the levels of trust it has from them, and in turn then will impact how it will behave in *regulating* its responsibility.<sup>9</sup>

Section 2.1 briefly considers a set of principles that are cited as important in achieving a good regulatory and competition environment, and which are helpful in framing the review of the regulatory and competition framework in Jersey. While many of these principles are applicable to any jurisdiction, it is critical to consider the specific characteristics of Jersey and, in particular, the impact of the small scale of the economy on the principles for an effective regulatory and competition regime. This is addressed in section 2.2.

### 2.1 General best-practice principles for competition and regulatory authorities

The most relevant principles for achieving good regulatory and competition outcomes can be described as follows.

- **Adherence to legal and constitutional principles.** This helps ensure that the authority has a wide support base among citizens and institutions, and reduces the opportunities for the authority to make arbitrary decisions.
- **Role clarity.** An effective competition or regulatory authority should have a clear and well-defined set of objectives and a well-specified set of functions and instruments to achieve its objectives. This can help provide certainty to stakeholders, including companies.
- **Independence.** Independence is the ability of an authority to make decisions free from undue external influence, political or otherwise (e.g. industry interference). Independence has the potential to improve policy outcomes because it enables the authority to apply the regulatory/competition framework in a way that supports overall public welfare, instead of serving particular (narrow) interests. It also ensures that authorities engage in investigative processes in a non-discriminatory fashion. This is especially relevant when both government and non-government entities operate alongside each other in the same markets and are regulated under the same framework.
- **Accountability and transparency.** An authority is accountable and transparent if it abides, and is seen to abide, by a clearly defined set of rules, and is required to explain its decisions and reasons for them. This

<sup>8</sup> See, for example, OECD (2014), *The Governance of Regulators*, OECD Best Principles for Regulatory Policy, OECD Publishing.

<sup>9</sup> OECD (2014), op. cit. p. 18. Emphasis in original.

ensures that the authority's actions are predictable, and that stakeholders and citizens (generally) accept the rulings and feel that their interests are protected. This increases the authority's perceived legitimacy and protects it from the harmful effects of political or industry interference. In order to ensure that the authority is accountable, it is also important to have an appropriate appeals mechanism that is independent of government influence.

- **Competence and diversity of expertise.** An authority's effectiveness and efficiency depends on the competence and suitability of its staff. Between the staff members, they should be adept in all technical aspects of the authority's work and should have diverse backgrounds.

While these principles are all important, they may also come into tension with one another. For instance, there needs to be decision-making independence and rules to ensure that the government cannot interfere with the authority if the government is not supportive of the authority's work. This needs to be balanced with the possibility for the government to set the general policy agenda for the authority and to review this periodically. However, once the framework is established, the government should not have a say in the decisions that the authority makes in accordance with that framework.

It is therefore important to define a certain set of areas for competition and regulation where the government should and can intervene, and areas where it should not. For instance, the government should not interfere with how the authority exercises administrative functions, sets tariffs for regulated entities, or monitors and enforces decisions and remedies problems.<sup>10</sup> The literature also explains that, as a general rule, the authority should be:

- an administrative body standing outside existing governmental structures;
- given a clear and carefully designed mandate in law that accurately specifies and limits the authority's powers.

This set-up would be necessary to strengthen the credibility of the authority since it prevents disputes with the government over matters of competence and provides clarity about roles.

## **2.2 Implications for competition and regulatory authorities in small jurisdictions**

While the principles set out above are the same in small jurisdictions, it is important to recognise that the application of these principles may differ.

In general, small jurisdictions have the following characteristics.

- **Small domestic markets:** this limits competition possibilities and increases issues of market dominance, as there is room in the market for fewer suppliers that can reach minimum efficient scale, especially in goods that are not traded.
- **Small population and administrative constraints:** this implies that it is more difficult to find the required technical expertise for competition and regulation functions within the jurisdiction.

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<sup>10</sup> OECD, Directorate for Financial and Enterprise Affairs, Competition Committee (2014), 'Competition Agencies, Independence, and the Political Process', chapter by William Kovacic, 17–18 December.

- Informal and multi-faceted relationships between individuals.

As a result, the small size of the economy is likely to have an impact on the institutional and policy design of the authority.

The literature suggests principles and characteristics that are particularly important for authorities in small economies, as follows.

- **Goal-setting:** authorities in small jurisdictions should have fewer clear and realisable goals than in larger jurisdictions. However, as in larger jurisdictions, the authority should focus on pursuing economic efficiency and not try to achieve multiple and broader objectives (e.g. social goals, wealth distribution, etc.). This is because these authorities will face a number of constraints, and intervention to pursue social goals may have perverse consequences.
- **Advocacy work:** a culture of competition is a precondition for competition law to work effectively. If the population is accustomed to state-owned monopolies and government policy is not pro-competitive, implementation of the competition regime can be difficult. Any activity designed to promote a competitive environment and raise awareness of competition policy and its benefits among businesses, consumers and public institutions is therefore important, particularly when there are resource constraints, because the authority might have limited capabilities to properly enforce competition law.
- **Resource constraints:** authorities in smaller jurisdictions may find it more difficult to recruit the appropriate level and quantity of resources and to build and retain in-depth expertise in particular areas.
- **Matching commitment and capabilities:** the authority should concentrate on cases that can be effectively investigated and which are likely to cause the most harm to the economy if not addressed.
- **Cooperation with international partners:** cooperation with larger jurisdictions and seeking their assistance when necessary can be beneficial. Access to technical expertise can take the form of workshops, seminars, placements, or secondments, for example. In multi-jurisdictional cases, the authority should consider relying on larger jurisdictions to prosecute international, complex cases and enter agreements to gain access to information. In many cases, larger jurisdictions may already be addressing competition issues in a way that is likely to be adequate from the perspective of the smaller economy.

Relationships between regulation and competition policy need to be carefully considered in smaller jurisdictions. There may be more need for regulation in smaller jurisdictions for a number of reasons: the number of monopolies and dominant firms is likely to be higher, especially in non-tradable goods; the market may not be large enough to accommodate multiple firms; and the market may not be able to self-correct market failures due to scale effects. As such, regulation may be more appropriate than competition enforcement in relatively more cases than in larger economies.

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### 3 Organisational structure of the JCRA

This section focuses on issues with the JCRA's organisational structure identified through interviews with stakeholders and a review of the literature. In particular, it focuses on the operation of the combined Authority (CICRA); access to resources; and interaction with stakeholders. These issues are discussed below, before providing a summary of recommendations.

At the outset it is important to note that CICRA is a very small independent competition and regulatory authority, reflecting the size of the jurisdictions it oversees. Most of the research and analysis on the organisation of competition and regulatory authorities, including those looking at the particular problems of 'small' jurisdictions described in section 2, relate to jurisdictions that are still much bigger than even the combination of Jersey and Guernsey. Therefore, care is needed in interpreting the results of these studies.

One of the key factors that emerges from the study of the operation of other authorities is that the resources needed to address competition and regulatory issues do not vary proportionately with the size of the jurisdiction—see Table 3.1, for example. In addition, for very small competition and regulatory authorities, the limited pool of staff that is likely to be available is unlikely to have the range of skills and expertise to undertake all the regulatory and/or competition tasks that arise. This is taken into account in the discussion and the recommendations set out below.

Even in larger economies, the question of what is the optimal design of regulatory and competition authorities has not been definitively answered, with various governments continuing to combine and split apart competition, regulatory and consumer advocacy functions over time. We therefore consider a range of authorities that are reasonable comparators to the JCRA, with the aim of recognising, and taking into account, the elements of other authorities that have worked well.

#### 3.1 Operation of the combined JCRA

##### 3.1.1 Merging of Jersey and Guernsey institutions

As noted earlier, the JCRA was administratively merged with the GCRA in December 2010 to become CICRA.<sup>11</sup> The rationale behind the merger was to 'help the Parties to co-operate efficiently and effectively at operational and strategic levels in areas of mutual interest.'<sup>12</sup> In particular, the merger was intended to achieve a number of objectives, including:

- supporting the delivery of island-specific and pan-Channel Islands strategies in the areas of regulation and competition;
- reducing the cost of regulation through the sharing of knowledge and resources;
- lessening the compliance burden on businesses by implementing pan-Channel Islands procedures and remedies where appropriate.<sup>13</sup>

The JCRA has estimated that the sharing of a board, staff, IT and other facilities has saved approximately £100,000/year, or 7% of total operating costs.<sup>14</sup> The

<sup>11</sup> 'Memorandum of Understanding between the Jersey Competition Regulatory Authority and the Office of Utility Regulation'.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> JCRA (2011), 'Annual Report 2011'.

total costs of the JCRA in 2014 were approximately £1.1m, or £1.75m for CICRA as a whole.<sup>15</sup>

The merger has provided synergies as the issues that the Islands encounter are often quite similar. The merger has also created benefits in terms of access to a larger pool of resources as the staff are shared between the two Islands. There was no indication from our review that CICRA should be separated, nor any concerns about the balance of work between Jersey and Guernsey. Instead, there were suggestions from stakeholders that the Islands could be more aligned and work together more, particularly in terms of the regulatory structures in Jersey and Guernsey. However, there are difficulties in creating alignment given different priorities and political cycles in Guernsey and Jersey, as noted by stakeholders and recently by CICRA's chairman.<sup>16</sup> In addition, such further alignment is generally outside the control of CICRA. However, we consider that it would be useful for there to be, at least, annual meetings between the board of CICRA and the Ministers responsible for competition and regulatory policy in Jersey and Guernsey.

We would therefore recommend that CICRA be maintained as an operationally combined authority between Jersey and Guernsey, and that the Islands seek to align more on priorities and approaches, where possible. Some ways in which this could be achieved are through greater clarity of government policy, as discussed in section 4.

### **3.1.2 Combined role of sector regulator and competition authority**

In addition to being a combined authority in the sense of covering both Jersey and Guernsey, CICRA is also a combined authority in that it is both a competition and regulatory authority, and deals with regulatory matters across a number of sectors. This is fairly common in smaller economies, although there are exceptions—both Iceland and the Faroe Islands maintain separate organisations for competition matters and utility regulation, for example.<sup>17</sup> Some larger economies, such as Australia, New Zealand and the Netherlands, also have combined authorities. Stakeholders did not raise any concerns about the combination of the regulator and competition authority.

The literature explains that there may be some benefits from integrating competition and regulation functions, which can be especially pronounced in small economies. For instance, there may be economies of scope, easier access to resources, and a more efficient and coordinated portfolio of policy instruments that can be used in a combined authority. However, there can also be issues when the two functions are combined in one authority. Box 3.1 below identifies gains and losses from institutional specialisation, and the balance between these would be the deciding factor for integrating the two functions.

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<sup>15</sup> CICRA (2014). 'Annual Report 2014'.

<sup>16</sup> Ibid.

<sup>17</sup> The Icelandic Competition Authority (ICA) deals with competition matters, whereas sector-specific regulators are responsible for utility regulation (e.g. National Energy Authority, Post and Telecom Administration, Icelandic Transport Authority, etc.). The Faroese Competition Authority deals only with competition matters. For most regulated sectors, Danish regulatory authorities fulfil the role of regulators for the Faroe Islands (e.g. Danish Energy Regulatory Authority).

### Box 3.1 Specialisation of authorities

Gains from specialisation	Losses from specialisation
<ul style="list-style-type: none"> <li>• It is easier to have clearly defined tasks for the institution</li> <li>• Senior management is entirely focused on one area</li> <li>• It is easier to attract and retain specialists</li> <li>• External accountability and performance monitoring is facilitated</li> <li>• Separation encourages competition and regulatory authorities to monitor each other</li> </ul>	<ul style="list-style-type: none"> <li>• Increase in resource costs due to loss of economies of scope</li> <li>• Higher risk of distortions to resource allocation within the economy as a result of inconsistent approaches</li> <li>• The narrow remit of each institution increases coordination costs</li> <li>• High coordination costs may encourage the regulator to rely too much on its narrowly defined set of tools for complex problems</li> <li>• More limited range of external parties interested in monitoring each institution</li> </ul>

Source: OECD, Directorate for Financial and Enterprise Affairs, Competition Committee (2014), 'Institutional Design of Competition Authorities', Note by Allan Fels and Henry Ergas, 17–18 December.

The fact that both costs and benefits arise from institutional specialisation implies that it is difficult to identify which model is preferable overall. However, the relative strengths of the costs and benefits can be expected to vary with size of the organisation(s). This, in turn, varies with the size of the economy/jurisdiction. The costs of organisational specialisation (and, therefore, multiple organisations) seem to be particularly high in small economies (e.g. due to resource constraints). As such, an integrated authority may be preferable. Fels and Ergas (2014) conclude (in relation to small economies that are considerably larger than the Channel Islands) that the costs of specialisation will outweigh the benefits.<sup>18</sup>

The scale of CICRA's operation suggests that any benefits from organisational specialisation are likely to be outweighed by the issues of scale. Indeed, in some jurisdictions of similar size to the Channel Islands, additional functions have been placed in the competition/regulatory authority. In Malta, for example, the Competition Authority is also responsible for trading standards functions (although the regulatory functions are located in separate organisations). In that case, the authority has a separate work plan for each division and monitors outputs based on the work plan to ensure that each function has sufficient resources.

Notwithstanding the issue of scale, which would tend to dominate issues of organisational structure, there are disadvantages to combining the competition and regulatory (and potentially other consumer-related) functions in one organisation. In particular, the wide remit of the institution, combined with limited resources, creates a risk of the organisation lacking focus and spreading its resources thinly across too many of the *possible* activities it could undertake and in doing so achieving few (or even any) of them. In addition, a thinly spread senior management might lead to reduced accountability and less scope for performance monitoring. This suggests that maximising the benefits from being a combined authority requires strong prioritisation of the use of the limited

<sup>18</sup> OECD, Directorate for Financial and Enterprise Affairs, Competition Committee (2014), op. cit., p. 30, para. 150.

resources that are available. This is not a trivial task and involves more than just the authority itself; for example, it requires the government as well, as discussed in section 4. Section 5.1 provides recommendations on improving prioritisation.

However, on balance, at a structural level, Oxera would recommend that the JCRA remains a combined regulatory and competition authority.

### **3.1.3 Combining regulation and competition functions with other consumer and trading functions**

In addition, although outside the direct remit of this research, it may be worth giving consideration to achieving further economies of scale between CICRA and other consumer protection bodies (e.g. the Consumer Council and/or Trading Standards), but in a way that preserves the independence of the regulatory and competition functions.

A number of stakeholders noted that while the JCRA and the Jersey Consumer Council have common interests in understanding how markets work, and making them work better, they have not always joined forces in developing relevant information, and tend to work in silos.

Stakeholders also noted that while the Consumer Council provides newsletters, these were perceived to have a limited reach, and the Council does not tend to respond to CICRA's consultations. This may be for a number of reasons: resource constraints; the Council does not have the expertise as the consultations can be quite technical in nature; or lack of clarity about what the JCRA is seeking responses on. There is, therefore, no external body representing consumers' views that provides an effective counterbalance to the responses and interests of businesses.

Much like the benefits associated with combining the regulatory and competition authority, there may be benefits in terms of costs, resources and skills from better coordination between, or merging, CICRA and the Consumer Council. Better coordination could take the form of more explicit communication of aims and objectives when the organisations create their strategic plans. CICRA, the Consumer Council and Trading Standards could put together a formal arrangement for discussing priorities, coordinating their activities and ensuring that, between them, they have accounted for the significant issues facing consumers. For example, the Consumer Council could focus on more representational issues, while the JCRA could look at the more complex issues in areas such as market dynamics. It may also be useful to consider more formal agreements and/or merging the bodies into a Markets Authority (as the UK has done to an extent in the Competition and Markets Authority).

## **3.2 Resources**

In terms of resources, there are three considerations, as discussed below: staff, the Board, and funding.

### **3.2.1 Staff: overall resource level**

Economies of scale in the joint application of competition law and utility regulation mean that, for smaller economies, these activities cost more per head of population than in larger economies. Hence, in small economies, the authority will tend to be much smaller in overall size, but larger relative to the population (or size of the economy) than in larger economies.<sup>19</sup>

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<sup>19</sup> This is consistent with the findings of previous reports. See LECG and Charles Russell (2009), 'Review of the regulatory powers, resources and functions of the JCRA as a telecommunications regulator', Final,

CICRA's staff levels are compared with those of other competition and/or regulatory authorities in Table 3.1. As at 31 December 2014, CICRA had nine staff members working between Jersey and Guernsey.<sup>20</sup> The table indicates that CICRA has the lowest number of staff of all authorities considered, but is in line with the others in number of staff per 100,000 population.<sup>21</sup>

**Table 3.1 Staff in international competition and regulatory authorities**

	CICRA	Mauritius	Iceland	Malta	New Zealand	Faroe Islands	Australia	Denmark	Netherlands	Isle of Man
Number of staff	9	14	23	132	184	12	788	139	523	15
Nominal GDP, 2013 (£bn)	6	8	10	6	121	2	999	215	546	4
Nominal GDP per capita, 2013 (£'000)	36.3	6.1	30.4	14.6	27.1	33.8	27.7	28.0	29.5	50.0
Population, 2014 (m)	0.16	1.26	0.33	0.43	4.51	0.05	23.49	5.64	16.85	0.09
Staff per 100,000 population	6	1	7	31	4	24	3	3	3	17

Note: The table uses combined data for Jersey and Guernsey as CICRA. GDP and GDP per capita are nominal GBP in 2013. Data on population and staff refers to different years given data availability: Mauritius (2012), Iceland (2015), Malta (2013), New Zealand (2013), Faroe Islands (2012), Australia (2014), Denmark (2006), Netherlands (2014), Isle of Man (2014/15). Staff per 100,000 population indicates how many staff each Authority employs for every 100,000 population. Given that the Faroe Islands have fewer than 100,000 citizens, the staff numbers rise when quoted per 100,000 population. We have used number of staff (excluding the Board), but in some cases (Malta, New Zealand, Isle of Man, Australia and the Netherlands) it was not clear from the annual reports whether the total number of staff included Board members.

Source: Government of Jersey, Statistics Unit; Government of Guernsey; World Bank; Jersey and Guernsey (CICRA annual report 2012); Mauritius (Annual Report 2012); Iceland (website); Malta (Annual Report 2013); New Zealand (Annual Report 2013/14); Australia (Australian Competition and Consumer Commission (Annual report 2013–14); Denmark (Annual Report 2006); Netherlands (Annual Report 2014); Isle of Man (Annual Report 2014/15).

There is also a different balance of staff in terms of skill sets among the various organisations. In the Maltese authority, for example, 36% of the staff are in administrative functions, while this is 9% in Iceland. These two authorities also appear to have more individuals with legal expertise than staff with economics and technical expertise.

In making such comparisons, however, it is important to note that although they all deal with competition issues, only the New Zealand, Australia, Netherlands and Denmark authorities also look at regulatory matters. Also, the authorities may outsource projects to consultancy firms or authorities in larger jurisdictions to different extents. This is discussed in the following section.

### 3.2.2 Staff: location of, and access to, relevant expertise

In the past, the JCRA operated with a 'specialist' model of staffing with one staff member responsible for each area (e.g. telecoms, post). However, over time it has moved towards a 'generalist' model so that any staff member can be called upon to assist on most issues. The change seems to have been motivated in

March. Regulatory Policy Institute (2010), 'Review of Guernsey's utility regulatory regime', A report for Commerce and Employment prepared by: Professor George Yarrow & Dr Christopher Decker', 15 October.

<sup>20</sup> There are four staff in Jersey and five in Guernsey, although they often travel between the two Islands.

<sup>21</sup> According to LECG's 2009 report, benchmarking found that the JCRA's budget and resourcing was broadly comparable, but at the lower end of the range of other small economies in terms of resources and staffing.

part by the difficulty in recruiting the necessary specialist staff, and in part by the organisation's strategy.

In the main, stakeholders commented that this shift has been positive, as the generalist model makes the JCRA more resilient to variations in the availability of specific staff (it is easier for staff to cover each other).

Most of the concerns expressed by the stakeholders were about skills rather than number of staff. From the review it emerges that the JCRA has been facing issues with recruiting suitably experienced staff, partly because there are a limited number of candidates with the required expertise in Jersey (or Guernsey), particularly for telecoms.<sup>22</sup> This restricts the JCRA's ability to operate effectively and efficiently if it tries to locate the technical expertise it needs in house.

To address this issue, the JCRA outsources some projects to consultancy firms. CICRA has noted that 'recruiting suitable staff is difficult in both islands and, increasingly, CICRA is using outside consultants albeit with extensive executive input.'<sup>23</sup> Oxera understands that since 2014, the JCRA has had an expert panel of external consultancies and law firms in place to support its work. Members of this panel supported the JCRA in investigations such as postal pricing complaints and data hosting.

In 2014, the JCRA spent approximately £600,000 in salaries and staff costs and £230,000 on consultancy fees.<sup>24</sup> While its staff costs as a percentage of total expenditure are consistent with those of other authorities, its expenditure on consultancy fees is slightly higher as a percentage of expenditure, which is consistent with the JCRA's strategy mentioned above (see Table 3.2, which looks at CICRA as a whole).

**Table 3.2 Staff and consultancy costs in international organisations**

	CICRA	Mauritius	Malta	New Zealand	Australia
Staff expenditure, 2014 (£)	975,326	426,037	2,159,887	12,031,830	58,851,811
% staff expenditure of total expenditure	56%	59%	56%	71%	58%
Consultancy fees, <sup>1</sup> 2014 (£)	345,803	69,530	36,472	2,740,535	16,770,604
% consultancy fees of total expenditure	20%	10%	1%	16%	17%

Note: All numbers are quoted in 2014 GBP. <sup>1</sup>These are referred to differently in countries' accounts: CICRA (consultancy fees), Mauritius (professional fees), Malta (legal and professional fees), New Zealand (legal and other professional fees), and Australia (legal fees, consultants and contracted services).

Source: Jersey and Guernsey (CICRA Annual Report 2014), Mauritius (Annual Report 2012), Malta (2013 Annual Report), New Zealand (2013/14 Annual Report), Australia (ACCC 2013/14 Annual Report).

Outsourcing appears to have delivered benefits in providing access to expertise that may not be available in Jersey, and possibly at a lower cost than hiring additional full-time staff. This may also bring benefits as consultants can draw on their experience and knowledge of what has worked well, or less well, in other jurisdictions.

<sup>22</sup> We understand that there has been difficulty in recruiting a Jersey-based telecoms specialist.

<sup>23</sup> CICRA (2014), 'Annual Report 2014', p. 4.

<sup>24</sup> Ibid.

While stakeholders were generally positive about the use of consultants, many were concerned that the consultancy firms are not based in Jersey and/or do not have a good understanding of the local context. Also, given that the JCRA often uses different consultancy firms, there is not sufficient time for these firms to build up their understanding of the local context. This is important as the issues that arise, and the recommendations that are applicable, need to be specific to the nature and size of the Jersey economy.

Furthermore, there is still a need to ensure that sufficient expertise on individual issues is available within the JCRA to effectively manage any expertise bought in and, perhaps more importantly, to ensure that (if necessary) the analysis undertaken by off-island experts can be mapped onto the specifics of the Jersey economy.

The trade-off between maintaining specific expertise within the authority and the potential underutilisation of that expertise can be complex. We could find no examples of very small authorities solving this problem in a way that was clearly superior to the approach adopted by CICRA. However, there may be ways of making some improvements within the existing approach.

In order to help ensure that bought-in expertise is appropriately applied to the Jersey economy, the JCRA should continue using a panel with a small number of consultancy firms and technical advisers (e.g. specialising in telecoms and competition economics.) The JCRA should seek advice from these firms when it requires assistance to assess the relevance of issues being raised by external stakeholders, or to help in undertaking the analysis for particular cases. Over time, this arrangement, which has only been in place for less than two years, should provide more stability and continuity in terms of (external) resources. The JCRA should retender the contract every three to five years to ensure that the firms continue to have incentives to perform well, but also sufficient time to build up the knowledge and understanding of the specific local context.

An alternative, which could also be implemented in conjunction with the recommendation above, is that the JCRA could deepen formal relationships with other competition and regulatory authorities. The JCRA is already a member of networks such as the International Competition Network (ICN), which promote the sharing of knowledge and best practice. The JCRA also liaises with individuals at the European Commission on competition matters.

There is also already some coordination between CICRA and the UK Office of Communications (Ofcom), as the latter has responsibility for aspects of telecommunications in the Channel Islands, including managing the radiofrequency spectrum and the numbering plan.<sup>25</sup> Ofcom also reviewed the structure of the 4G competitive bid process before it was issued by the JCRA, and the two organisations work closely together on issues such as mobile termination rates.

However, cooperation between the organisations could be extended so that the JCRA could gain access to Ofcom's expertise on a more project-specific basis. For example, the JCRA could actually use Ofcom staff to undertake analysis for particular cases, through either an agreement between the organisations or secondments. For this to be successful, the other regulatory or competition bodies must have both the legal ability and operational willingness to provide such services to the JCRA, and the JCRA would need to develop this recommendation in more detail. There could also be more scope for the JCRA to

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<sup>25</sup> CICRA (2014), 'Strategic Plan and Work Programme', Document No: CICRA 14/07, March.

share best practice with authorities in other small islands, as they are likely to face similar issues.

The issue of lack of expertise is potentially more acute with respect to telecoms than competition since the JCRA's Board (discussed in the following section) has extensive competition expertise. There is currently some cooperation between the Competition and Markets Authority (CMA) and the JCRA in terms of sharing best practice through workshops and meetings, but there could be merit in creating more formal links with the CMA or having a few UK law firms on a panel of advisers (subject to dealing with issues of conflict). Over time, these bodies/firms would develop an understanding of the issues in transposing general competition law to a small economy, and would be able to advise on solutions suitable for the Jersey economy. This could also help mitigate the issues that arise when there is a major litigation case that diverts JCRA's resources away from other activities, and the 'inequality of arms' that can arise between the JCRA and large companies in costly litigation cases.

None of these approaches will eliminate the problems of access to appropriate resources and expertise, but they should help if they can be successfully implemented. The degree of cooperation required from the resource-providing institutions and firms would also be significant. However, this approach seems to provide the best potential outcomes.

An example of a small authority relying on its counterparts from larger jurisdictions to assist on specific cases is in Greenland. Greenland is an autonomous country within the Kingdom of Denmark and its competition authority has a statutory right to outsource the analysis and administrative process for some of its cases to the Danish Competition Authority before returning to Greenland for a final decision.<sup>26</sup>

While this is the only example of direct outsourcing of cases that we have found, many small jurisdictions face problems similar to those experienced by the JCRA in terms of recruiting and retaining staff. As a result, many have arrangements with authorities in larger jurisdictions to benefit from their expertise, or use other resourcing techniques, such as secondments (see Box 3.2). The Icelandic Competition Authority cooperates and shares information with other Nordic competition authorities (Denmark, Norway, Sweden, Finland, Greenland and the Faroe Islands) on competition matters, and creates working groups on projects of regional relevance. It also has a continuous education programme to which it allocates a specific proportion of its total payroll cost.<sup>27</sup>

### **Box 3.2      Resourcing strategies in competition and regulatory authorities**

#### **Mauritius**

The Competition Commission of Mauritius (CCM) states:

Developing the organisation's core skills and capabilities is key to becoming a high performing entity. At the CCM, we not only know this but we also value it. The CCM has invested extensively in providing pertinent training and encouraging overseas attachment for the benefit of its human resources. In spite of increasing casework, the CCM nevertheless remains a relatively young competition authority. The technicalities and at times, high complexity of cases dealt with mean that capacity building should be an integral part of our learning

<sup>26</sup> Website of the Danish Competition and Consumer Authority.

<sup>27</sup> Website of the ICA.

process so that our staff members are always equipped to deliver efficiently and qualitatively.

Therefore the Commission has a strategy for investing in capacity-building. This includes structured training programmes and career development opportunities, such as:

- international workshops and conferences in other jurisdictions;
- frequent overseas training on new developments in economic analysis and legislation in competition policy;
- fellowships in overseas authorities (e.g. US Federal Trade Commission);
- overseas secondments (e.g. UK Office of Fair Trading, Competition Commission of South Africa, Autorité de la Concurrence).

The Commission may also rely on external resources, for example through:

- Memoranda of understanding with regulators to foster collaboration and capacity-building on technical aspects and information exchange, including the French Autorité de la Concurrence;
- secondments from overseas institutions (e.g. senior lawyers from the Australian Competition and Consumer Commission and from the New Zealand Commerce Commission);
- international experts to help on cases.

The Competition Act also allows the Commission to appoint any individuals as consultants to advise or perform services for the Commission.

### **Malta**

The Maltese Competition and Consumer Affairs Authority uses several approaches to help deal with its resourcing issues, as follows:

- the Board may, with the approval of the Minister, appoint ad hoc advisory boards and committees to assist in the performance of its functions;
- the Authority is part of the European Competition Network and cooperates with other European authorities and with the European Commission on competition matters, sharing information, etc.;
- in some cases, senior staff may be trained by officials from larger jurisdictions (e.g. some legal and economic experts were trained by a senior official from the Italian Competition Authority).

Source: Competition Commission of Mauritius (2012), 'Annual Report'; Competition Commission of Mauritius (2011), 'Annual Report'; Competition Commission of Mauritius (2010), 'Annual Report'; Malta Competition and Consumer Affairs Authority (2013), 'Report and Accounts'; Malta Competition and Consumer Affairs Authority Act.

In addition to the general issues surrounding the optimal way of accessing the expertise and resources needed, another challenge identified by stakeholders is staff retention. Stakeholders noted the frequent changes in JCRA staff and chief executives over the years. Indeed, there have been four chief executives (formerly referred to as Executive Directors) over the last six years,<sup>28</sup> alongside substantial staff turnover. This means that there is limited knowledge built up within the JCRA and a lot of time is taken up training new staff. Companies have mentioned that this creates costs and uncertainty for them in terms of

<sup>28</sup> Since 2009, the Executive Directors have been: Michael Byrne, Andrew Riseley, John Curran and Charles Webb.

familiarising the JCRA staff with issues that had been discussed with their predecessors. It also creates a risk of inconsistency in approach over time. While it is difficult to avoid this churn problem, it is important that the JCRA ensures that the same principles and rules continue to be followed by new staff to ensure the appropriate level of consistency in approach. The literature on best practice notes that methods to increase staff retention include providing good career development opportunities, training programmes and competitive remuneration.<sup>29</sup> Maintaining good internal knowledge management processes and systems could also create more stability for the organisation.

### 3.2.3 Board

Since 1 August 2012 the JCRA has been led by a joint board for CICRA,<sup>30</sup> made up of a Chairman, three non-executive directors and two executive directors.<sup>31</sup> Members are appointed for a period of up to five years, and are eligible for reappointment at the expiration of their term. They are contracted for 30 days per year, although they often spend more time than this. In 2014, the cost of the non-executive board (including the Chairman) in member fees and expenses was approximately £133,000. The costs of the Board are split equally between the JCRA and GCRA, while the costs of staff are split depending on how much time they spend on Jersey and Guernsey matters.

The Board sets strategic policy, monitors JCRA's performance against annual objectives and budget, and helps determine the issues for investigation. There are eight scheduled meetings per year (although more can be held if necessary),<sup>32</sup> and members are provided with briefing materials in advance of each meeting.<sup>33</sup> The JCRA mainly relies on the Board for guidance, although the Board is more directly involved in some issues than may be expected for a competition/regulatory authority in a larger economy. Indeed, its annual report notes that CICRA 'is a tiny organisation and is dependent on its non-executive board members being more directly involved in some projects than would be normal'.<sup>34</sup>

In a small organisation such as CICRA, the non-executives also tend to represent a higher proportion of the total costs of the organisation. As an example, the cost of non-executive pay for Ofcom was approximately £500,000 in 2013/14, and represents about 0.5% of total costs,<sup>35</sup> which compares with 8% of total costs for CICRA.<sup>36</sup>

Stakeholders were generally positive about the role of the Board, with many commenting on the high-calibre and expertise of its members. However, similar to the feedback with respect to the use of consultants, it was noted that it would be useful if the Board members had more local presence and/or a better understanding of the local economy. Questions were also raised about the appropriate number of Board members.

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<sup>29</sup> OECD (2014), 'The Governance of Regulators – OECD Best Practice Principles for Regulatory Policy'.

<sup>30</sup> The Chairman is appointed concurrently as Chair of the GCRA by the States of Deliberation in Guernsey and Chair of the JCRA by the States of Jersey. Members are appointed to the boards of the GCRA and JCRA by the government of Guernsey and Jersey respectively. CICRA (2014), 'Annual Report 2014'.

<sup>31</sup> The current Board members are: Mark Boleat (Chairman), Michael Byrne (Chief Executive), Louise Read (Executive Director), Hannah Nixon (Non-Executive Director), Regina Finn (Non-Executive Director) and Philip Marsden (Non-Executive Director). CICRA (2014), 'Annual Report 2014'.

<sup>32</sup> In 2014, 11 JCRA Board meetings and two Audit and Risk Committee meetings were held.

<sup>33</sup> CICRA (2014), 'Annual Report 2014'.

<sup>34</sup> *Ibid*, p. 4.

<sup>35</sup> Ofcom (2014), 'Annual report 2013/14'.

<sup>36</sup> CICRA (2014), 'Annual Report 2014'.

Table 3.3 below compares the JCRA Board to the boards of other authorities in small economies. Boards can adopt a commission or governance board model.

- In a **governance board model**, the board sets the authority's strategy and oversees the authority's operations, but decision-making in competition and regulatory matters is delegated to other parts of the organisation.
- In a **commission model**, the board fulfils a strategic and a decision-making role.

Overall, Table 3.3 indicates that, with the exception of Malta, smaller jurisdictions tend to adopt the commission rather than the governance board model.

**Table 3.3 Board structure and role in international competition and regulatory authorities**

	Composition	Functions and powers	Method of appointment	Term	Requirements
Channel Islands	5 members headed by a Chairman	Commission model	Chairman appointed as Chair of the GCRA and JCRA by the States of Deliberation in Guernsey and the States of Jersey respectively. Other members appointed to the Boards of the GCRA and JCRA by the government of Guernsey and Jersey respectively	5 years, renewable	No specific requirements
Mauritius	4 members headed by a Chairman	Commission model Separation of investigative and adjudicative functions Executive Director in charge of investigations	Appointed by the President of the Republic on the advice of the Prime Minister, following consultation with the leader of the opposition	5 years, renewable once	Expertise in law, economics, accountancy or commerce
Iceland	6 members headed by a Chairman	Commission model Director in charge of day-to-day operations	Appointed by the Minister	4 years	Expert knowledge of competition and business matters
Malta	7–10 members	Governance Board model Chairman exercises executive function	Appointed by the Minister	1–3 years with possible renewal	A competition law/consumer law specialist; economist; engineer; pharmacist; accountant; representative of the national employers' organisation; representative of the national consumer association
CARICOM <sup>1</sup>	7 Members	Commission model Divided into investigative and adjudicative panel <sup>2</sup>	Appointed by the Regional Judicial and Legal Services Commission	5 years, renewable for additional 5 years	Expertise in commerce, finance, economics, law, competition policy and practice, international trade

	Composition	Functions and powers	Method of appointment	Term	Requirements
New Zealand	4–6 members including a Chairperson, a deputy Chairperson and possible associate members	Commission model Separation of investigative and adjudicative functions	Appointed by the Governor-General on the Minister's recommendations	5 years	At least 1 barrister/solicitor 1 telecoms expert

Note: <sup>1</sup>Caribbean Community and Common Market (CARICOM) member states are Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago. <sup>2</sup> The investigative arm is in charge of initiating the investigation and carrying out the analysis; the adjudicative arm makes a final decision on the case and decides on remedies based on findings at the investigative stage.

Source: Mauritius Competition Act 2007; Malta Competition and Consumer Affairs Authority Act 2011; Caribbean Community (CARICOM) Secretariat (2001), 'Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy'; Icelandic Law Gazette (2005), 'Competition Law No 44/2005, amended by amendments No 52/2007 and 94/2008'; New Zealand Commerce Act 1986.

In the authorities reviewed, members tend to be appointed through the political process for terms of up to five years that are renewable, although only once in a number of instances. Requirements for technical expertise and qualifications are set out in the legislation in the different jurisdictions.

Most of the authorities included in the table do not state clearly the split between executive and non-executive members. The CMA is an example where there is a clear split between executive and non-executive roles within the Board.<sup>37</sup> The authorities reviewed also tend to appoint boards in line with the recommendations from the literature on best practice; namely, members should be appointed for fixed terms, but which overlap more than one electoral cycle; there should not be unlimited tenure; appointments should focus on technical expertise; and members should be from diverse political backgrounds.

We do not consider that any changes are required to CICRA's current Board. However, as its members are replaced, it needs to ensure as wide a skill set as possible, with expertise in the areas where the JCRA may need to intervene. The Board members also need to have sufficient understating of the local market and wider Jersey economy, which some stakeholders commented may be missing at the moment.

### 3.2.4 Funding

There are two primary sources for funding the JCRA (and CICRA). For regulatory functions in the telecommunications and postal sectors, the activities are funded by the licence fees paid by licensed operators. As the quantity of work required in any particular year varies—depending on whether the JCRA is setting a price control in that year, for example—the amount collected in licence fees also varies. The total has fluctuated over the past ten years from around £350,000 to £850,000.<sup>38</sup>

The other major source of government funding is the competition law grant, which covers the competition law functions of the JCRA. Over the same ten-year period, the sum has varied from around £250,000 to £450,000 per year, partly determined by the number of market studies undertaken. The JCRA also collects

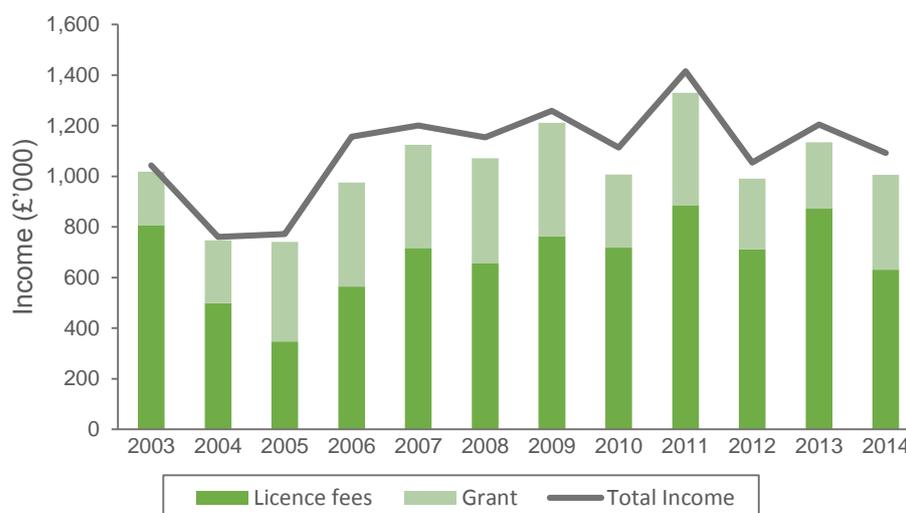
<sup>37</sup> The CMA has 1 chair, 1 chief executive, 3 executive directors and 6 non-executive directors. Source: CMA website.

<sup>38</sup> JCRA Annual reports.

fees with respect to merger notification/investigations, which vary with the number of mergers notified/investigated. In the same period, income from mergers ranged from £10,000 to £100,000 per year. As the JCRA is not permitted to cross-subsidise between its competition and regulatory activities, it needs to ensure that it receives enough income during the year to fund them separately.

The overall income for the JCRA (rather than the combined Authority) is illustrated in Figure 3.1. Also illustrated is the split between the two main sources of grant and licence fees, which together made up an average of 93% of total income from 2003 to 2014.<sup>39</sup> The income/expenditure was highest in 2011 and has been quite variable year on year.

**Figure 3.1 JCRA's income, 2003–14**



Source: Oxera, based on income data from the JCRA and CICRA annual reports, 2004–14.

This level of funding is low in absolute terms, but high per head of population when compared with economies such as the UK. For example, in 2014 the UK CMA had a budget of around £60m,<sup>40</sup> most of which came from the UK government. This translates into approximately £1 per head of population. In the same year, the JCRA spent around £460,000, or less than 1/100th of the CMA, on its competition functions, although its work plan was also less extensive.<sup>41</sup> This translates into around £10.8 per head of population.

A few stakeholders commented on the need for additional funding for the JCRA, although this is not apparent from a comparison with other regulatory and competition authorities in Table 3.4 below.

The link between activity and income in the mergers and regulatory areas also provides a degree of comfort that the JCRA can meet the demands put on it. While in the competition law field beyond mergers there is no such link, in many cases the JCRA has some discretion as to whether it investigates and/or takes action so that it is more in control of the level of relevant expenditure. At a high level, a trade-off needs to be made between the budget provided and the

<sup>39</sup> The other income comes from: merger and acquisition fees, bank interest, application fees and sundry income.

<sup>40</sup> Competition & Markets Authority (2015), 'Annual Report and Accounts 2014-15'.

<sup>41</sup> For example, in the financial year ending in March 2015, the CMA reviewed 83 merger cases and launched 12 competition and consumer enforcement cases. In 2014, CICRA reviewed 8 merger cases and did not launch any competition enforcement investigations.

benefits to the economy (and therefore Jersey residents) that arise from the competition law activities. Although (small) jurisdictions vary as to where this level of funding is drawn from, Jersey's costs are not out of line with others'.

**Table 3.4 Cost of international authorities**

	CICRA	Mauritius	Malta	New Zealand	Australia	Netherlands
Expenditure/GDP (2014)	0.03%	0.01%	0.06%	0.01%	0.01%	0.01%
Expenditure(£)/population (2014) <sup>1</sup>	10.8	0.6	9.0	3.8	4.3	4.0

Notes: <sup>1</sup> Expenditure is presented in 2014 GBP and population is also from 2014. To ensure comparability, whenever expenditure comes from accounts other than 2014, its value is deflated/inflated to 2014 by an appropriate country-specific inflation index.

Source: Government of Jersey, Statistics Unit; Government of Guernsey; World Bank; Jersey and Guernsey (CICRA annual report); Mauritius (Annual Report 2012); Malta (2013 Annual Report); New Zealand (2013/14 Annual Report); Australia (ACCC Annual report 2013–14); Denmark (Annual Report 2006); Netherlands (Annual Report 2014); Isle of Man (Annual Report 2014/15).

Most of the stakeholders' concerns about funding related to uncertainty. Stakeholders noted that the Minister can unilaterally decide to cut JCRA funding, which would have a significant effect given that this represents more than one third of its income. The literature on best practice suggests that to ensure that funding is not subject to political pressure, a number of principles should be followed, including:

- multi-year budget setting;
- avoid budget-setting exclusively by individuals who are accountable only to the government (e.g. Ministers); instead involve the broader legislative arm (e.g. Parliament);
- funding should only be reduced as part of an overall reduction in government spending, not selectively.

Other best-practice funding principles with implications for the effectiveness and robustness of JCRA's work are set out in Box 3.3.

**Box 3.3 Best practice in funding for regulatory and competition authorities**

The literature on best practice suggests that:

- funding should be adequate to enable an efficient authority to fulfil its objectives and duties, taking into account the uncertainty over actual required expenditure;
- a competition authority should not be reliant on proceeds from penalties and other proceeds from investigations as the main sources of income since these are uncertain and may distort its decision-making process;
- cost-recovery fees should be established for regulatory activities that benefit only selected groups in the community;
- for regulatory agencies, a levy on regulated entities (which can be passed through to customers) could be an additional source of income and promote independence. In this case, the agency should use proceeds from the levies transparently and should return any surplus to customers.

Source: Brown, A., Stern, J. and Tenenbaum, B. (2006), 'Handbook for Evaluating Infrastructure Regulatory System', World Bank.

There are no straightforward solutions to maintaining the optimal funding stability at an organisational level when certain income streams vary with activity, but the institutional resources (for example, the employees) cannot be varied over the same timescales. Although some of this variation in demand can be accommodated by using consultants when necessary, the resources are not always substitutable.

The most significant concern from stakeholders related to the uncertainty that the JCRA may experience when it faces a legal challenge or an appeal when taking action under the Competition Law. If a JCRA decision is appealed, the Authority needs to request funding from the government, which the government can refuse. While this has not occurred in practice, it was noted that this might make the JCRA more risk-averse in pursuing cases under Competition Law. Moreover, it could cause embarrassment for the JCRA if the government decided not to provide funding. This may be a particular issue in Jersey given the government ownership of a number of companies that may be involved in litigation.

It is important that the JCRA has more certainty over funding, particularly for appeals. This would provide it with the comfort to proactively undertake investigations without the concern that it will not have the resources to pursue an appeal by a company.

To provide this certainty, as part of the Memorandum of Understanding between the JCRA and the government, an explicit commitment could be put in place that the government will provide the JCRA with the appropriate funding if it faces a legal challenge.

In addition, the government could provide a contingent fund for legal challenges. The government would not be able to stop the funds being used for particular cases, but it could decide not to refill the fund if it considers they are not being used appropriately. If the government does not refill the fund, it would be required to provide a reasoned decision why it is not in the Island's interest to do so. The potential threat that the government would not refill the fund might help to prevent the JCRA from pursuing inappropriate cases.

As indicated above, the required work for which the JCRA is paid out of licence fees is volatile year on year. In turn, the total annual income of the JCRA/CICRA is also volatile, with timescales that are shorter than in-house resources can be efficiently adjusted (and, in any case, staffing stability has benefits). Some of this variation in the work required, and therefore the licence fees to be levied, can be absorbed by spending more, or less, on consultants. However, the government grant used to finance the competition law work could also be used as part of the short-term matching of the funding to resources, by allowing the JCRA a degree of 'carry-over' into the next year.<sup>42</sup>

### **3.3 Communication with stakeholders (excluding government)<sup>43</sup>**

A wide range of stakeholders commented on the poor credibility of the JCRA and the perception that it is ineffectual ('toothless'). While our review identified some issues with the Authority's operation, it appears that the perception of the JCRA may be worse than the (current) reality. This perception seems to arise, in part, as the JCRA does not appear to publicise effectively or clearly its work or

<sup>42</sup> This may require a change to Treasury codes of direction to allow the JCRA to carry funds forward.

<sup>43</sup> Interactions with the government are covered in section 4.

what the relevant laws are. As a result, the beneficiaries of JCRA's interventions do not always appear to be aware of the results of many of those interventions, or even that the JCRA has intervened.

This perception diverges quite sharply from the JCRA's understanding of consumers' views. For instance, while the JCRA considered its investigation into school uniforms as successful and having a positive impact, many stakeholders were not even aware that the JCRA had looked into the issue. Some of those who were aware did not consider that the investigation had made a significant difference. Stakeholders also commented that they did not think that the public was aware of the results of the investigation into the groceries market.<sup>44</sup>

While getting customer engagement with competition authorities and the results of their interventions is difficult across jurisdictions, there is a particular concern about this issue in Jersey, given the divergence of views between the JCRA and the public.

### 3.3.5 Strategic plans and annual reports

A prominent theme in nearly all of JCRA's strategic plans is its engagement with stakeholders. In its strategic plan and work programme for 2014, CICRA noted that:

We are committed to increasing our influencing role within the Channel Islands by publishing appropriate papers, seeking speaking engagements at local events, engaging with stakeholders and advising Ministers and the Departmental Boards on policies that have an impact on regulation and competition issues.<sup>45</sup>

However, stakeholders commented that they had not seen evidence of this activity. Many also noted that when the JCRA does engage with the public, it tends to do so at a technical level, making it difficult for individuals and members of the public to engage effectively.

To improve stakeholders' perception of the JCRA, and encourage more awareness of, and support for, its work, Oxera recommends that the JCRA provide more clarity, in a way that is accessible to stakeholders, on what it investigates, the questions or issues on which it is seeking views, its priorities, and the benefits of its investigations. If the JCRA becomes more consumer-facing, then when issues first arise, stakeholders will be more likely to approach the Authority rather than the Ministers.

CICRA publishes a strategic plan and work programme<sup>46</sup> at the start of each financial year setting out the broad priorities and objectives for the JCRA in its different areas of work, and associated timescales. It now produces these plans for a three-year period, in line with a recommendation from LECG's 2009 review to consider objectives over the medium term rather than annually.<sup>47</sup> However, as previously noted, the JCRA does not discuss its strategic work plan with other interested and relevant parties, such as the Consumer Council, in advance of publication. The JCRA should publish annual plans, and consult on all of them with consumers and interested stakeholders before they are published.

The JCRA also publishes an annual report at the end of the year on its performance against some of the objectives in the strategic plan.<sup>48</sup> Given the apparent lack of awareness of the JCRA's impact, it should provide a more

<sup>44</sup> CICRA (2014), 'Review of the grocery market in Jersey and Guernsey', CICRA 14/06, 31 January.

<sup>45</sup> CICRA (2014), 'Strategic Plan and Work Programme', Document No CICRA 14/07, March, p. 8.

<sup>46</sup> Until 2010 this was referred to as the annual Aims and Objectives document.

<sup>47</sup> LECG and Charles Russell LLP (2009), *op. cit.* p. 43.

<sup>48</sup> As required by Article 18 of the Competition Regulatory Authority (Jersey) Law 2001.

comprehensive report on its performance against the previous year's work plan with some key performance indicators.<sup>49</sup> This is similar to a recommendation from the National Audit Office (NAO) following a review of the Office of Fair Trading (OFT) in the UK. The NAO recommended the OFT should work on:<sup>50</sup>

improving the measurement of its achievements and the communication of its work: by developing a series of performance indicators which would help demonstrate more clearly the effectiveness of its competition enforcement work, including the benefits to consumers; and by improving accessibility to information on its enforcement work for external audiences.

The literature on best practice highlights performance assessment as something for authorities to undertake regularly to communicate with stakeholders and show their added value and increased effectiveness over time. The results of these assessments should be made public at regular intervals. Authorities should also establish indicators which should start from their goals, based on broader policy goals set by government, focus on outcomes and be qualitative and quantitative.

Other authorities tend to measure and publish more information about their performance. The Commerce Commission of New Zealand is an example of a competition and regulatory authority that has introduced a performance assessment regime as part of a more general accountability framework. It uses a number of non-financial performance metrics (see Box 3.4 below).<sup>51</sup> Many of these are based on information that is readily available so that the JCRA would not have to collect additional data in order to use these metrics.

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<sup>49</sup> This is in line with the recommendation put forward in LECG and Charles Russell (2009), which does not appear to have been implemented. We note that some of the earlier annual reports provided more detail and transparency about how the JCRA performed against its objectives.

<sup>50</sup> National Audit Office (2005), 'The Office of Fair Trading: Enforcing competition in markets', 17 November, p. 2.

<sup>51</sup> Commerce Commission New Zealand (2014), 'Annual report 2013/14'.

### Box 3.4 Performance assessment regime and metrics in New Zealand

<p><b>Government priorities</b> The government establishes the strategic priorities/goals in conjunction with the Commerce Commission</p>	<p><b>Examples</b></p> <ul style="list-style-type: none"> <li>• build a more competitive and productive economy</li> <li>• deliver better public services to New Zealanders</li> </ul>
<p><b>Outcomes</b> Based on strategic priorities, the Commission specifies the outcomes that will help achieve those goals</p>	<p><b>Examples</b></p> <ul style="list-style-type: none"> <li>• markets are more competitive</li> <li>• consumers' interests are protected</li> </ul>
<p><b>Impacts</b> Based on the intended outcomes, the Commission identifies the effects of achieving those outcomes. This provides a bridge between outcomes and measurable outputs</p>	<p><b>Examples</b></p> <ul style="list-style-type: none"> <li>• improved levels of awareness and compliance with competition policy</li> <li>• conduct that does not comply with competition or consumer law is detected and responded to appropriately</li> </ul>
<p><b>Outputs</b> Based on impacts, the Commission identifies the key outputs/metrics that measure those impacts directly (e.g. level of awareness, level of compliance) and monitor their main outputs</p>	<p><b>Examples</b></p> <ul style="list-style-type: none"> <li>• metrics for impacts (e.g. level of awareness) are: percentage of businesses with an active compliance programme; results from surveys</li> <li>• monitored outputs are determinations, advocacy and enforcement cases. These are measured in quantity, quality and timeliness</li> </ul>

This framework applies to competition and regulatory functions. The specific metrics used as part of the output aspect of the performance regime are as follows.

	Competition	Regulation
<b>Quantity metrics</b>	Number of: clearance applications processed; market structure cases; coordinated behaviour cases; etc.	Number of: determinations; reports completed; compliance assessments completed; etc.
<b>Quality metrics</b>	Percentage of: successfully defended determinations/appeals; stakeholders who rate the investigation process as fair and transparent; stakeholders who have received compliance advice and stated that the communication and guidance was clear and useful. Number of successful legal challenges of the Commission's processes	Percentage of stakeholders who: find the Commission's determinations and supporting reasons clear; rate reports as good or above. Number of successful legal challenges of the Commission's processes
<b>Timeliness metrics</b>	Average number of working days from date of registration to date of decision for merger clearance applications. Percentage of: investigations undecided for more than 18 months; investigations decided within 12 months	Percentage of determinations completed by statutory deadlines; average time to complete telecommunications determinations

Source: Commerce Commission New Zealand (2014), 'Annual Report 2013/14'; Commerce Commission of New Zealand (2014), 'Statement of Intent – Our Plan for 2014-18'.

The JCRA should also ensure that it pursues the more customer-facing role referred to in its strategic plan in terms of speaking engagements at local events or publication of newsletters. Importantly, it should interact with businesses so that they are clear about the implications of legislation. For instance, if there are changes in legislation, the JCRA should meet with companies to discuss what it means in terms of activities that they can pursue legally.

### 3.3.6 Advocacy

In addition to communicating what competition law allows and disallows, it is important for the JCRA to engage in advocacy in a direct sense. This means explaining why competition can be good and why competition law makes sense; in other words, building the constituency for competition. Indeed, advocacy is one of the keys to an agency's effectiveness identified in the literature on best practice, and is especially important in smaller jurisdictions (or for new or recently reformed authorities) that need to establish a good reputation, ensure accountability, and effectively communicate what is, and what is not, allowed under legislation. For instance, the academic literature explains that to foster public support for and predictability and stability of the regime, the authority should consult on all new initiatives and publish statements that explain its decisions. Nearly all authorities reviewed recognise the importance of advocacy and specify it as one of their key objectives—see Box 3.5.

While some of the functions may currently be undertaken by the Consumer Council rather than the JCRA in Jersey, as noted above, there could be improved coordination between these organisations.

#### Box 3.5 Role of advocacy in international authorities

##### **New Zealand**

In its 2014 Statement of Intent, the New Zealand Commerce Commission states:

Part of our education and advocacy programme is providing accurate, timely and understandable information and guidance to businesses. Among other things, we produce fact sheets and guidelines, meet with and present to industry groups, and contribute to industry publications

This is seen as an essential element in increasing compliance with competition and consumer protection obligations. The Commission implements this principle in different ways. When it introduces new regulation, embarks on a new policy or oversees new sectors, the Board might appoint specific resources in the form of advocacy advisers to ensure that potentially affected parties are aware and are kept informed of all developments (e.g. dedicated credit advocacy adviser for consumer credit, a new area of focus for the Commission). The Commission regularly launches extensive advocacy and communications campaigns after major reforms or following substantial changes in legislation.

##### **Mauritius**

The Competition Commission of Mauritius (CCM) explicitly states the importance of advocacy in spreading a competition culture:

Reaching out to others is one of the keys to maintaining a vigorous competitive environment. For this reason, the CCM has identified a number of strategies for education and advocacy, which include promoting awareness among core legal and business communities, promoting awareness among SMEs and deepening our relationship with tertiary education institutions, and aims for specific activities within each of these areas

The CCM regularly organises events to promote a pro-competitive framework among businesses and consumers, including workshops, interactive working sessions, and conferences. It also holds discussions with stakeholders to raise awareness among legal and business communities and pursues relationships with tertiary education institutions.

##### **Malta**

The Information, Education and Research Directorate of the Maltese Competition and Consumer Affairs Authority (MCCAA) is responsible for raising awareness on consumer rights

and good trading practices, and generally educating consumers so they can make informed choices. Officers from the Directorate take part in various communications activities (radio and television, articles in newspapers and magazines, distribution of information material, and customer-facing fairs and events).

As part of the European Consumer Centres' Network (EEC-Net), the MCCA seeks to increase consumer confidence by providing information on cross-border purchases and to assist them with complaints against businesses in another EU Member State.

#### **CARICOM**

The CARICOM Competition Commission states:

Education is a key to effective participation by consumers in the competitive process in a market economy. The more educated consumers are about competition policies, law, regulations, their rights and conditions in the market place, the more empowered they will be to make decisions in their best interest and take action when disadvantaged. The Commission is well positioned to promote consumer education and will do so.

Activities undertaken by the Commission to fulfil this function include organising events for the World Consumer Rights Day in 2015, and presentations to university students on the Commission's role.

#### **Iceland**

The Iceland Competition Authority advocates for effective competition through reports on specific subjects, such as financial restructuring after the banking collapse and competition in financial markets. Advocacy is also done through the Internet, social media, meetings, conferences and the publication of reasoned opinions on competition matters.

Source: Commerce Commission New Zealand (2013), 'Statement of Intent – Our Plan for 2014 – 2018'; Annual Report 2012; Malta Competition and Consumer Affairs Authority Report and Accounts 2012 and 2013; the CARICOM Competition Commission, 'Building Competitive Markets'; OECD, Directorate for Financial and Enterprise Affairs, Competition Committee (2012), 'Annual Report on Competition Policy Developments in Iceland'.

In both 2008 and 2010 the JCRA published reports that sought to measure the impact of its interventions on Jersey residents. Although the indications were that these would continue, no further reports were published after the merger of GCRA and JCRA. Without pre-judging whether these types of publication are the most effective way of communicating the benefits of JCRA/CICRA interventions, given stakeholders' current perceptions it would appear that the JCRA should consider the most appropriate way to provide this type of information to consumers.

Another type of advocacy, going beyond competition law, is seeking to ensure that other laws and policies are not (unnecessarily) anti-competitive; for example, that regulation is not creating restrictive entry barriers. This also requires involvement from the government, as discussed in the following section, and should be done on an ongoing basis.

### **3.4 Summary of recommendations**

- The JCRA should remain part of the combined authority, CICRA, and Jersey and Guernsey should seek greater alignment.
- The JCRA should coordinate more closely with the Jersey Consumer Council and Trading Standards—potentially by putting together formal agreements and/or merging the entities into one organisation.
- The JCRA should continue to use a panel or framework agreement with a limited number of consultancies and law firms so that the JCRA can buy in external expertise as and when needed. In return for being on the framework, the consultancies should commit to developing their own in-house expertise in the specific features of the Jersey economy.

- CICRA should explore the possibility of entering into broader and more formal arrangements with competition/regulatory authorities in another jurisdiction (e.g. Ofcom, CMA) with the aim of getting access to the expertise needed for specific projects, and the development of some expertise relating to the situation in Jersey within those authorities.
  - The JCRA should ensure that, as far as possible, future appointments result in a Board composition which, between its members, has expert knowledge in the key areas in which the JCRA is likely to be involved, and that there is a greater degree of local knowledge among the members.
  - The government should consult with Treasury and provide an explicit commitment that it will fund the JCRA as necessary if the Authority faces a legal challenge. If the government does not want to provide the resources to defend an appeal (under competition law), it should give a reasoned decision explaining why it is not in the Island's interest to do so.
  - The JCRA should seek Treasury support for a degree of 'carry-over' of funds from one funding period to the next as part of the short-term matching of the funding of demands to the availability of resources.
  - The JCRA needs to improve communication with stakeholders on its actions and the results it achieves. In particular, it should consult on, and publish, an annual plan in advance of each financial year, and provide a comprehensive report on how it has performed against the previous year's work plan, using key indicators or metrics. It should also ensure that it explains clearly what is allowed and disallowed under competition law and why competition is important.
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## 4 Interaction and relationship with government

The government in Jersey owns and/or controls JT, Jersey Post, Jersey Water, the Port and the Airport, directly regulates taxis, and directly provides sewerage services. The government is also concerned with the development of the economy, especially to ensure that the international finance sector is provided with the infrastructure necessary to be internationally competitive.<sup>52</sup> As a result, there is a great deal of interaction between the government and the JCRA, particularly as the regulator of specific sectors.

The JCRA is itself set up by statute. It is responsible for applying laws that are important in delivering the government's policy objectives with respect to the functioning of the Jersey economy. In addition, the Authority's regulation and competition functions will have an impact on the achievement of government policy. The wider organisational and constitutional structure adopted in Jersey (which mirrors most developed jurisdictions) creates an institution that is seen as independent of government. Notwithstanding this independence, governments and competition/regulatory authorities are interdependent. Making this interdependence work, while maintaining independence, is therefore a responsibility that both parties should embrace. Indeed, the success of regulatory and competition authorities, and the success of achieving government policy objectives, can be materially influenced by the interaction between the authorities and their respective governments, as mentioned in section 2.

While largely outside of the scope of this review, the government itself can have a direct influence on how markets in Jersey operate. In pursuing competition policy, the government should not ignore the impacts of its own actions. In particular, given the size (and position) of the local economy, barriers to entry may be particularly acute. A large number of existing government policies (including the regulations around housing and employment) are likely to have a significant, albeit indirect, impact on such barriers; and the implications of these policies for local competitive dynamics should be taken into account in their formulation. This raises a more general issue about whether the specialist competition body should be given a role in reviewing, and advising on, proposed or existing legislation or regulation where this has an indirect impact on competition.

As part of our review, stakeholders noted the complexity introduced by the government's role in setting the policy framework given its ownership of most of the companies regulated by the Authority. Indeed, many stakeholders noted that they felt that the JCRA was doing its best in view of the way the government and the JCRA currently interact. They further noted that, in order to improve the JCRA's performance, one of the major changes required should be with respect to that interaction, rather than focusing solely on the JCRA. This is discussed below.

### 4.1 Role of government in setting the policy framework

At a high level, government creates the policy framework for its competition and regulatory authorities through legislation which sets out the regulatory functions, duties and powers, etc. Independent regulators and competition authorities are then charged with carrying out their functions in line with their duties, within their legal powers. Reflecting their independence, governments stand back and let the authorities exercise their duties. Reflecting the complexities of real economies, and real political processes, the legal structures may also contain

<sup>52</sup> In particular, the appropriate telecommunications links, the appropriate physical communications links, and adequate energy security.

powers for the government to issue formal directions to the authorities that will have an impact on what the authorities do.

In reality, governments are likely to take more of an interest in what their independent regulators are up to than might appear strictly necessary from the legislative framework. In turn, regulatory and competition authorities will consider their government's political and wider policy framework when deciding how to allocate their resources.

In particular, for authorities with limited resources, their effectiveness will be influenced by getting the day-to-day relationships with their government right. This requires careful balancing between the need for independence and the reality of operating in areas where the government of the day has (legitimate) political interests. Many stakeholders were of the view that the right relationship had not developed in Jersey. In relation to the role of government in defining regulatory and competition policy,<sup>53</sup> some prominent themes emerged from the interviews with stakeholders and from our analysis, as explored further in the text below:

- in the legal framework, there is a **lack of clarity and understanding of the duties** of the JCRA as regulator and the government;
- there is a **lack of policy framework** set by the government within which the JCRA can operate, primarily in the regulated sectors (notably telecoms), but also in relation to the JCRA's competition functions;
- there is a **lack of direction**, clarity of objectives and expectations set for the JCRA by government. As a result, there is, at a minimum, a perception that the JCRA may be making some decisions on what are, in effect, policy matters. This is seen as not appropriate for a non-elected body.

#### 4.2 Duties of government and the JCRA

A number of stakeholders were concerned about the lack of clarity in the delineation of the government and the JCRA's duties. This is consistent with other stakeholders' views that the government does not necessarily fully understand what 'independent regulation' means in practice. The balance between interfering in ways that compromise independence and taking little interest in the Authority's work, hoping that it will be effective, is not easy to strike, and requires a clear articulation of the respective roles of the government and the Authority, particularly where the government also owns regulated entities.

In telecommunications and postal regulation, although the functions of the Minister and JCRA are different, the duties are the same under Article 7 of the Telecommunications (Jersey) Law 2002 and Article 8 of the Postal Services (Jersey) Law 2004. Indeed, neither law draws a distinction between the duties of the Minister as policymaker and the Authority as the body in charge of regulating the sector subject to government policy for the sector. For example, the Telecommunication Law establishes that:

- (1) **The Minister and the Authority shall each** have a primary duty to perform his, her or its functions under this Law in such manner as each considers is best calculated to ensure that (so far as in his, her or its view is reasonably practicable)

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<sup>53</sup> In this section, when referring to 'competition policy', the focus is on the government's role in defining policy as to whether competition in a given market or sector should be promoted, given the economic features of the sector or market, not its role in setting competition law or the JCRA's role in enforcing that law.

such telecommunication services are provided, both within Jersey and between Jersey and the rest of the world, as satisfy all current and prospective demands for them, wherever arising.

(2) In so far as it is consistent with paragraph (1) to do so, **the Minister and the Authority shall each –**

- a. perform his, her or its functions under this Law in such manner as each considers is best calculated to protect and further the short-term and long-term interests of users within Jersey of telecommunication services and apparatus, and perform them, wherever each considers it appropriate, by promoting competition among persons engaged in commercial activities connected with telecommunications in Jersey;
- b. perform his, her or its functions under this Law in such manner as each considers is best calculated to promote efficiency, economy and effectiveness in commercial activities connected with telecommunications in Jersey;
- c. perform his, her or its functions under this Law in such manner as each considers is best calculated to further the economic interests of Jersey;  
[...]  
(emphasis added).

Notwithstanding that the different functions of the Minister and the JCRA do differentiate their roles, there is no easily accessible description of these differences. Although legislation is rarely a paragon of clarity, approaches adopted in other jurisdictions appear to provide a clearer delineation of the duties and responsibilities of the regulator and government, as shown in Box 4.1.

**Box 4.1 Delineation of duties of the telecommunications regulator in selected countries**

Jurisdiction	Delineation of duties and powers
<b>UK</b>	<p>There are specific duties that apply solely to Ofcom. Only under some circumstances (e.g. in the interest of national security, safety of the public) does Ofcom have the duty to carry out its functions in accordance with directions given by the government (Secretary of State). There are also further restrictions on the Secretary of State. For example, it is not entitled to direct Ofcom to suspend or restrict a person's entitlement to provide an electronic communications network or services.</p> <p>The Act specifies circumstances in which Ofcom needs to consult with the Secretary of State.</p>
<b>Ireland</b>	<p>The functions and objectives of the Commission for Communications Regulation (ComReg) are specific to the Commission and defined in the Act. The government (the Minister) may transfer to ComReg such additional functions as the Minister considers appropriate, such as functions that are incidental, supplemental or consequential to the functions conferred to ComReg.</p> <p>When carrying out its functions, ComReg is required to have regard to policy statements published by, or on behalf of, the government in relation to the economic and social development of Ireland.</p> <p>Under some circumstances (e.g. in the interest of the proper and effective regulation of telecoms, post and radio spectrum and the formulation of policy), the Minister may give policy directions to ComReg. Before giving any such direction, the Minister shall give ComReg the reasons for it. The Act specifies restrictions on the directions given by the Minister.</p>
<b>Malta</b>	<p>The Act defines the functions and duties that apply solely to the Malta Communications Authority. The Authority shall advise the Minister on the formulation of its policy in relation to matters regulated by the Act, and on the planning and development of the communications industry.</p> <p>The Minister may, in relation to matters that affect the public interest, give directions to the Authority of a general character (and not inconsistent with the provisions of the Act) on the policy to be followed in carrying its functions.</p>

### Cyprus

The regulator (Commissioner) must act impartially and independently, applying the framework of general policy which is adopted, from time to time, and which may be communicated by the Minister. In cases where the Minister, following deliberation with the Commissioner, determines or revises the framework of general policy in relation to electronic communications and post, the Minister must publish the revised framework.

The Commissioner has the power and competence (among other things) to advise the Minister on matters concerning electronic communications and post.

Source: UK: Communications Act 2003; Ireland: Communications Regulation Act 2002; Malta Communications Authority Act; Cyprus: Regulation of Electronic Communications and Postal Services Law of 2004.

Owing to the lack of clear distinction between the duties of the Minister and the JCRA, some stakeholders noted that:

- it is not clear who interprets the consumer interest duties and balances short- and long-term interests. This has raised concerns that duties may be driven by short-term political agendas;
- it is not possible to determine whether the duties of the JCRA and the Minister are substitutable or complementary, with the risk that (some) areas may not be covered by either of them.

These problems are compounded in the absence of a clear government policy for the sectors regulated by the JCRA and an apparent lack of sufficient communication and coordination between government and the Authority, as further explained below.

Furthermore, this lack of delineation of duties in the legislation is not consistent with the best-practice principles (set out in section 2) of role clarity, accountability and transparency, and, at a minimum, reduces the perceived efficiency of the regulatory process and the effectiveness of regulatory outcomes.

To address the issues surrounding the respective roles of the JCRA and Ministers, a clear description of these roles should be produced by the government (in conjunction with the JCRA).

### 4.3 Defining sectoral policy

While there should be a clear separation of roles and responsibilities between the regulator and the government in order to ensure the regulator remains independent, the regulator should be pursuing regulation or competition functions within a clear policy framework set out by the government. This issue is particularly relevant in the context of small jurisdictions, as recognised in the literature.<sup>54</sup>

The literature explains that establishing the way in which the government can engage with the regulator is important. It also sets out principles in terms of creating a sound policy framework that should enable an authority to implement and act in accordance with that policy (see Box 4.2 below).

<sup>54</sup> See, for example, Gal, M. (2001), 'Size does matter: general policy prescriptions for optimal competition rules in small economics', *Southern California Law Review*, 73, April.

## Box 4.2 Attributes of a sound policy framework

A sound framework should include the following elements:

- a clearly defined set of specific objectives;
- explicit consideration of any trade-offs between objectives and how to resolve them. This should be clear in the legislation or there should be clear directions on priorities;
- explicit consideration of the extent to which the legislative framework creates potential for discretion and how to deal with this discretion;
- functions and powers that are proportionate and sufficient to achieve the stated objectives;
- communication that is formalised, and does not compromise the actual or perceived independence of regulatory decision-making;
- assessment of conflicts between different functions and how these will be managed (particularly relevant if the authority has both regulatory and competition enforcement powers);
- definition of the nature of interaction between the authority and other bodies (e.g. Ministers):
- no duplication of functions across different entities, to prevent inter-agency conflict.

Source: OECD (2014), 'The Governance of Regulators – OECD Best Practice Principles for Regulatory Policy'.

Clear government policy is also part of the JCRA's stated principles of good regulation, as set out in its strategic plan. As part of the principle of accountability, it notes that 'independent regulation needs to take place within a framework of duties and policies set by the democratically accountable States Assemblies of Jersey and Guernsey.' It is also part of the principle of coherence: regulatory frameworks should form a logical part of the States of Jersey and Guernsey's broader policy context, consistent with established priorities.<sup>55</sup>

However, in practice the view from several stakeholders was that a clear government sectoral policy is absent, and there is broad agreement that the government needs to provide clarity on its policy and the scope for intervention in different sectors, particularly in sectors where there is existing government regulation or intervention.

Stakeholders also noted that there appears to be no common position between government (as both policymaker and shareholder), regulator and industries that would enable the identification of a clear vision for the Island. The result is that, at times, the regulator has been operating in a vacuum having to interpret its legal requirements and exercising its discretion in an environment where it may have to try to second-guess government policy.

In such circumstances it may not be entirely surprising the objectives and actions of the government and the JCRA have not always aligned, with consequent conflicts, and that the JCRA has not always received the support of government in the implementation of remedies recommended by the Authority. As noted by the CICRA Chairman in the 2014 Annual report: 'putting regulation and competition policy closer to the centre of government may well mean a better alignment with other policies.'<sup>56</sup>

On this issue, one commonly cited example in the interviews is the JCRA's investigation into the taxi market (see Box 4.3 below). After analysing the taxi market the JCRA put forward recommendations to the Transport and Technical Services (TTS) Department, proposing changes to the way taxis are regulated. However, the government appeared unwilling to implement the recommendations. If the government had provided greater clarity about its policy

<sup>55</sup> See OUR and JCRA, 'Strategic Plan 2012-2014 and 2012 Work Plan', pp. 4–5.

<sup>56</sup> CICRA, '2014 Annual Report'.

stance at the outset, the JCRA may not have decided to use its limited resources to investigate this market.<sup>57</sup> This does not mean that the JCRA should never take on a case where the government has not indicated a prior willingness to make changes. Rather, given its limited resources, the JCRA should prioritise cases where it considers it can have an impact (discussed further in section 5.1).

### Box 4.3 Taxi regulatory reform

In December 2010, following a request from TTS, the JCRA produced a report recommending changes to the taxi regulatory regime with the aim 'to assist the relevant authorities [to] make an informed decision about changes to the current regulatory regime'. The 2010 report suggested that the system of taxi regulation was not working in consumers' best interests, and, to address the concerns, the JCRA put forward recommended changes to the way taxis are regulated, including the removal of restrictions on the number of taxis and greater transparency on taxi fares.<sup>58</sup>

In March 2012 TTS published a Green Paper consultation on the regulation of taxis. CICRA responded to the consultation reiterating many of the views expressed in the 2010 report, while supporting some of the proposals.

In December 2013, TTS published the White Paper consultation 'Taxi Regulatory Reform'. CICRA responded, expressing similar concerns to those raised in the earlier stages of the consultation. CICRA also noted in its annual reports its 'disappointment at the lack of progress' with the changes to a regulation that was 'operating in the interest of the service providers rather than the public'.

Questions about the progress made with the reform proposals have been raised in the States Assembly since the White Paper consultation ended. In September 2015 the government announced its proposed plans to reform the taxi industry, which will be introduced between 2016 and 2019. From interviews with stakeholders (which were conducted before the September 2015 announcements), it was clear that the lack of action in relation to the taxi market was contributing to the perception of 'toothlessness' of the JCRA and the breakdown in relationships between the government and the JCRA.

One aspect that emerged from the review of public domain information and the interviews with stakeholders was an apparent lack of clarity on the jurisdiction of CICRA to investigate and make recommendations to address competition concerns in a sector that is subject to regulation by a government department, and on whether competition law considerations are relevant for TTS.<sup>59</sup> An assessment of such jurisdictional aspects is beyond the scope of this review, but the fact that these issues have been raised *after* the investigations have been carried out is further evidence of a lack of clarity between the roles of the government as regulator and the JCRA as competition authority.

This example highlights the need for better clarity of roles, and that, where the government disagrees with the JCRA, the government should ensure that this is made clear and provide sufficient rationale to justify its position.

Source: JCRA (2010), 'Taxi regulation in Jersey', JCRA position paper; CICRA (2012), 'The future of taxis—public consultation', letter to the Director of Transport, 28 June; CICRA Annual Report 2012; CICRA Annual Report 2013; States of Jersey (2013), 'Taxi Regulatory Reform', White Paper, 11 December; CICRA (2014), 'The future of taxis—regulatory reform', letter to the Director of Transport, 18 February; States of Jersey Assembly, Hansard, various reports; States of Jersey (2015), 'Changes planned for taxi industry', News, 29 September.

The lack of clear policy is a particularly acute problem in the telecoms sector. We note that the government has recently consulted on and set out a policy framework as part of the energy plan for Jersey, and we consider that something similar would be useful in the telecoms sector.<sup>60</sup>

<sup>57</sup> CICRA produced the report on taxis as a response to a consultation launched by TTS in 2012.

<sup>58</sup> JCRA, 'Annual Report 2010'.

<sup>59</sup> Taxis are regulated by the Minister for Transport and Technical Services, under the provision set out by the Motor Transport (Jersey) Law 1935, which establishes that the Minister is under a duty to regulate so as to ensure that 'there is an adequate, efficient and reasonably priced cab service available throughout Jersey at all times'.

<sup>60</sup> States of Jersey (2014), 'Pathway 2050: An Energy Plan for Jersey', March.

There are also cases where the government has set a clear policy and the JCRA did not act in accordance with it (e.g. telecoms interference). It is therefore important both to have clear government policy and for the JCRA to act in line with it to ensure a coordinated approach.

More generally, the government needs to be clear about its policy for promoting competition versus direct regulation of the outputs of the sector/regulated entity. The government could choose between:

- regulating a natural monopoly through a price control; or
- doing the minimum—i.e. monitoring a natural monopoly; and/or
- encouraging competition to develop (e.g. upstream/downstream).

Many stakeholders commented that the government tends to adopt an approach that competition is desirable, even though it may not actually take any clear actions to support its development, and without ensuring that competition is possible and/or will deliver a good consumer outcome. There may be markets in Jersey where competition does not exist and is unlikely to be sustainable or an economically efficient outcome, due to economies of scale and the small size of the economy, as noted in section 2. In such instances, the government and regulator need to better consider the feasibility of competition and identify the appropriate option from the list above. This can be reviewed and updated in line with developments and trends in the market.

Importantly, there should be a common view within the government, between the Treasury, the Economic Development Department and the Council of Ministers. We understand that when issues have arisen in the past between an individual or company and the JCRA, the JCRA tends to interact with one part of government (e.g. ED), while the other party may go to another part of government (e.g. the Treasury). Ideally, there should be a response from all relevant parts of government.

Furthermore, some stakeholders noted that communication and engagement between the JCRA and the government needs to be improved. For instance, if the government is going to initiate a market review through an Article 6(4)<sup>61</sup> request (discussed in section 5), it should adequately communicate with the JCRA beforehand. This issue is consistent with past recommendations in relation to the financial services sector, where there was no common position between government, industry and regulator in terms of seeking the best outcome for the Jersey economy (see Box 4.4).

#### **Box 4.4 Interaction between the government and regulator in the financial services sector**

A significant number of stakeholders suggested that a model of how the interaction between the government and the JCRA should work is the way the Jersey Financial Services Commission (JFSC) interacts with the government of Jersey. As well as now being a good model, stakeholders indicated that the relationship between the government and the JFSC had improved markedly over the past few years, with benefits to the Jersey economy.

The JFSC's regulatory functions are different to either the competition law functions or the utility regulatory functions of the JCRA. In particular, the JFSC is not concerned with competition issues between suppliers based in Jersey, nor, importantly, with the supply of upstream inputs by a monopolist to those that will compete with it in downstream markets. Reflecting the position of the sector, the JFSC has an international focus with its operation monitored internationally. In addition, the government does not own any of the entities that the JFSC regulates. Finally, a number of the issues relating to access to resources are less acute

<sup>61</sup> Article 6(4) of the Competition Regulatory Authority (Jersey) Law 2001.

for the JFSC as there is an extensive pool of people with finance sector expertise in Jersey. Reflecting the position of the finance sector in the economy, with ten times more staff and budget than JCRA, the JFSC is also significantly larger than the JCRA.

Notwithstanding these differences, there are also similarities in the relationships of the JFSC and the JCRA with the government as holders of the relevant economic policies and as creator of the institutions. In both cases the government has a legitimate interest in the regulator's activities, particularly in relation to the overall economic policies of the Island, and is responsible for the institution. Crucially, the regulator also has to be, and be seen to be, independent in its decision-making (particularly in relation to individual cases).

The JFSC now works within a well-articulated government policy with respect to the type of international finance sector the government wants. There is regular dialogue between the government and the JFSC at ministerial and civil service levels. There is also a good mutual understanding of the boundary between what is a legitimate government concern and compromising the independence of the regulator. The government takes a keen interest in, and devotes significant resources to understand the needs of, the finance sector. On both sides, the relationship between government and regulator is taken seriously.

However, it is also instructive that, in the relatively recent past, relations between the government and the JFSC were less effective. Analysis by consultants in 2013, looking at the future of the finance sector in Jersey, picked up on the need for policy and regulation to be coordinated as a crucial aspect of future success, which led to more effort being put into making this happen, on both sides. Although stakeholders did not think that this was the only reason why the JFSC was seen as being successful, there was general agreement that the well-articulated government policy in this area, and the effort made by both parties to make the relationship work, was a crucial aspect of this success.

Source: Jersey Finance (2013), 'Government, Industry and Regulator to act together in response to research findings', press release, 29 April.

The JCRA and the government should potentially build on the experience of the memorandum of understanding between the government and the Jersey Financial Services Commission. However, a precondition for this new model would be the development of a clear government policy for the sectors regulated by the JCRA. In the absence of such policy, any alignment between government, regulator and industry will be practically impossible, making it even more difficult to change the existing perception among many stakeholders that the Authority is ineffective.

#### **4.4 Role of government as shareholder**

The government is the sole shareholder of the two companies that are directly regulated by the JCRA: JT and Jersey Post. The shareholder function rests with the Treasury and Resources Minister, supported by the States' Treasurer and a staff member in the Treasury and Resources Department. The government's relationship with JT as a sole shareholder is governed by a Memorandum of Understanding which sets out objectives for JT covering efficiency and profitability, delivery of returns to shareholders, being a good employer, and being responsive to the wider interests of the Jersey community.

Despite this Memorandum, nearly all stakeholders noted concerns about the role of government as shareholder. Stakeholders commented that the government needs to have a clear objective as to why it owns these companies and what it wants to achieve through such ownership. They also noted the need for the government to set out clearly (and resolve if necessary) any conflicts between the tasks that the government has set the regulator and the objectives it hopes to achieve through ownership of regulated companies.

It was noted that in the past there have been inconsistencies in terms of pressurising JT for dividends at the same time as telling the company to reduce its prices. A number of stakeholders were concerned that the government was not adequately balancing the risk and potential benefits of companies' actions,

such as the risks to the delivery of telecommunications services in Jersey from the significant increase in the proportion of JT's revenue generated from outside Jersey.

A manifestation, at least in part, of the conflicts noted by stakeholders is the appeal by JT against the JCRA's decision on a specified regulatory function that involved the modification of the company's licence conditions (i.e. the introduction of wholesale line rental). In its judgment, the Royal Court noted that it was 'unfortunate' that two parties that are funded and owned by the taxpayer were unable to resolve matters between them, adding that 'one cannot help but to think that the money and resources devoted to this case could have been put to much better use.'<sup>62</sup> At the same time, it would be important that the JCRA does not avoid going after companies if they have acted illegally, simply because they are government-owned.

Furthermore, a number of stakeholders considered that the relationship between JT and government, and the way the JCRA conducts its business, raised questions about the perceived effectiveness of the regulator. Indeed, some of these stakeholders questioned the extent to which, as a result of the existing role of government as JT shareholder, the regulator and government have enabled the development of a level playing field in the sector (discussed further in section 6).

A 2014 report by the Office of the Comptroller and Auditor General on the role of government as shareholder of JT considered the adequacy of the States of Jersey's governance arrangements to discharge its responsibilities as the sole shareholder of JT.<sup>63</sup> The report was critical of a number of aspects including:

- the absence of a clear link between objectives as owners and the way the government monitors JT's performance;
- the availability of resources required to perform the shareholder function;
- concerns with public accountability of JT.

The report concluded that if the States of Jersey decided to retain ownership in whole or part, the objectives of ownership should be clearly understood, and it should review how it performs the shareholder function, focusing on how it monitors performance, the availability of resources, and public accountability. These recommendations are consistent with analysis by consultants in 2010 that recommended establishing a dedicated, professional capability within the Treasury with experience of managing investment as a way to enhance the current level of engagement between the shareholder and the state-owned companies' Boards. Such a shareholder function was envisaged to:

- provide a formal and transparent framework for the Treasury's engagement with the companies;
- enable the Treasury to effectively exercise its levers to hold the Board to account for the delivery of the Strategic Plan and the shareholder's objectives; and
- create a 'buffer' between the Boards and the Minister, reducing the risk of political interference in the day-to-day management of the companies.<sup>64</sup>

<sup>62</sup> Royal Court (2013), *JT (Jersey) Limited v Jersey Competition Authority*, [2013] JRC238, 29 November.

<sup>63</sup> Comptroller & Auditor General (2014), 'The States as Shareholder – Jersey Telecom', 24 July.

<sup>64</sup> Deloitte (2010), 'States of Jersey Owned Utilities Governance Review', Key Findings Report, 10 June.

Despite these reports, we note that the recommendations have not been fully implemented.<sup>65</sup>

It is also instructive to note that, under models of private ownership, the role of shareholders in monitoring the management can be important in addressing market failures and can result in considerable expenditure by shareholders on improving the accountability of management to shareholders. Taking a conservative assumption on the cost of this monitoring (which, for institutional investors, is included in the fees paid to asset managers) as being something in the region of 5bp of the asset value, one would expect this monitoring function to cost around £150,000 per annum for a company such as JT. Oxera understands that this is far in excess of the current costs to the Treasury of the (in-house) function of monitoring JT, and therefore additional spending on monitoring JT could be reasonable. We note, however, that the recent Draft Medium Term Financial Plan 2016–2019 considers the allocation of funds for strengthening shareholder relationship resources.

One solution to this problem would be for the government to set out its objectives more clearly in a revised Memorandum of Understanding, which we understand is currently under review. The government should consider setting out what it wants from the regulated company in terms of what it wants the company to achieve and how it is monitoring success. For instance, whether it wants the company to pursue social and economic objectives other than those relating to financial return. In addition to government having a clear policy framework, ideally there should be a common position between the Minister of Economic Development as responsible for setting policy and the Treasury as shareholder of JT and Jersey Post. These government objectives (as shareholder and policy guardian) should also be consistent with the objectives set by the government for the JCRA as regulator of the relevant sector and/or as competition authority.

Given the importance of the way in which the shareholder role is managed in terms of the environment in which regulation can operate, the function within the shareholder (i.e. the Treasury) that oversees the relationship between the Treasury and the company should be strengthened. This is in line with the objectives in the Medium Term Financial Plan, as noted above. This would provide an opportunity in terms of enhancing the level of engagement between shareholder and the Boards of the state-owned utilities, and provide the needed clarity on the role envisaged for the companies.

#### **4.5 Summary of recommendations**

- To address the issues surrounding the respective roles of the JCRA and Ministers, a clear description of these roles should be produced by the government (in conjunction with the JCRA).
- The government should develop a clear policy for each of the sectors regulated by the JCRA, including its policy for promoting competition or direct regulation.
- Where the government retains ownership of regulated assets, it should clearly set out objectives for the regulated companies.

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<sup>65</sup> The report by the Comptroller and Auditor General noted that the recommendations made in the 2010 Deloitte report were not fully adopted by Treasury as it believes that the benefits of doing so would not be justified by the costs. See Comptroller & Auditor General (2014), *op. cit.*, para 3.12. This was also confirmed during the interviews with stakeholders. Similarly, to our knowledge, the recommendations by the Comptroller & Auditor General have not yet been implemented.

- The government, regulator and industry should establish and maintain strategic alignment, while preserving the independence of the regulator. The best precise mechanism for this should be developed, potentially building on the experience of the Memorandum of Understanding between the government and the Jersey Financial Services Commission.
  - The function within the shareholder (i.e. the Treasury) that oversees the relationship between the Treasury and the company should be strengthened.
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## 5 Competition

With respect to the competition functions of the JCRA, there are three considerations:

- anti-competitive agreements and abuse of dominance;
- mergers; and
- market investigations.

These are discussed in turn below after considering two issues that apply across all areas: the prioritisation or selection of cases, and the duration of cases.

### 5.1 Prioritisation of cases

According to legislation, the JCRA can conduct a competition investigation if it considers that a party is engaging in anti-competitive arrangements, abuse of a dominant market position, merger or acquisition without approval,<sup>66</sup> or if the Minister makes a request for a report, advice, assistance or information under Article 6(4) of the Competition Regulatory Authority Law 2001.<sup>67</sup>

As discussed in section 5.4, a key issue in the past has been the JCRA's focus on international mergers that have little or no impact on the Jersey economy. However, the prioritisation of cases was also identified as a broader issue across all of the JCRA's competition functions. Stakeholders commented that the JCRA has often become (or at least appears to have become) involved in small and relatively unimportant issues in place of more significant issues where the Authority's intervention could add more value to the Jersey economy.

The level and complexity of analysis in a competition or a regulatory investigation is not linear to the size of the economy. In other words, case analysis has fixed costs, and authorities in small economies may need to do a similar amount of analysis as their counterparts in larger economies. Therefore, given the small size of the JCRA, and the resource issues previously discussed, the Authority needs to focus on the most important issues affecting consumers and the economy. This is consistent with the recommendations regarding Guernsey's regulatory regime from a 2010 review, which referred to the need to 'do a limited number of bigish things well' in a small economy.<sup>68</sup>

The literature on best practice notes that prioritisation should be an essential part of an authority's resource planning. It suggests that priorities be set in formal strategic planning rounds, after consultation, and based on overarching goals established by government. The literature also sets out a number of principles that can act as guidelines for effective prioritisation. For example, the authority should pursue cases only where the expected impact on consumer welfare and competition is likely to outweigh the costs of investigation. Other principles include setting appropriate size or market share thresholds for investigating mergers, assessment of the likelihood of finding anti-competitive practices, and materiality thresholds.

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<sup>66</sup> Or of a direction. This is Article 8(1), 16(1) or 20(1), or if it risks breaching Article 20 (1). Competition (Jersey) Law 2005.

<sup>67</sup> Competition (Jersey) Law 2005, Article 26; Competition Regulatory Authority (Jersey) Law 2001, Article 6(4).

<sup>68</sup> Yarrow, G. and Decker, C. (2010), 'Review of Guernsey's utility regulatory regime', A report for Commerce and Employment, 15 October.

Prioritisation of cases is used by competition authorities around the world, including the UK CMA and the Competition Commission in Mauritius (Box 5.1).

### Box 5.1 Prioritisation principles

#### UK

The CMA's general approach is as follows:<sup>69</sup>

We generally prioritise according to the impact of work on consumers and according to the strategic significance of the work. We balance this against the risks and resources involved. [...] we will not apply the principles in a mechanical way: judgement and a reasoned balancing exercise are required for each case which necessitates that we consider the principles in the round and on a case-by-case basis.

The principles that govern the CMA's prioritisation approach are:

- impact of the intervention—likely direct effect on consumer welfare (e.g. effect on price, quality, range, disadvantaged consumers); likely indirect effect on consumer welfare (e.g. deterrence and improved awareness); and expected additional impact on efficiency, productivity and the wider economy;
- strategic significance: assessment of whether the case is consistent with the CMA's strategy and objectives;
- risks: assessment of the likelihood of a successful outcome;
- resources: assessment of the resource implications (e.g. proportionality of resources to benefits, effects on resource availability).

#### New Zealand

The Commerce Commission undertakes market inquiries only if it considers that the likelihood of recommending regulation is sufficiently high, and only after consideration of alternatives that might achieve similar or better outcomes more quickly and more cost-effectively. Even if there is a potential breach of law, the Commerce Commission does not automatically open a file but decides whether to investigate based on: the extent of the detriment; the seriousness of the conduct; and the public interest.

#### Mauritius

The CCM conducts internal periodic meetings to review complaints and decide whether they warrant further action. Where they do, an inquiry is launched to establish whether there are reasonable grounds to launch an investigation, by considering the following:

- does it fall into the scope of the CCM's activities?
- is there enough evidence to support the case?
- is it likely to have an appreciable adverse effect on competition?
- are there reasonable grounds to believe that competition law has been breached?
- is it a strategic priority?

Whether the case is a strategic priority depends on the goals identified as part of the annual strategic plan.

#### Iceland

Decisions on which cases to investigate are based on the ICA's priorities and must have a 'sufficient cause for investigation', including: seriousness of the alleged breach or distortion of competition from a public interest angle; and consideration of whether the barrier to competition is relevant to the complainant alone, or has a wider harmful impact on competition. Other prioritisation rules include the thresholds for mergers and anti-competitive agreements. The ICA also sets priorities for particular sectors for monitoring and market investigations. For instance, it recently targeted the financial sector due to the banking crisis, while more generally it prioritises sectors with productivity levels that are lower than in neighbouring countries (e.g. telecoms and food markets).

Source: Competition and Markets Authority (2014), 'Prioritisation principles for the CMA', CMA 16; Competition and Markets Authority (2014), 'Market Studies and Market Investigations: Supplemental guidance on the CMA's approach', January; Competition Commission of Mauritius, Annual Report 2012; ICA website, OECD (2012), 'Annual Report on Competition Policy Developments in Iceland'.

<sup>69</sup> Competition and Markets Authority (2014), 'Prioritisation principles for the CMA', CMA 16, April, paras 2.1 and 2.2.

Oxera understands that the JCRA developed and approved a set of prioritisation principles for market study investigations in November 2014. These principles are:

- actionable;
- meaningful;
- realistic;
- persuasive;
- conduct or structural;
- communicable.

However, these principles do not appear to be published by the JCRA and it has not clearly set out how it selected these principles or how it has used them in deciding which investigations to pursue. In addition, these principles only apply to market investigations. In order to ensure that the JCRA is focusing on the most important issues, it needs to apply a set of principles to determine which cases to pursue across all areas, and publish how these decisions have been taken.

Importantly, the criteria should ensure that the JCRA focuses on identifying issues where there is the most (potential) consumer detriment and where it can have the greatest impact. The principles should also ensure that the JCRA:

- does not reinvestigate a market it has previously considered unless conditions have changed materially;
- does not undertake an investigation if it is being considered by another, larger authority and the effects are likely to be the same in Jersey, and/or any remedies applied by the larger authority will address issues that are likely to arise in Jersey;
- is likely to have access to the necessary technical and Jersey-specific expertise.

Although the government can also initiate market investigations based on an Article 6(4) request, it should follow the same principles in determining whether to initiate such a request. As discussed in section 4, the government also needs to provide more clarity on its policy and the scope for intervention in different sectors, particularly in sectors where there is existing government regulation or intervention. This would assist in preventing the market reviews commissioned by the government from being reactive and responding primarily to short-term political pressure. Indeed, these criteria may help alleviate the concern that the government, or the JCRA, may seek to review a market solely because of the priorities of one of the Ministers or its members of staff.

To the extent possible, the JCRA and the government should seek to identify potential matters for investigation in advance, in order to include them in the strategic programme for the following year. This would also provide more clarity to consumers and other stakeholders, in line with the recommendations in section 3.

## 5.2 Duration of cases

Many stakeholders commented that, in some instances, by the time the JCRA investigates an issue or makes recommendations, changing market conditions or new developments mean that its work is no longer relevant. Stakeholders considered that this may be due to the resource constraints identified in section 3.

The JCRA does have published timeframes for merger and acquisition reviews: one month for non-complex cases and up to six months for complex cases.<sup>70</sup> However, it does not identify on its website whether cases are considered 'complex', making it difficult to determine whether the Authority has respected these timeframes. We would recommend that the JCRA clearly identifies whether merger cases are complex, and the criteria for doing so.

The JCRA does not specify in advance an expected timeframe for all market studies. For the market studies initiated by the government, the expected duration is specified in the terms of reference of the agreement between the government and the JCRA. In contrast, for the market studies initiated by the JCRA, timeframes were not indicated at the outset. We would recommend that the JCRA specifies clearly the expected timeframe for all market studies in advance.

The average duration for all merger cases, non-merger decisions, and market investigations, is set out in Table 5.1.

**Table 5.1 Duration of cases**

	(Average) duration	Number of cases
<b>Mergers: average time between notification and decision (2005-2015)</b>		
All cases	50 days	94
<b>Non-merger decisions</b>		
Resale price maintenance (JT) <sup>1</sup>	192 days	1
Abuse of dominance (TTS) <sup>2</sup>	3 years	1
<b>Market investigations</b>	289 days	9 <sup>3</sup>

Source: Based on decision documents published on CICRA's website (valid as at August 2015).

<sup>1</sup> Case C793/11 against JT (Jersey) Limited. <sup>2</sup> Case C038/06 against the States of Jersey Transport and Technical Services Department. <sup>3</sup> Because timescales were unclear from the website, this number does not include market investigations for taxis, school uniforms, or the aviation fuel market.

The average duration for merger and acquisition cases in Jersey is similar to that in other jurisdictions.<sup>71</sup> For example, in 2013/14 in New Zealand (from registration to decision) cases lasted nearly 60 days on average, and simple cases took around 40 days, while complex cases (international mergers or cases in complex/regulated sectors) have a published timeframe of 90–100 days or more. In Mauritius, the published timeline to issue decisions on cases of anti-competitive conduct<sup>72</sup> is 40 days, while in Iceland the competition authority must reach a decision on mergers within three months of notification.<sup>73</sup>

<sup>70</sup> JCRA, 'Strategic Plan 2011-2013'.

<sup>71</sup> The timeframe for simple cases may be affected by whether there is a mandatory or voluntary notification regime. The JCRA also invests resources in enforcing the mandatory notification regime by prosecuting cases of failed notification.

<sup>72</sup> This includes all competition cases other than merger cases and market investigations, and includes all types of anti-competitive agreements, cartels, abuse of dominant position, resale price maintenance, etc.

<sup>73</sup> Website of the Icelandic Competition Authority.

The duration of the few non-merger cases appears to be quite long in Jersey, but is not inconsistent with international precedent. 92% of non-merger investigations were decided within 12 months in New Zealand and 5% were undecided for more than 18 months.

The JCRA's timescales for investigating cases are therefore in line with international practice. However, when it does undertake a competition case, the JCRA should ensure that the decision to look at the case, and the investigation itself are undertaken as quickly as possible. In addition, if there are changing market or other conditions during the period of investigation, the JCRA should ensure that these are taken into account. Better communication with stakeholders during the process, as discussed in section 3, would help to keep individuals informed and to alleviate the perception that cases take a long time to complete.

### **5.3 Anti-competitive agreements and abuse of dominance**

The prohibitions against anti-competitive agreements and abuse of dominance are contained in Articles 8 and 16 of the Competition (Jersey) Law 2005. The legislation is generally aligned to the UK Competition Act 1998, itself aligned to Articles 101 and 102 TFEU.

Article 8 explains that arrangements between two parties that have the object or effect of hindering competition, to an appreciable extent, in the supply of goods or services are prohibited. This applies to anti-competitive arrangements where the object or effect is to:<sup>74</sup>

- directly or indirectly fix purchase or selling prices or any other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Article 16 discusses abuse of dominance which is described as when one or more undertakings of a dominant position pursues the activities set out above (with the exception of sharing markets or sources of supply).

The Authority may grant exemptions in certain circumstances.

The JCRA has undertaken two cases under this legislation:

- 2009 abuse of dominance case against TTS in relation to sewerage services.<sup>75</sup> The JCRA determined that TTS abused its dominant position (Article 16(1)) in the market for sewerage services in Jersey, and imposed a penalty of £15,000. TTS voluntarily brought the infringement to an end before the JCRA issued its decision;

<sup>74</sup> Competition (Jersey) Law 2005.

<sup>75</sup> Decision C038/06 and order imposing financial penalties under Articles 35, 37 and 39 of the Competition (Jersey) Law 2005 concerning an infringement of Article 16(1) of the Competition (Jersey) Law 2005 by Transport and Technical Services. The complaint concerned restricted access to a treatment facility (Bellozanne) for private waste disposal companies.

- a resale price maintenance case against JT in 2012 in relation to pay-as-you-go SIM Packs.<sup>76</sup> The JCRA ultimately decided that JT had breached Article 8(1) and imposed a penalty of £2,500. In responding to the JCRA's draft decision, JT did not contest the facts, the provisional conclusion that it had breached the law, or the level of the proposed financial penalty.

Our review identified one potential concern with the current legislation on anti-competitive agreements. Although there are mechanisms to exempt companies from prohibition of agreements which are anti-competitive but which benefit consumers, this exemption is available only if the JCRA has ruled, *ex ante*, that the agreement benefits consumers. As noted by stakeholders, there is a risk that anti-competitive agreements that may be in the consumer interest could still result in significant penalties because they have not been 'approved'. There is a balance to be struck between creating a deterrence effect to stop anti-competitive agreements from being entered into and creating a climate where agreements beneficial to consumers are not concluded.

In line with other jurisdictions, it is possible for parties to a potential agreement to obtain advice and guidance, and, where an agreement already exists, for the approval to be backdated. In addition, and in line with other jurisdictions, although the penalties for entering into an anti-competitive agreement can be severe, these penalties cannot be levied unless the authority:

is satisfied that the breach of the prohibition was committed intentionally, negligently or recklessly. (Section 39 (1))

The Blue Island/Auringy code share agreement and Jersey Dairy are examples of agreements that could be covered by this provision.

In addition, we understand that in order to overcome the problem of having to notify all agreements, CICRA has recently embarked on a consultation on the merits of introducing block exemptions, which the law allows and which are common within Europe.<sup>77</sup> These exemptions would apply to agreements where it is clear that they would not be harmful to competition, or because they offer substantial benefits to consumers that outweigh any potential harm. CICRA notes that block exemptions would allow for more effective use of its limited resources, and would reduce the resource costs to parties seeking individual exemptions. CICRA notes that, in its view:

the introduction of a small number of block exemptions which are limited in their scope would substantially improve the operation of competition law in both Guernsey and Jersey and offer increased certainty for businesses in the Channel Islands.<sup>78</sup>

Oxera would recommend that the block exemptions along the lines suggested by CICRA in its consultation document be introduced.

<sup>76</sup> JCRA (2012), 'Case C793/11: Breach of Article 8(1) of the *Competition (Jersey) Law 2005* by Jersey Telecom Limited', Final decision. Document No: CICRA 12/20.

<sup>77</sup> CICRA (2015), 'Consultation on Block Exemptions under Channel Islands Competition laws', Consultation, Document No: CICRA 15/24, 22 May.

<sup>78</sup> *Ibid.*, p. 1.

## 5.4 Mergers

JCRA approval is needed before mergers or acquisitions are executed in Jersey (known as a mandatory notification regime) in three situations:<sup>79</sup>

- in a merger between competitors where the (horizontal) merger results in a share of supply or purchase of 25% or more (in the Jersey market) being achieved or increased;
- where one party has a share of supply or purchase of 25% or more and the other is a supplier to, or customer of, that party (i.e. a vertical merger);
- where a party has an existing share of supply or purchase of 40% or more, unless it qualifies for one of two exemptions (i.e. conglomerate mergers).<sup>80</sup>

Current legislation therefore requires the JCRA to investigate mergers where one or more of these thresholds are met, even if they are between international companies for which Jersey is a very small part of their total businesses, and the impact on the local economy is negligible.<sup>81</sup> Given that the companies are based elsewhere, the mergers are also likely to be investigated by other, much larger competition authorities. In the past, the JCRA investigated a number of these types of merger—for example, in 2010, it investigated the merger between Cadbury plc and Kraft Foods Inc.

Of all competition law cases since 2005, nearly 95% were merger-related.<sup>82</sup> The JCRA attracts fees for each merger notification, and therefore investigations into these mergers provided some additional revenue. Stakeholders noted that the fees received and the requirement under legislation were key reasons that these mergers were investigated in the past, but that there may also have been inexperienced staff who chose to investigate issues that were of personal interest.

As suggested from the interviews with stakeholders, the JCRA attracted criticism for its review of these mergers, as stakeholders were concerned that much of its activities were not relevant to the Jersey economy. A review of these cases was also not the most effective use of its limited resources, as acknowledged by the JCRA itself in its 2010 Annual Report.<sup>83</sup> However, stakeholders noted that this has improved.

In 2011, the JCRA initiated a consultation to amend the merger thresholds of the Competition (Mergers and Acquisitions) (Jersey) Order 2010 (the 'Order'). The JCRA proposed to change the types of transaction that must be notified to, and approved by, the JCRA, rather than getting rid of the mandatory notification regime altogether, given that this was already in law. Also, the JCRA considered that mandatory notification was particularly important in small jurisdictions as it ensures that any mergers are investigated before they can have a negative

<sup>79</sup> Competition (Mergers and Acquisitions) (Jersey) Order 2010.

<sup>80</sup> This is designed to deal with a situation where there is no horizontal or vertical relationship between the parties, but the merger may raise competition concerns. The exemptions are a) if the undertaking(s) being acquired has no existing share of the supply or purchase of goods or services of any description supplied to or purchased by persons in Jersey and otherwise owns or controls no tangible or intangible assets located in Jersey; or b) as regards the seller only, the 40% share of supply or purchase is not subject to the proposed merger or acquisition and provided that any non-competition, non-solicitation or confidentiality clauses included do not exceed a period of three years and are strictly limited to the products and services supplied by the undertaking being acquired.

<sup>81</sup> For example, where the merging parties manufacture internationally traded widgets in the UK and these are imported into Jersey.

<sup>82</sup> Of the 103 merger cases, 99 were approved unconditionally. See CICRA website (last accessed November 2015).

<sup>83</sup> JCRA, 'Annual Report 2010'.

effect on the economy. At the same time, the JCRA hoped that these changes would enable it to better focus its limited resources on the transactions that have the greatest negative impact on competition in Jersey, and would make it easier for companies to know whether they need to notify.<sup>84</sup>

The JCRA proposed abolishing the current share of supply test, which is not considered consistent with best practice, and introducing a combined turnover and asset test.<sup>85</sup> It considered that a merger or acquisition should be notifiable when the total turnover in Jersey of all undertakings involved in the transaction is greater than £2m in the most recent financial year. However, this turnover threshold may still capture international mergers that generate turnover locally, but where the companies have no actual local presence in Jersey and are therefore unlikely to have an impact on competition in Jersey. The JCRA considered that an additional asset test should be introduced to the notification threshold so that a merger or acquisition would be notifiable if, in addition to meeting the turnover threshold, in the most recent financial year, one or more of the parties had:<sup>86</sup>

- an undertaking where employees work in Jersey;
- a registered subsidiary, representative or branch office in Jersey; or
- a level of influence over local agents or facilities that equate to a local asset.

The JCRA also proposed that there could be exemptions from notification for certain types of transaction if they are unlikely to raise competition concerns.

In response to the JCRA's recommendations, the European Competition Lawyers Forum (ECLF) submitted a paper acknowledging that the current regime was not consistent with best practice. The ECLF suggested a voluntary or hybrid regime instead.<sup>87</sup> It considered that it is difficult to set a threshold to capture the kinds of transaction that have the potential to substantially lessen competition in Jersey at the same time as screening out those that do not have a significant impact on the local economy.

We agree that the particular economy of Jersey may create problems with thresholds because of the disparity of the size of merging entities in the export sector compared with supply to Jersey residents. Also, a merger of suppliers outside Jersey could result in concentration in the supply in Jersey even though the suppliers have no presence in Jersey (but represent a high share of imports). Therefore, any threshold set is likely to lead to the notification of a number of mergers that do not have a significant impact on Jersey consumers.

A review of the regimes in other jurisdictions (Box 5.2 below) identified a mix of mandatory and voluntary notification regimes, and that the mandatory regimes tend to rely on a turnover test, with thresholds of at least £2m.

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<sup>84</sup> JCRA (2011), 'A Consultation on Proposed Amendments to the Merger Thresholds', 12 May.

<sup>85</sup> The International Competition Network states that merger notification thresholds should apply only to transactions with a material impact in the reviewing jurisdiction based on 'objectively quantifiable criteria such as assets or turnover that reflect domestic activity'.

<sup>86</sup> JCRA (2011), 'A Consultation on Proposed Amendments to the Merger Thresholds', 12 May.

<sup>87</sup> The hybrid regime would include a voluntary regime for foreign-to-foreign mergers. European Competition Lawyers Forum (2011), 'Response of the European Competition Lawyers Forum to the JCRA Consultation on Reform of the Jersey Merger Control Regime'.

## Box 5.2 Merger regimes

<b>New Zealand</b>	Voluntary notification and no binding thresholds. The Commission assesses whether a substantial lessening of competition is likely to occur.  Indicative thresholds: <ul style="list-style-type: none"><li>• combined market share of 40% or more;</li><li>• combined market share of 20% in a concentrated market.</li></ul>
<b>Mauritius</b>	Voluntary prior-notification where: <ul style="list-style-type: none"><li>• combined market share of 30% or more on a relevant market;</li><li>• one of the parties has a market share of 30% or more and the Commission deems the risk of a substantial lessening of competition to be high.</li></ul>
<b>Malta</b>	Mandatory pre-notification if: <ul style="list-style-type: none"><li>• combined turnover in Malta of €2.3m;</li><li>• each party has at least 10% of combined turnover in Malta.</li></ul>
<b>Iceland</b>	Mandatory pre-notification if: <ul style="list-style-type: none"><li>• combined turnover in Iceland of £10m;</li><li>• at least two parties each have turnover in Iceland of £1m;</li><li>• the ICA believes that there is a significant risk of lessening competition, it may require post-merger notification (with £5m combined turnover as threshold)</li></ul>

Source: European Competition Lawyers Forum (2011). 'Response of the European Competition Lawyers Forum to the JCRA Consultation on Reform of the Jersey Merger Control Regime', 29 June.

In 2012 the JCRA published its decision on the proposed amendments.<sup>88</sup> It acknowledged the attractions of voluntary notification, but noted that it would require a change to the law, which would not be straightforward. Instead, it proposed a change in the Order, which was deemed an easier process. Under the proposed changes recommended to the Minister, mergers and acquisitions would need to be notified if:

- the combined aggregated annual turnover in Jersey and Guernsey of the undertakings concerned in a transaction exceeds £5m;
- the annual turnover in Jersey of each of at least two undertakings concerned exceeds £2m.

The JCRA asked the government to amend the legislation to implement the proposed regime. However, we understand legislative change has not yet been made owing to representations from the legal and financial services sectors in light of Guernsey's practical experience when implementing its merger regime. As a result, further amendments were sought to the Guernsey merger regime. The JCRA indicated that it would not be sensible to progress the Order until Guernsey had resolved its policy since it could have consequences for aligning the regimes in the Islands.

Oxera understands that CICRA is currently considering recommendations on the merger control regime and is intending to consult across the Channel Islands in

<sup>88</sup> JCRA (2012), 'Proposed amendments to thresholds for notification and review of mergers and acquisitions', Decision, CICRA 12/21, February.

the next few months. Following the outcome of that process, it would intend to submit recommendations for changes to the law in both jurisdictions. It is important that this proceeds as quickly as possible as companies have noted that the current ambiguity about the regime creates considerable uncertainty about whether they are required to notify, and indicated that this has led to the continued notification of mergers where there was no competition issues in relation to Jersey.

The design of the appropriate merger regime for a jurisdiction such as Jersey (and Guernsey) is complex—the market is made up of local businesses with relatively low turnover and assets that may command a significant market share, and mergers could result in increases in market power in relation to Jersey residents. On the other hand, entities in Jersey operating in international markets may have high turnover and assets, potentially representing a high market share of this activity taking place in Jersey; whereas a merger in Jersey would have no impact on their (largely or exclusively international) customers. Setting general and simple thresholds that catch the former and exclude the latter may not be easy, or even possible.

This suggests that a structure should be put in place that:

- provides a filter based on easily verifiable characteristics of the merging parties where there is little likelihood that the merger would create competition issues for Jersey residents. Such a merger would fall outside the merger control, as it would pass an exemption threshold;
- creates a simple short-form system whereby the JCRA allows a merger to proceed with very limited additional information and analysis if it is established that there is little likelihood of the merger creating competition issues for Jersey residents.

Any mergers remaining would then be subject to Phase 1, and if necessary, Phase 2, scrutiny.

We understand that a short-form approach is currently being considered in Guernsey, and would recommend the adoption of a similar approach in both Jersey and Guernsey. This would help to alleviate stakeholders' concern that filing the merger form is an onerous and expensive task in itself, and would increase alignment between the Islands.

Much like the prioritisation criteria suggested above, the JCRA should also develop criteria that determine whether a merger that would still fall to be investigated is, or is likely to be, looked at in Brussels, another jurisdiction, or Jersey alone. For instance, if the effects of a transaction are likely to be the same in the UK or France as in Jersey, the JCRA should not also consider this merger. In these cases an initial notification under the short-form preliminary process could be a letter with a copy of the notification to the larger jurisdiction. Under these circumstances the JCRA would take no action.<sup>89</sup>

Finally, where a merger would still fall to be investigated by the JCRA because of the *potential* competition effects in Jersey, but given the location of the merging parties there is no effective remedy available to the JCRA should the merger create a significant lessening of competition, the JCRA should also take no action.

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<sup>89</sup> Consistent with this idea, the EC Merger Regulation has provisions under which Member States leave scrutiny to Brussels.

Given the importance and size of certain sectors, and the international nature of the market supplied from Jersey (for example, financial services), it may make sense over time to enable the JCRA to extend the exemption thresholds on a selective basis, or provide for a different set of procedures or thresholds for certain sectors. This has been recognised in Guernsey where there is a short-form procedure for financial services transactions. In Guernsey, if an acquiring business in a prospective merger or acquisition meets the thresholds, but is a credit or financial institution, it submits a shortened merger application form and CICRA then undertakes a preliminary review of the transaction.<sup>90</sup>

The overall objectives of these types of change is to enable the JCRA to identify pragmatically mergers that are clearly non-problematic, using minimal resources of both the JCRA and the merging parties. In this way, the limited resources available can be used to address mergers that may cause problems, and which the JCRA could do something about.

At the other end of the spectrum, it would make sense to enable the JCRA, with the agreement of the parties, to move straight to a Phase 2 investigation where it is reasonably obvious that the merger will require in-depth investigation.

## 5.5 Market investigations

A market investigation can be initiated by the JCRA or by Ministers. However, in order for the JCRA to have the legal powers to require the provision of information from stakeholders, it must also obtain a formal Ministerial request as part of the 6(4) process. This is in contrast to a number of competition authorities in other jurisdictions that have direct powers to require the production of information under these circumstances. However, stakeholders did not identify major issues with this process in Jersey, and we are not aware of any instances where the JCRA sought these powers from the Minister but they were not granted.

The JCRA has undertaken a number of market investigations over the last few years: four in 2014, three of which were initiated following requests by Ministers (marine fuel, aviation fuel, and tobacco) and one (groceries) initiated by the JCRA; and nine between 2005 and 2013, in electricity, road fuel, heating oil, taxis, school uniforms, motor trade, supermarkets, shipping and port services and food prices, all but three of which were initiated by JCRA itself.<sup>91</sup>

While a detailed review of these decisions is outside the scope of Oxera's review, some stakeholders commented that, in a few cases, the substance of the market investigations undertaken has been misguided or incorrect. Stakeholders indicated that at least some these investigations did not appear to have led to an improvement in outcomes for consumers, and may not have been undertaken using the most appropriate methods or with the appropriate focus. For example, stakeholders commented that CICRA did undertake a detailed review as part of the food prices investigation initiated by the government, but had focused on the wrong details (i.e. comparison of prices on thousands of food products with England, rather than looking at the supply chain in Jersey, or a meaningful sample of prices of food products). These concerns also seem to apply to investigations initiated by the JCRA itself, for example into supermarkets.

To the extent that the market investigation process could be improved, this would be in the areas of the choice of markets to investigate, the duration of

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<sup>90</sup> CICRA (2012), 'Channel Islands Competition Laws: CICRA 6b – Shortened Merger Application Form', August.

<sup>91</sup> The three exceptions were shipping and port services, the motor trade and food prices.

investigations, and the way in which any resultant recommendations are implemented. The prioritisation principles and publication of timelines, discussed above, should help to ensure the selection of appropriate cases and improve perception about the long duration of cases. Therefore the rest of this section focuses on the implementation of the JCRA's recommendations.

Although a number of the JCRA's market investigations have recommended changes in legislation or other remedies (e.g. establishing agreements with other countries in the tobacco investigation), the Authority does not have the power to implement these changes itself. While it tends to get government support when it seeks to pursue cases, this does not appear always to be the case once recommendations have been made. In addition to the lack of engagement with consumers discussed in section 3, the lack of implementation of JCRA's recommendations appears to be another source of the perception of the ineffectiveness of the Authority.

In some instances legislative changes have been introduced following JCRA investigations. For instance, in the road fuel investigation the JCRA recommended that retailers be obliged to display prices that are clearly visible from the roadside.<sup>92</sup> The States of Jersey subsequently introduced requirements for all retailers to display their prices from September 2012.<sup>93</sup> However, as noted in section 4, in other cases (e.g. taxis) the JCRA's recommendations have not been implemented by government.

The taxi example raises a particular problem where the JCRA investigates markets that are already the government's responsibility. Therefore the recommendations previously set out in terms of the government providing clarity over policy, better communication between the JCRA and the government, and using prioritisation principles so that the JCRA pursues cases only where it has a good chance that it can affect change, may help in rectifying this issue.

However, we would also recommend the consideration of more fundamental changes to help resolve this problem, as the fact that the JCRA has to rely on the government to implement remedies hampers the effectiveness of the Authority, and thus the perception of that effectiveness.

We recommend the consideration by the JCRA and the States of a two-tier system for implementing remedies. For behavioural changes the JCRA could be given additional powers to implement remedies itself. For more significant, structural, changes, the JCRA could make recommendations to the government. The suggested structural remedies would then be subject to a negative resolution procedure whereby the JCRA's recommendations are implemented unless the government votes otherwise, in which case the government would need to explain its reasons. Further consideration would be required as to whether a two-tier system could be introduced within the Jersey legal system.

## **5.6 Summary of recommendations**

- The JCRA should review and publish its prioritisation principles. It should ensure that it uses these principles to determine which cases to pursue and clearly explains its decisions. The government should also follow these principles in deciding whether to initiate a request for a market investigation.

<sup>92</sup> JCRA (2011), 'Review of the Jersey market for road fuels', August.

<sup>93</sup> See <http://www.gov.je/Industry/RetailHospitality/PriceMarking/Pages/DisplayingFuelPrices.aspx>

- The JCRA should publish timeframes for all cases and make sure that all cases are considered within these timeframes. It should also take account of changing market conditions as part of its investigations.
  - Block exemptions for cases relating to anti-competitive agreements should be introduced so that cases that create consumer benefits which outweigh the harm to competition do not have to be approved ex ante.
  - The merger regime should be changed so that only mergers that affect the local economy, and which the JCRA can actually do something about, are investigated. It should be possible to move straight to phase 2, with the agreement of the parties. The thresholds and processes should be clear and easy to understand in order to reduce uncertainty for businesses.
  - A two-tier system for implementing remedies from market investigations should be considered, and, if appropriate, introduced, with the JCRA given additional powers to implement remedies for behavioural changes, while it would make recommendations to government for structural changes. These recommendations would be subject to a negative resolution procedure.
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## 6 Sectoral regulation

This section considers the key issues with respect to the regulatory functions of the JCRA and provides recommendations as to how these can be improved.

### 6.1 Legal framework

The JCRA currently regulates the telecoms and the postal sectors. New powers to regulate the airport and the harbour are being consulted on. This section focuses on the legal framework for sectoral regulation.

The Telecommunications (Jersey) Law 2002 established the JCRA as the telecommunications regulator and changed the status of Jersey Telecom Group Ltd to a fully government-owned but separately incorporated entity. Similarly, the Postal Services (Jersey) Law 2004 governs the regulation of Jersey Post. The JCRA is responsible for issuing and enforcing the conditions of the licence granted to each organisation.<sup>94</sup>

Most stakeholders did not consider that significant changes were required in the scope of the JCRA's regulatory powers. However, one key issue that they identified with respect to regulation is that the general structure for the enforcement of licence conditions does not allow third parties (for example, competitors) to obtain damages for breaches of licence conditions, nor does it allow the JCRA to apply a penalty for the breach of a licence condition. These potential financial 'penalties' are available only for the breach of a decision that the Authority has issued once it has established that a licence condition has been breached. (See below for the modification to the Telecommunications Law in 2012 that addresses the latter issue.) Given that decisions must specify what a licensee must do to remedy a breach of a licence condition, and give the licensee sufficient time to carry out the decision, third parties have to rely on very quick action by the regulator to minimise any damage that may be caused by breaches of licence conditions.

This structure mirrors the original regulatory structure introduced by the UK Telecommunications Act 1984, which in turn mirrored the then UK competition law. However, such a structure reduces the incentives on the licensee to comply with its licence conditions—i.e. there is no significant deterrence effect. It also makes it more difficult for those damaged by a breach of a licence condition to obtain redress since actions for damages are possible only if the licensee fails to comply with a decision, rather than arising as soon as a licensee fails to comply with their licence conditions. Private enforcement of the licence conditions is, therefore, conditional on the Authority taking action and the licensee subsequently failing to comply with any decision issued.

This structure has largely been replaced in the UK<sup>95</sup> (and in other jurisdictions) with the equivalent of the direct enforceability of licence conditions and/or allowing third parties to seek damages for a breach of a licence condition irrespective of whether the regulator has itself taken any action and/or come to a definitive conclusion on the breach of a particular licence condition. Implementing this type of arrangement in Jersey would bring the regulatory structure into line with the Jersey competition law, where, as in most developed economies, the obligation to comply with competition law is owed to affected

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<sup>94</sup> In addition, it will be responsible for issuing and enforcing licences relating to ports when these are finalised and, if triggered, licences for life-line ferry services.

<sup>95</sup> As part of the Communications Act 2003.

parties who can sue for damages in the courts, and the relevant authority can impose financial penalties directly for a breach of the competition law.

We note that a report by the previous Minister for Economic Development recommended that the legislation be amended to allow the JCRA to include licence conditions requiring operators to follow its directions.<sup>96</sup> The report suggested that having the power to fine licensees up to 10% of their turnover, as in many other jurisdictions, would be a useful tool for the regulator.<sup>97</sup> This is also consistent with the recommendations from the 2009 LECG report, which noted that ‘fining an operator for a breach of its licence is a well-recognised regulatory tool which is not available in Jersey’, and that the JCRA should have the power to fine operators up to 10% of turnover.<sup>98</sup>

A change was made in 2012 to the Telecommunications Law giving the JCRA the ability to fine an operator up to 10% of relevant turnover.<sup>99</sup> This change does not apply to the Postal Services Law, although an equivalent measure will be contained in the Air and Sea Ports (Incorporation) Law when enacted. At an appropriate time, it would make sense to update the Postal Law to reflect the changes made (or introduced) for telecommunications and ports with respect to JCRA’s ability to impose fines directly for breaches of licence conditions.

The changes to the Telecommunications Law and the law relating to the regulation of the ports still make third-party actions for a breach of a licence conditional on the JCRA issuing a decision and the licensee failing to abide by that decision. Particularly in a jurisdiction with limited resources, excluding third-party actions for damages with respect to licence breaches may be cutting off an effective mechanism that creates incentives for licensees to ensure they keep within their licence conditions at all times.

Another feature of the processes that lay behind the UK’s approach in the 1984 Telecommunications Act is the time taken for the regulatory processes to complete. The standard process envisaged when the JCRA wishes to take some regulatory action (for example, to enforce a licence condition or instigate a licence modification) is as follows.

- Issue a provisional notice to the licensee(s) (making public) that an action is proposed, giving interested parties at least 28 days to respond.
- Consider those responses.
- Confirm that what was in the provisional notice is to be issued as a final decision, or modify the proposal and start again. This document should explain how the Authority has dealt with any representations made, giving reasons.
- Issue (and publish) a final notice, with at least 28 days before it comes into force.

Where the consultation and discussions under the provisional notice lead to a change in the proposed action, the reference back to provisional notice stage, combined with the two-stage consultation and the time needed to consider representation, means that the elapsed time between deciding that some regulatory action is needed and it actually coming into force can be lengthy. For instance, with a minimum of 56 days with no time after the first consultation

<sup>96</sup> Draft Telecommunications (Amendment No. 2) (Jersey) Law 201-

<sup>97</sup> Ibid.

<sup>98</sup> LECG and Charles Russell (2009), *op. cit.*, p. 3.

<sup>99</sup> Telecommunications (Amendment No 2) (Jersey) Law 2012.

needed to consider representation, and with significant representations and a need to modify the provisional notice, the minimum elapsed time can easily reach 100 or more days.

Certain modifications to this process were made to the Telecommunications Law in 2012 to streamline the enforcement of licence conditions. This creates the following general process when the authority becomes aware of, or suspects, a contravention of a licence condition (with the reference to the Telecommunications Law in brackets).

- Notify the licensee that the Authority suspects a breach of a condition, provide a draft of the Direction that the Authority proposes to issue, and allow the licensee to respond to the allegation (19(2)).
- Give the licensee a minimum of 28 days to respond (19(2A)).
- If the licensee is taking reasonable steps to become compliant (19 (2G)), do not proceed to issue a direction.
- If these reasonable steps are not taken, issue a direction that specifies what action the licensee must take to rectify the breach.

As the modification also removed the enforcement of telecoms licence conditions from the general conditions relating to notices (Section 11 of the law), the process beyond the expiry of the notice period for the draft direction is not clear. However, it is likely to include a further notice period of a minimum of 28 days. Where the consultation in relation to a licence enforcement reveals that a different regulatory instrument is required, the main regulatory processes would start afresh.

The result of this structure is that many regulatory decisions take a long time to implement and the minimum time required to take even small and uncontentious regulatory decisions is longer than is necessary.

Due process is important to ensure that there are adequate checks and balances in the regulatory system. However, the lack of general flexibility in process timings which relate to complexity and contentiousness may be contributing to the perception of the JCRA being 'toothless'. It is also unlikely to be contributing to the efficiency of the overall regulatory process. A better recognition that different issues require different levels of consultation and different minimum times to solicit stakeholder responses would help improve the efficiency and effectiveness of the system. This is particularly the case where third parties are reliant on the completion of regulatory actions before they can take any restorative action.

Overall, therefore, a review of the regulatory processes for regulatory actions (including licence enforcement) would appear warranted, with a view to ensuring that the needs of different decisions, relating to their type, complexity and contentiousness, are met efficiently and effectively. The legal framework should provide for proportionate processes, as well as the Authority being proportionate in the way it conducts itself within that framework (see below).

## **6.2 Proportionality**

A key issue that emerged from the review with respect to the JCRA's regulatory functions is the proportionality of the regulation applied. Proportionality is one of the regulatory best-practice principles set out by a number of organisations, including the OECD and the UK Department for Business, Innovation and Skills

(BIS).<sup>100</sup> Indeed, CICRA notes that it follows the principles of good regulation as set out by BIS, but modified to suit the characteristics of the Channel Islands.<sup>101</sup> The JCRA's 2011–2013 Strategic Plan notes that the Authority tries to minimise the cost of regulation on businesses and 'carefully consider the proportionality of the decisions as part of the process'.<sup>102</sup> Proportionality is likely to be particularly relevant in a small economy, as noted in the 2010 review of Guernsey's utility regulatory regime.<sup>103</sup>

In some sense, the JCRA has sought to ensure that the regulation applied is proportionate. For example in the 2011-2013 Strategic Plan, the JCRA noted that its aims for postal regulation were 'reviewing the regulatory regime with a view to rolling back regulation as competition develops' and 'targeting regulation so that it is aimed at those parts of the market where market forces alone are not sufficient to protect consumers' interests'.<sup>104</sup> The JCRA suggested that it would work with Jersey Post to lessen the burden of regulation and reduce the reporting requirements.

In the 2014 Annual Report, the CICRA Chairman noted that changes in market conditions—specifically the decline in demand for postal services and the change in the nature of the service from urgent mail to parcel delivery—'requires a much lighter regulatory touch, which has been duly implemented by CICRA, with a resultant reduction in resources and lower regulatory fees'.<sup>105</sup> The JCRA now applies a light-touch regulatory approach whereby it monitors Jersey Post's quality of service.

However, with respect to the proportionality of the regulation applied in Jersey stakeholders raised two key issues:

- the JCRA requests very detailed information from companies without explaining why it requires the information, and sometimes without providing clear guidelines. This creates costs for companies in terms of responding to the JCRA's requests and diverts its resources;
- it is not clear that the JCRA (effectively) uses the information provided to carry out its regulatory and/or competition functions.

One frequently cited example is the separated accounts that the JCRA requires JT to publish. In 2009, the JCRA published a consultation document on whether, and if so in what format, JT should have to publish statutory accounts for its regulated activities. In 2010, the JCRA issued a notice proposing the publication and format of the statutory accounts.<sup>106</sup> The publication of separated accounts was also recommended by two reviews of the telecommunications sector in Jersey by Regulaid<sup>107</sup> and LECG.

The JCRA noted that the reason for creating separated accounts is to ensure that JT is not discriminating between its own downstream operators and those of competing providers, and that requiring publication of these accounts may assist

<sup>100</sup> BIS calls this efficiency and notes that 'policy interventions must be proportionate and cost-effective while decision making should be timely, and robust.' BIS (2011), 'Principles for Economic Regulation', April.

<sup>101</sup> OUR and JCRA, 'Strategic Plan 2012-2014 and 2012 Work Plan'.

<sup>102</sup> JCRA (2011), 'Strategic Plan 2011-2013'.

<sup>103</sup> Yarrow, G. and Decker, C. (2010), 'Review of Guernsey's utility regulatory regime', A report for Commerce and Employment, 15 October.

<sup>104</sup> JCRA (2011), 'Strategic Plan 2011-2013', p. 6.

<sup>105</sup> CICRA (2001), 'Annual report 2014'.

<sup>106</sup> This was based on based on the format proposed in an earlier direction to JT from 2005. 'Proposed Direction to Jersey Telecom Limited Concerning the Publication, Format and Audit Requirements of its Regulatory Separated Accounts'.

<sup>107</sup> Regulaid (2009), 'Review of Jersey Telecom Ltd's regulatory accounts and access provisions', A draft report to the Jersey Competition Regulatory Authority', Draft 4, 29 June.

in the detection of anticompetitive behaviour in the retail and wholesale markets. The JCRA suggested that some of the potential uses for such accounts are:<sup>108</sup>

- monitoring the operator's performance for the purposes of the price control;
- gaining information on costs for the purpose of setting wholesale access charges and interconnection pricing;
- detecting anti-competitive behaviour such as unfair cross-subsidisation and undue discrimination;
- assisting in benchmarking a company's performance in relation to other companies' performance.

In JT's responses, it has suggested that the level of disaggregation of accounts proposed would represent a disproportionate requirement on JT. Other stakeholders also commented more generally that the level of detail required is onerous. However, the JCRA considers that such detail is appropriate given JT's significant market power across a range of telecommunications services, and the need for JCRA to be able to monitor the financial relationships between the various parts of JT's business and to ensure compliance with licence conditions.

The JCRA noted that the requirement for the production and publication of the dominant operator's accounts is in line with best international practice in large and small jurisdictions, citing Guernsey and the UK. Furthermore, if the JCRA is going to request such detailed information from operators, it should ensure that it uses this information in helping with the regulation of JT. As an example, we have not identified instances where the information contained in the JT separated accounts have led to any regulatory response from the JCRA.

Stakeholders also raised questions about the telecoms surveys undertaken by the JCRA. In relation to the statistical information requested, for example for the Channel Islands Telecoms Market Reporting Data Collection Framework, there is a sense that, while it has some value, it is too detailed with limited benefits. This has also been an issue with consultancies requesting significant amounts of information for studies for the JCRA, and a lack of understanding that some information that may be collected and readily available in a larger market may not be available in Jersey. This relates to the issues raised in section 3 in relation to outsourcing, and can be addressed with the same recommendations discussed.

Overall, it is important to ensure that the JCRA's regulatory intervention is proportionate. The literature on best practice suggests that intervention should be the minimum necessary to remedy the problem and be undertaken only where the benefits outweigh the economic and social costs; the market failure cannot be removed by other means; natural monopoly characteristics are pervasive; and significant market power exists.<sup>109</sup>

The JCRA should also publish clear guidance on why it is asking for certain information (for example, as part of information requests), and be clear about what it will do with the information once it is gathered. It should explain why requiring that level of disaggregated data is the best way to achieve the objective. Companies would then have the obligation to provide the information

<sup>108</sup> JCRA (2009), 'Consultation on the Publication of Jersey Telecom Limited's Regulatory Separated Accounts', Consultation Document 2009-T4, 15 December.

<sup>109</sup> OECD, Directorate for Financial and Enterprise Affairs, Competition Committee (2014), 'Institutional Design of Competition Authorities', Note by Allan Fels and Henry Ergas, 17-18 December.

in a timely and usable manner. Once the JCRA collects the information, it should ensure that it follows through with using it in the way proposed/set out.

### **Other ways of achieving a proportionate approach**

In some parts of the economy the role of the regulator is essentially taken on by the government, and, in many cases, the regulatory cost is (or at least appears to be) relatively low. The most obvious sectors are where the government is the (majority) owner of the main/only supplier, but the entity is outside the *regulatory* (but not necessarily the competition law) powers of the JCRA. Examples include the Jersey Electricity Company and Jersey Water, where the government performs a dual role of owner and ‘regulator’ of these companies in the event that their prices are disputed. However, the price cap powers have never been used in these sectors.

There are also examples where the government does not own the entity involved, but has some other lever, including potential future regulation. Examples in Jersey include Condor Ferries and Jersey Gas, and similar examples can be found in other jurisdictions, including the Isle of Man (Manx Gas, Isle of Man Ferries) and Guernsey. Stakeholders have commented that they consider that this works effectively. Although a full analysis of the approach of government as ‘regulator’ is outside the scope of this review, it is noticeable that one element of this approach appears to be a much simpler regulatory system. This may reflect the simpler regulatory problem involve—in essence, the entity being ‘regulated’ is a pure monopolist and crucially is not supplying wholesale inputs to other entities with which it competes downstream.

A similar outcome (in terms of relative simplicity) may also be achieved from the *threat* of future regulation (as long as this threat is credible), again wielded by the government.

If this type of approach is actually providing a lower-cost solution, and is working effectively, it would be worth establishing whether, and if so how, this approach could be transferred from the government to the JCRA, given that the JCRA has been created as a specialist institution to deal with regulatory and competition matters, while the government may not have easy access to the skills necessary to carry out this function in the most effective way.

### **6.3 Summary of recommendations**

- The current licence structure should be replaced with direct enforceability of licence conditions, with a penalty if the conditions are not met, and/or, if appropriate, allowing third parties to seek damages from breach of a licence condition.
  - A review of the regulatory processes for regulatory actions (including licence enforcement) would appear warranted, with a view to ensuring that the needs of different decisions, relating to their type, complexity and contentiousness, are met efficiently and effectively.
  - The JCRA should publish general guidelines about why and when it will request information, and should explain why it requests certain information in particular cases and what it will do with the information. Once the data is collected the JCRA should ensure that it follows through with using the data for the proposed purpose.
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## 7 Appeals mechanism

There have been three appeals against JCRA decisions, all of which have been in telecoms. As a result, this section focuses on appeals in the telecoms sector, although the recommendations apply more generally as well. The appeals are as follows:

- Appeal by JT in 2008 regarding the JCRA's requirement for the implementation of mobile number portability. This appeal was settled before going to the Royal Courts.
- Appeal by Clear Mobitel (Jersey) Ltd in 2011 against the JCRA's decision to revoke a recommendation to Ofcom with respect to the allocation of part of the 2600MHz spectrum band to Mobitel.<sup>110</sup>
- Appeal by JT to the Royal Court against JCRA's decision to introduce wholesale line rental (WLR) in Jersey in 2013.<sup>111</sup>

Many stakeholders commented on the WLR case and the fact that it was unfortunate that there was a wholly owned government company in court against the JCRA. The stakeholders suggested that this was a case where the lack of clarity over government policy, and the different aims of government as shareholder and policymaker, were evident. Therefore, the recommendations in section 4 could help in alleviating this problem. Stakeholders also noted that this case highlighted the 'inequality of arms' that exists between the Authority and the well-resourced firm.

### 7.1 General structure of appeals

The JCRA can take decisions that are appealable under both its competition law powers and its specific regulatory powers. Although the precise legal basis of an appeal will vary by the type of decision and the legislation under which it is made, the general pattern in Jersey is for appeals on the merit of the case. In essence, this allows the case to be reheard, and for the Royal Court to be able to substitute their decision for that made by the JCRA, even when the JCRA decision was reasonable.<sup>112</sup>

In a number of jurisdictions (including the UK), there has been a move away from appeals mechanisms just on the merits of the case to a narrower set of reasons that would allow an appeal to succeed.<sup>113</sup> An appeal on the merits creates incentives for those disadvantaged by the decision to try again, in the hopes of getting a better outcome and/or just delaying the implementation of the decision, even when original decision is reasonable.

As noted above, the practical experience of appeals under the relevant Jersey statutes is very limited, and limited to telecoms law. In the cases that have gone to court, it has been made clear that the Royal Court could substitute their own decision for that of the regulatory body, and the cases have been initiated on grounds of substance, as well as process. However, to date, the cases have actually been determined in relation to process issues, not the substance. As

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<sup>110</sup> Clear Mobitel (Jersey) Limited and Jersey Competition Regulatory Authority, Judgment, [2011] JRC181, 22 September 2011.

<sup>111</sup> JT (Jersey) Limited and Jersey Competition Regulatory Authority (2013), Judgement, [2013] JRC238, 29 November.

<sup>112</sup> JT (Jersey) Limited and Jersey Competition Regulatory Authority (2013), Judgement, [2013] JRC238, 29 November.

<sup>113</sup> See the recent UK consultation on the appeal functions under regulatory law, <https://www.gov.uk/government/consultations/regulatory-and-competition-appeals-options-for-reform#history>

such, there has been no substitution of substance of the Royal Court's decision for that of the JCRA.

Going forward, it is likely that an individual/party subject to action under regulation or competition law will wish to appeal and the issue will be resolved on issues of substance, not process. Getting the appeals process right is therefore important, especially as it also has an impact on the behaviour of the firm (and the regulator) during the case.

However, getting the appeals process right is not simple, as witnessed by the ongoing reforms that have been or are being instituted in the UK and other jurisdictions. Regulatory and competition law decisions often involve issues of judgement in relation to quite complex economic issues. It is the need for these judgements to be made that lies behind the creation of specialist competition and regulatory bodies in the first place. Given the judgement involved, different bodies can come up with different answers, which may all be reasonable.<sup>114</sup> With the creation of a specialist body to solve these complex economic issues, it does not really make sense to allow a body that is likely to be less expert to substitute its conclusions as to where in some range of reasonableness the final decision should be anchored. Such conditions are unlikely to improve decisions overall.

On the other hand, these regulatory and competition bodies are taking decisions that can have a material impact on the future profit (and even economic viability) of regulated companies and companies subject to competition law action. Some form of appeal on the substance would seem necessary against the decisions of the specialist body, particularly if the decision is unreasonable or capricious.

A further consideration is that the appeal process itself will use up the resources of the regulator, parties involved in the case and the judiciary. The triggering of an appeals process may also delay the implementation of the decision, and it could be that appeals are initiated with the primary objective of delay, rather than a material objection to the original decision. Given the economic impact of decisions and delays, stakeholders may seek to game the system.

Reforms of the appeals process under regulatory and competition law have attempted to steer a fine line between these (often conflicting) objectives. In particular, reforms have sought to ensure that any appeal on the merits of the case is heard by a body that will have the right expertise, while confining such appeals to decisions that are 'unreasonable', thus limiting the grounds of appeal.

In a small jurisdiction, these issues of available expertise, resource use and the companies' incentives are likely to be more acute, making the optimal trade-off between the various objectives of an appeal process more, rather than less, problematic.<sup>115</sup> On the other hand, given the economies of scale of regulation, an inefficient appeals process will have a higher cost per head in smaller than in larger jurisdictions.

On balance, the general movement away from regulatory and competition law appeals being allowable if any stakeholder simply dislikes the outcome to one where the grounds of appeal are more limited suggests that Jersey should also consider such a move. Notwithstanding that the issues facing small jurisdictions are different, there are no obvious dynamics that suggest that the optimal appeals process would be more open to just substituting the judgment of the appeal body for that of Authority when the original decision is reasonable.

<sup>114</sup> For example, although there are coordination processes in place, the UK economic regulators and the CMA (and the Competition Commission before it) have come to slightly different conclusions on issues such as the cost of capital.

<sup>115</sup> For example, Guernsey's expert appeals panel for the utilities has been abandoned.

Building on work already undertaken by the government, the appeals process in Jersey should be reviewed, with the aim of introducing a new 'unreasonableness' test that takes account of the legal system.

Ideally, such a review should be coordinated with Guernsey, with a view to aligning the process in both jurisdictions, if possible.

## 7.2 Funding

Another key issue with appeals under competition law is the uncertainty faced by the JCRA when it embarks on legal disputes without knowing whether it will have the money to defend itself. As explained in section 3.2.4, we therefore recommend that the government should consult with the Treasury and provide an explicit commitment to the JCRA that it will provide funding in the case of appeals where it considers that the case will provide value for money.

The main other concern raised by stakeholders in relation to appeals was about the expertise of the Royal Court and its ability to deal with technical issues. In Jersey, appeals are before the Royal Court with a bailiff and two jurats, who are lay people that judge fact rather than law. As previously noted, the JCRA often considers technical issues in complex sectors such as telecoms. Therefore the Royal Court need some level of expert knowledge if they are to determine such appeals adequately and decide whether the JCRA made an error and/or implement its own decision.

One solution could be for the courts to appoint specialists to help them deal with technically complex matters, whether this is with respect to competition law or the telecoms sector. Legislation in Guernsey, Ireland and Malta makes specific provisions for individuals (assessors, experts or assistants) to assist the court, which would be consistent with the best-practice principles for an effective and fair judicial review (Box 7.1).

### Box 7.1 Best-practice principles

An effective and fair judicial review should have the following characteristics:

- an independent and competent judicial review of the Authority's decision that supports the established framework;
- an impartial and clearly defined route of appeal;
- in regulatory contexts, there should be limits to the grounds for appeal (e.g. regulator exceeded attributed powers, insufficient consultation, material omissions of evidence, disproportionate actions). In competition matters, there should be fewer restrictions;
- while the appeals body may have the right to overturn a decision, suspension of the effects of a decision before the end of the appeals process is not desirable;
- the appeal forum should possess regulatory/competition expertise;
- grounds for rejecting a regulatory decision include the regulator: acting beyond its legal authority; failing to follow appropriate procedural requirements; and acting arbitrarily or unreasonably;
- the appeal should provide parties with an opportunity to seek a rehearing or review of decisions.

Source: Brown, A., Stern, J. and Tenenbaum, B. (2006), 'Handbook for Evaluating Infrastructure Regulatory System', World Bank.

Oxera considers that there should be a way for the Royal Court to gain access to the right independent expertise as part of an appeal.

### **7.3 Summary of recommendations**

- The appeals process in Jersey should be reviewed, with a view to introducing a new 'unreasonableness' test that takes account of the legal system.
  - There should be a way for the Royal Court to gain access to, and appoint specialists, to help it deal with technically complex matters.
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## 8 Conclusions and recommendations

Overall, Oxera recommends that the JCRA, both as its own entity, and as part of CICRA, should be maintained. Across the areas reviewed, we have highlighted the need to ensure that the JCRA takes account of the resource constraints it faces—for example, in resourcing strategies and deciding which cases to pursue. It is also important that the specific nature of the Jersey market be taken into account, for example when designing legislation, rather than importing rules of thumb from larger jurisdictions.

A number of specific recommendations are set throughout the report for each area reviewed. These should be seen as a package that could lead to significant improvements in the operation of the competition and regulatory regime in Jersey.

These recommendations are set out below, noting whether they require changes in legislation, can be implemented by the JCRA itself, or require involvement from the government.

### Changes in legislation

1. The JCRA should seek Treasury support for a degree of ‘carry-over’ of funds from one funding period to the next as part of the short-term matching of the funding of demands to the availability of resources.
2. Block exemptions for cases relating to anti-competitive agreements should be introduced so that cases that create consumer benefits which outweigh the harm to competition do not have to be approved *ex ante*.
3. The merger regime should be changed so that only mergers that affect the local economy, and which the JCRA can actually do something about, are investigated. It should be possible to move straight to phase 2, with the agreement of the parties. The thresholds and processes should be clear and easy to understand in order to reduce uncertainty for businesses.
4. A two-tier system for implementing remedies from market investigations should be considered, and, if appropriate, introduced, with the JCRA given additional powers to implement remedies for behavioural changes, while it would make recommendations to government for structural changes. These recommendations would be subject to a negative resolution procedure.
5. The current licence structure should be replaced with direct enforceability of licence conditions, with a penalty if the conditions are not met, and/or, if appropriate, allowing third parties to seek damages from breach of a licence condition.
6. A review of the regulatory processes for regulatory actions (including licence enforcement) would appear warranted, with a view to ensuring that the needs of different decisions, relating to their type, complexity and degree of contentiousness, are met efficiently and effectively.
7. The appeals process in Jersey should be reviewed, with a view to introducing a new ‘unreasonableness’ test that takes account of the legal system.
8. There should be a way for the Royal Court to gain access to, and appoint specialists, to help it deal with technically complex matters.

## JCRA

9. The JCRA should remain part of the combined authority, CICRA, and Jersey and Guernsey should seek greater alignment, particularly with respect to regulation.
10. The JCRA should continue to use a panel or framework agreement with a limited number of consultancies and law firms so that the JCRA can buy in external expertise as and when needed. In return for being on the framework, the consultancies should commit to developing their own in-house expertise in the specific features of the Jersey economy.
11. CICRA should explore the possibility of entering into broader and more formal arrangements with competition/regulatory authorities in another jurisdiction (e.g. Ofcom, CMA) with the aim of getting access to the expertise needed for specific projects, and the development of some expertise relating to the situation in Jersey within those authorities.
12. The JCRA should coordinate more closely with the Jersey Consumer Council and Trading Standards—potentially by putting together formal agreements and/or merging the entities into one organisation.
13. The JCRA should ensure that, as far as possible, future appointments result in a Board composition which, between its members, has expert knowledge in the key areas in which the JCRA is likely to be involved, and that there is a greater degree of local knowledge among the members.
14. The JCRA should publish timeframes for all cases and make sure that all cases are considered within the published timeframes. It should also take account of changing market conditions as part of its investigations.
15. The JCRA needs to improve communication with stakeholders on its actions and the results it achieves. In particular, it should consult on, and publish, an annual plan in advance of each financial year, and provide a comprehensive report on how it has performed against the previous year's work plan, using key indicators or metrics. It should also ensure that it explains clearly what is allowed and disallowed under competition law and why competition is important.
16. The JCRA should review and publish its prioritisation principles. It should ensure that it uses these principles to determine which cases to pursue and clearly explains its decisions. The government should also follow these principles in deciding whether to initiate a request for a market investigation.
17. The JCRA should publish general guidelines about why and when it will request information, and should explain why it requests certain information in particular cases and what it will do with the information. Once the data is collected the JCRA should ensure that it follows through with using the data for the proposed purpose.

## Government/Ministers

18. The government should consult with Treasury and provide an explicit commitment that it will fund the JCRA as necessary if the Authority faces a legal challenge. If the government does not want to provide the resources to defend an appeal (under competition law), it should give a reasoned decision explaining why it is not in the Island's interest to do so.

19. To address the issues surrounding the respective roles of the JCRA and Ministers, a clear description of these roles should be produced by the government (in conjunction with the JCRA).
  20. The government should develop a clear policy for each of the sectors regulated by the JCRA, including its policy for promoting competition or direct regulation.
  21. Where the government retains ownership of regulated assets, it should clearly set out objectives for the regulated companies.
  22. The government, regulator and industry should establish and maintain strategic alignment, while preserving the independence of the regulator. The best precise mechanism for this should be developed, potentially building on the experience of the Memorandum of Understanding between the government and the Jersey Financial Services Commission.
  23. The function within the shareholder (i.e. the Treasury) that oversees the relationship between the Treasury and the company should be strengthened.
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## **A1 List of stakeholder interviews**

- Carey Olsen
  - Chief Minister's Department
  - CICRA (current and past Board members)
  - Condor Ferries
  - Digital Jersey
  - Economic Development Department
  - Foreshore (previous owner)
  - Hanson Renouf
  - Jersey Chamber of Commerce
  - Jersey Consumer Council
  - Jersey Dairy
  - Jersey Electricity
  - Jersey Financial Services Commission
  - Jersey Post
  - JT
  - Mourant Ozannes
  - Nitel
  - Ogier
  - Scrutiny Panel (past and current)
  - Sure
  - Transport and Technical Services Department
  - Treasury and Resources Department
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