

## **Review of the JCRA decision that ATF fuels had abused a dominant market position.**

### **Terms of Reference**

#### Background

The Jersey Competition Regulatory Authority (“The JCRA”) may conduct an investigation under the competition law if it has reasonable cause to suspect the abuse of a dominant market position.

In March 2016, having concluded its investigation, the JCRA determined that ATF fuels had abused a dominant market position by:

- i. Refusing to supply fuel to ABP for resale;
- ii. Charging prices to ABP that were higher than those paid by customers purchasing similar volumes and this was therefore discriminatory.

ATF appealed the decision and the case was heard by the Royal Court in October 2017. The Royal Court overturned the decision of the JCRA.

The Royal court reported that no questions of procedural unfairness or concerning the vires of the JCRA arose.

The Government of Jersey is now seeking a review of whether the JCRA has discharged its legal responsibilities and duties appropriately in this case.

Key stages in the case include:

1. The decision of the JCRA to conduct an investigation in March 2015;
2. Submissions made to the JCRA and the resulting judgment exercised by the Authority on the substantive points being raised;
3. The draft decision issued in September 2015;
4. The hearing meeting in December 2015;
5. The determination made by the JCRA in March 2016 that ATF had abused a dominant position.

A review is now required of the circumstances leading up to the decision and whether:

1. The JCRA exercised its discretion reasonably in deciding to conduct an investigation. How did the Authority use its prioritisation principles and were they appropriately and proportionately applied?
2. The evidence available to the Board was of sufficient quality and scope and appropriately considered and applied?
3. The Board had properly considered the risks of taking the decision that it did in terms of the potential for appeal and quantified the level of litigation costs associated with that?
4. The JCRA had reasonably examined and exhausted all avenues available to remedy the behaviours it considered problematic before making a final decision, and
5. Overall the decision that the regulator took was reasonable and proportionate under the circumstances?

The Royal Court commented that *“It must not be uncommon in appeals of this nature in other jurisdictions that new evidence arises at the time the Appeals Tribunal hears the appeal than was available at the time the decision taker originally took its decision. Furthermore the nature of the argument which is presented is bound to become more refined. We think that has occurred in this case, albeit some of the arguments advanced by the Appellant have been consistently advanced from the outset.”*

Looking at the substantive principles established in the judgment, whether:

1. There are any **significant deficiencies** in how the competition law has operated and if so how these might be addressed, and
2. The Royal Court indicated that whilst there are no statutory grounds to require a licence for the resale of fuel the Court considered that there was nevertheless a requirement for a licence because of the Ports of Jersey's role in operating an aerodrome. The Government of Jersey is keen to understand whether this is **an accurate representation of the EU *acquis on this issue*** and to consider the role of the Ports of Jersey in clearly confirming the need or otherwise for a licence.

The reviewer is invited to consider any other matter necessary and appropriate to answering the questions in this terms of reference.

In carrying out the review it is expected that evidence will be invited from stakeholders.

It is expected that a Report will be published to the States of Jersey and so it may be necessary to go through a redaction process to remove any confidential information.