Economy

Consultation on Amendments to the Competition (Jersey) Law 2005:

Response Paper

Contents:

Background

1. On 21 February 2023, the Government of Jersey published a public consultation seeking feedback on a number of proposals to amend and update Jersey's competition legislation.

2. Ahead of issuing the consultation, Government officials engaged extensively with the Jersey Competition Regulatory Authority (the '**JCRA**') which has expressed support for the legislative proposals outlined in the consultation papers.

3. As part of the consultation process, Government officials directly engaged with various local stakeholders to obtain input from a wide and varied group of interested parties. This included representatives from the legal and financial industry, telecommunications sector and the Jersey Consumer Council.

4. The consultation closed on 21 April 2023. In total, the Government received 14 responses. Six respondents submitted feedback using the online survey, whilst the other eight respondents directly wrote to Department to submit their views. All responses have now been carefully considered and the Government would like to thank those who have taken the time to respond to this consultation.

5. This paper summarises the feedback received and sets out the Government's response to the consultation. Further questions or comments relating to this Consultation Response and Policy Paper may be directed to:

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Competition Law Consultation Paper 1: Market Studies

Question 1: Do you support the proposal to develop an enhanced formal and transparent framework for market studies under the Competition Law, including powers for the JCRA to collect information?

6. The proposal to introduce a formal and transparent framework for market studies under the Competition (Jersey) Law 2005 (the '**Competition Law**') was generally supported.

7. One respondent commented that without information gathering powers, the JCRA would be reliant on stakeholders to provide information voluntarily. If stakeholders refuse to cooperate, this could hamper the JCRA's ability to undertake a market study and prepare a comprehensive report at the end of the study.

8. Another respondent requested further information in relation to the circumstances under which the JCRA would be able to commence a market study under the proposed new framework. The importance of protecting commercially sensitive information during a market study was also highlighted by one of the respondents.

9. One respondent objected to the granting of formal information gathering powers to the JCRA in the context of a market study. This respondent explained that using formal information gathering powers, including the threat of sanction for non-provision of information, or provision of misleading information, may mean that parties will be less likely to cooperate constructively with the JCRA (i.e. only providing the minimal cooperation required) and may increase legal costs.

Question 2: Do you consider the JCRA should be empowered to impose binding remedies at the end of a market study (beyond making recommendations to Government or other stakeholders)?

10. Mixed feedback was received in response to this question. Some respondents supported giving the JCRA remedial powers at the end of a market study to enable tangible action to be taken, subject to appropriate procedural safeguards being put in place.

11. Other respondents objected to this proposal as, in their view, it would be disproportionate and inappropriate to give the JCRA such powers following a market study. The Government was advised to limit the JCRA's powers in the context of a market study to making recommendations to Government or other stakeholders and this should not include a power to impose binding remedies.

12. One respondent commented that the current powers in the Competition Law, enabling the JCRA to commence an investigation if it has reasonable cause to suspect an infringement (Part 5 of the Law), are adequate. This respondent did not agree that the JCRA should be permitted to impose binding remedies following a market study.

Question 3: If the JCRA is given remedial powers, do you believe the sectoral scope of the proposed Ministerial public interest intervention power – i.e. linking this to 'critical national infrastructure' and States of Jersey controlled companies – is correctly drawn? If you think this should be wider or narrower, please explain why?

13. Mixed feedback was also received in response to this question. As certain stakeholders did not support remedial powers for the JCRA in the context of a market study, they also objected to this proposal. Respondents commented that the JCRA should not be able to impose legally enforceable behavioural and structural remedies without Government intervention.

14. Another respondent, who supported giving the JCRA remedial powers at the end of a market study, also supported the proposal to give the Minister powers to intervene at the remedial stage in certain cases on public interest grounds.

Government response:

15. As outlined in the Consultation Paper, market studies are helpful tools for the JCRA to examine markets outside the context of an antitrust investigation or merger review and complement the enforcement tools already available to the Authority under the Competition Law. Nearly all competition authorities in the OECD conduct some type of market study. However, a formal framework for market studies does currently not exist in Jersey.

16. The OECD Market Study Guide highlights that it is more common for market study powers to be explicit, legislative powers, rather than powers inferred from the general powers granted to a competition authority.[1] Having regard to this, and the support received from stakeholders, the Government intends progress the proposal to introduce a tailored and transparent framework for market studies under the Competition Law.

17. As regards the collection of information, as stated in the consultation paper, it is envisaged that the JCRA will, wherever possible, adopt an informal approach with regard to information gathering, as the JCRA's experience to date is that stakeholders often engage with market studies in a positive and cooperative way when approached by the Authority.

18. However, if such informal approaches are not successful, the Government takes the view that there should be a formal power for the JCRA to collect the information it needs to review a specific market in Jersey. Stakeholders generally supported this proposal which would be in line with international best practice. The OECD's Market Study Guide emphasises that competition authorities with the power to conduct market studies generally also possess powers to collect information for the purposes of conducting those studies.

19. Stakeholder comments in relation to the protection of confidential information are noted and the Government agrees that such information should be subject to protection. Further detail on the structure of the framework will be published – and feedback will be invited – once draft legislative proposals have been prepared.

20. In light of the feedback received to questions 2 and 3 – concerning remedial powers for the JCRA in certain circumstances – the Government does not intend to proceed with these proposals at this time. Firstly, a formal, legal framework for market studies is currently not yet provided for in the Competition Law. As such, the introduction of a tailored, new regime in law, including information gathering powers, would be a

[1] See: OECD Market Studies Guide for Competition Authorities 2018.

significant step to enhance the JCRA's ability to keep local markets under review, even where this is not combined with remedial powers.

21. Furthermore, the market study tool is intended to be an efficient and flexible tool for the JCRA to analyse whether there are competition issues in a particular market. Introducing remedial powers into the market study function, could risk losing the pace and flexibility advantages of the envisaged process (e.g. the need for procedural checks and balances where remedies are to be imposed) and may increase the duration of market studies.

22. The Government also notes that the JCRA's experience to date is the local businesses generally engage with market studies in a positive and cooperative way. Enabling the JCRA to impose legally binding remedies at the end of the market study process, could also lead to businesses adopting a more adversarial approach where they fear remedies may be imposed.

23. However, to ensure that JCRA recommendations to Government are properly considered, it is proposed that the framework will include an obligation for the Minister to respond to the final market study report.

Competition Law Consultation Paper 2: Mergers and Acquisitions

Question 1: Do you support the proposed changes to the definition of 'mergers and acquisitions' in Article 2 of the Competition Law and agree that these achieve the below policy objectives?

- **clarify that an undertaking that does not already control another undertaking is included in the scope of Article 2(1)(b) of the Competition Law;**
- **clarify that the framework can apply to the acquisition of control over assets, so long those assets constitute a business to which a turnover can be attributed; and**
- **clarify that only the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity (so-called 'full-function' joint ventures) shall constitute a 'merger or acquisition' within the meaning of the Competition Law**

24. This proposal was widely supported. Amongst other things, it was noted that circumvention of the duty to notify should be prevented. There was only stakeholder who objected to these changes, but their view was not substantiated by any evidence. One stakeholder queried whether the proposed amendments would align with the introduction of the proposed new turnover test.

25. One other stakeholder, whilst being supportive, suggested the below underlined words are included in the proposed new subparagraph in Article 2(1) of the Competition: "the acquisition by an undertaking of the whole or a part of another undertaking, although not involving the acquisition of a corporate legal entity, involves the acquisition of assets that constitute a business <u>with a market presence</u> to which a turnover can be attributed, and for the purposes of this paragraph 'assets' includes goodwill".

Question 2 Do you agree that – as proposed – the current definition of 'undertaking' in Article 1 of the Competition Law is retained? If you believe that the definition of 'undertaking' should be changed, please explain why, supported by examples of types of mergers or acquisitions that may escape JCRA scrutiny as a result of the current definition.

26. No objections were raised to this proposal.

Question 3: Do you support the introduction of a new mandatory, local turnover test – replacing the current share of supply test – to determine whether a particular merger or acquisition needs to be notified to the JCRA for approval?

27. This proposal was generally supported.

28. Stakeholders responded that a narrower and more objective mandatory jurisdictional threshold test would provide greater confidence to businesses, reduce the need for informal guidance and could reduce the number of notifications. This would also allow the JCRA to focus its limited resources on the most problematic cases.

29. It was also noted that under the current framework, it can be difficult for parties to accurately self-assess their share of supply in practice, particularly in markets where parties may not have access to accurate market share assessments. Instead, adopting a turnover test would align Jersey's approach to that taken in other

jurisdictions that use a mandatory notification system, such as Guernsey and the EU (which in the view of this respondent operate efficiently).

30. The importance of ensuring the test is bespoke and tailored to Jersey was also emphasised in one of the responses. One stakeholder expressed a concern that under a new turnover test transactions between smaller businesses with low turnover, but with potentially high shares of supply could be missed. This concern is acknowledged and the proposals to introduce a discretionary share of supply test (see question 5 below) are intended to address this issue. One further stakeholder objected but did not substantiate their views.

31. As outlined in the consultation paper, the main purpose of this round of consultation was to obtain views on the proposed new framework for the control of mergers and acquisitions in Jersey. No firm decision has been made regarding turnover thresholds and location of turnover and a further opportunity for stakeholders to comment will be provided.

32. A small number of stakeholders also took the opportunity to share views regarding the structure of the test (the options included in the annex to the consultation paper). One respondent stated that they disagree with the Oxera suggestion regarding the number of businesses that would need to generate a certain level of turnover in Jersey in order for a transaction to be notifiable. Instead, the 2016 JCRA proposal would be preferred.

33. One of these stakeholders also commented that the thresholds suggested by JCRA are too low as they reflect the thresholds in equivalent Guernsey legislation which was introduced in 2012. This stakeholder suggested that the thresholds should be adjusted in line with inflation. A further stakeholder suggested that different turnover thresholds should apply depending on the market at issue.

Question 4: Do you support the proposed rules for the calculation of turnover, including the turnover of credit institutions, financial institutions and insurance undertakings?

34. This proposal was generally supported. Only one stakeholder objected, without providing any further explanation.

35. One respondent, whilst supporting the proposals, queried whether a shorted Merger Application Form could be introduced for certain transactions involving credit or financial institutions. This stakeholder also suggested that it would be helpful to have further clarification in relation to the proposed provisions to prevent mergers from being carried out in stages to circumvent the duty to notify that would otherwise arise. In particular, this respondent asked for further clarification on the meaning of "same persons or undertakings" for example in the context of transactions which involve entities within the same group, or transactions between the same persons on separate matters.

36. One respondent questioned why for credit and financial institutions there does not need to be a connection to Jersey when calculating the applicable turnover. By counting the (worldwide) income received in Jersey, rather than that from local customers, the regime may create additional administrative burden. Having regard to the significance of Jersey's financial services markets, any new framework needs to strike the right balance. This respondent also emphasised the need for appropriate definitions to ensure that the regime does not

inadvertently capture a large number of transactions that in all likelihood do not impact the competitive structure of local markets.

Question 5: Do you support the introduction of an additional, discretionary share of supply test (complementing a relatively straightforward mandatory turnover test) to allow the JCRA, in certain cases, to review transactions which would not be caught by the mandatory turnover provisions, but which may nevertheless have the potential to substantially lessen competition in Jersey?

37. Whilst this proposal was generally supported, a small number of respondents suggested that some changes are made. Only one respondent objected, without providing detailed feedback.

38. One respondent stated that, in principle, they do not object to the introduction of a supplementary share of supply test. This respondent however suggested that the proposed two-part test may place an additional burden on the JCRA as the Authority would need to undertake a significant amount of horizon scanning and investigation in order to successfully identify mergers and acquisitions that are not captured by the mandatory notification requirement but could cause competition concerns in Jersey. A concern was expressed that this could prevent the JCRA from performing its duties as an economic regulator in Jersey. The Government was urged to ensure that any new legislation should not put undue strain on the JCRA's already busy annual work plans and regulator duties.

39. As outlined, the purpose of this consultation was, in particular, to seek input on the proposed new framework for merger control in Jersey (i.e. the introduction of a mandatory turnover test, complemented by a discretionary share of supply test). The annex to the consultation paper also set out a couple of options for consideration in relation to share of supply percentages that could apply in the context of the proposed discretionary test. However, at this stage, no firm decision has been made in this regard, and further stakeholder engagement will take place once draft legislative changes have been prepared, thus enabling stakeholders to comment.

40. Regarding the structure of the proposed discretionary share of supply test, one respondent stated that they consider that this test should only capture transactions which are of significant concern to Jersey and therefore a 40% threshold should apply. Retaining the current thresholds, albeit as a discretionary test, could duplicate the administrative burden on businesses, resulting in an increase in filings.

41. Another respondent expressed a view that the discretionary test should only apply to horizontal mergers as these may raise the strongest concerns for merger policy in Jersey. This respondent also stressed that the time period during which a transaction may be called in for review by the JCRA should be relatively short (i.e. a matter of weeks, rather than months) as otherwise this may fail to achieve the objective of legal certainty and businesses may choose to make an application for approval instead as this may be faster (and less risky). This respondent also requested clarity as to when the period during which a transaction can be called in would start.

Question 6: Do you support the introduction of a small number of exceptions relating to specific situations in which a 'merger or acquisition' within the meaning of Article 2 of the Competition Law would not be deemed to occur?

42. This proposal was generally supported, and it was noted that the proposed exceptions would be a helpful addition to the framework. One respondent expressed a concern about monitoring the proposed exceptions.

Question 7: Do you support the proposal to include explicit provision in the Competition Law enabling the JCRA to request or accept retrospective applications for approval where there has been a failure to notify a notifiable merger or acquisition?

43. Respondents generally agreed that this would be a useful provision. A question was raised regarding the circumstances in which the JCRA could request a retrospective application. It should be noted that the JCRA would only be able to accept or request a notification under the proposed new provision if the thresholds for notification are met. I.e. if the transaction would otherwise be a notifiable transaction under the mandatory regime (thus not after the call-in period under the discretionary test).

44. One respondent, who objected to this proposal, stressed that Competition Law breaches should not be acceptable. It should be noted here that the proposed changes do not provide a 'get-out-of-jail-free card' but are intended to remove ambiguity as regards the legal status of a transaction that was erroneously not notified to the JCRA. As outlined in the consultation, the proposed changes do not affect the JCRA's powers to impose a financial penalty for a failure to notify a notifiable merger or acquisition. As such, even if the JCRA retrospectively approves a particular merger, it may still impose a financial penalty for breaching the notification requirement in the first place.

Question 8: Do you support the removal of the JCRA's discretion to refuse to approve a merger or acquisition in the circumstances mentioned in Article 22(4) and (5) of the Competition Law?

45. Mixed feedback was received in response to this question. Some stakeholders did not agree and stressed that it would be useful to retain this discretion to be exercised in exceptional cases where a transaction may lessen competition in Jersey but where there may be good public policy (or other) reasons to exercise the discretion to approve the transaction.

46. It was also put forward that an obligation to refuse a merger or acquisition for a party's failure to provide information or a document within a reasonable time of being requested would be disproportionate as there may be legitimate reasons why the document or information may take time to obtain or may not be able to be provided at all.

Question 9: Do you agree that the proposed powers to gather information and impose interim measures – where these require legislative amendments – are appropriate to enable the JCRA to effectively review 1) mergers and acquisitions that fulfil the thresholds of the discretionary share of supply test and 2) unnotified, notifiable transactions for retrospective approval?

47. There was broad support for this proposal. It was remarked by one respondent that these changes are necessary for the proper functioning of the regime.

Government response:

48. Having regard to the positive feedback received in response to questions 1 and 2, the Government proposes to proceed with the proposed changes and retain the current definition of 'undertaking' in Article 1 of the Competition Law.

49. As outlined above, one respondent suggested that the (below) underlined words are included in the proposed new subparagraph in Article 2(1) of the Competition: "the acquisition by an undertaking of the whole or a part of another undertaking, although not involving the acquisition of a corporate legal entity, involves the acquisition of assets that constitute a business with a market presence to which a turnover can be attributed, and for the purposes of this paragraph 'assets' includes goodwill". However, the inclusion of this wording does not appear to be strictly necessary, and it is not proposed to make this change.

50. In relation to question 3, having regard to the generally supportive feedback, the Government intends to proceed with these proposals to develop a new mandatory, local turnover test to determine whether a particular merger or acquisition needs to be notified to the JCRA for approval.

51. Further work will be undertaken in relation to appropriate jurisdictional thresholds and the rules for the calculation of turnover, in particular the calculation of turnover of credit and financial institutions. Stakeholders will be able to provide further input when Government consults on draft legislative proposals. As regards the introduction of a shortened merger application form, this would not require a change to legislation as the procedure for notification of mergers and acquisitions falls within the remit of the JCRA under Article 21 of the Competition Law.

52. The Government also intends to take forward the proposal to introduce a discretionary test (complementing the new mandatory turnover test) to allow the JCRA, in certain cases, to review transactions which would not be caught by the mandatory turnover provisions, but which may have the potential to substantially lessen competition in Jersey. Further work will also be undertaken in relation to this proposal, having regard to the feedback received, and there will be a further opportunity for stakeholders to comment once draft legislative proposals have been developed.

53. The Government would furthermore like to thank those respondents who have provided feedback regarding the structure of the new framework (e.g. in relation to turnover and share of supply thresholds). The input provided will be taken into account when developing the structure of the new framework.

54. It is the Government's view that the amendments proposed in the mergers and acquisitions area should ensure the regime is:

- transparent,
- robust (where needed),
- light touch (where possible) to limit the administrative burden for businesses, and
- allows the JCRA to focus its limited resources where they are most needed.

55. As such, the Government agrees with stakeholder comments that the proposed amendments should not result in the JCRA spending a disproportionate amount of its resources on merger control and/or horizon scanning. This will be a key objective when developing the structure of the new framework, which as outlined, will be subject to further consultation in due course.

56. The proposals regarding the introduction of a small number of exceptions (question 6) and a power for the JCRA to consider retrospective applications for approval (question 7) were generally supported and the Government intends to proceed with these proposals.

57. In light of the feedback received in response to question 8 concerning the proposed removal of the JCRA's discretion to refuse to approve a merger or acquisition in specific circumstances, the Government intends to retain the current wording in Article 22(4) and (5) of the Competition Law.

58. There was broad support for the proposal outlined in question 9 and the Government therefore intends to take the proposed legislative amendments forward.

Competition Law Consultation Paper 3: Appeals and Compliance

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

59. Mixed feedback was received in relation to this proposal. However, those respondents who submitted a written response (rather than completing the online survey) did generally not support this proposal.

60. One respondent emphasised that the independence and impartiality of the Court, and the potential for the Court's full engagement in competition matters, is of significant importance in a small jurisdiction such as Jersey. The ability to bring matters to the Court for a full review of the merits of a JCRA decision is an important protection and bolsters confidence in the balance and fairness of Jersey's competition regime. This respondent also argued that in a small Island, where market operators and the Authority are well known to each other and are likely to have had past dealings, as well as ongoing dealings, with one another, the ability to have a full an unconstrained view by the Court as an independent party is vitally important.

61. Another respondent also argued that, in order to be compatible with Article 4(1) of the Human Rights (Jersey) Law 2000, the Competition Law must allow for a full appeal on the merits. This respondent also argued that the previous Oxera and Kassie Smith KC reviews fail to make a persuasive case to move away from full merits reviews for Competition Law appeals. For example, it was highlighted that the three cases referred to in the Oxera review concern appeals under the Telecommunications (Jersey) Law 2002 (and thus not the Competition Law). This respondent also highlighted that in the UK, the Competition Appeals Tribunal hears and decides on appeals on the merits in respect of decisions made by the Competition and Markets Authority under the Competition Act 1998. For the above reasons, this respondent concluded that an 'unreasonableness test' would not be an appropriate standard for appeals under the Competition Law.

62. Another respondent objected as implementing this proposal would weaken the protection available to addressees of JCRA decisions. This respondent stressed the importance of retaining the Court's current wide powers to review JCRA decisions as the JCRA has been given very strong powers under the Competition Law. It is the investigator, the prosecutor, the decision taker and the body to impose a penalty. It was also noted that an important aspect of the present appeals structure is that the Court is able to assess the situation at the date of the hearing.

63. This respondent also stated that the appeals framework under the Competition Law currently seems to function well. It was highlighted that there has only been one Competition Law appeal in the last 18 years. This respondent argued that, together with the need to balance the JCRA's strong powers under the under the Competition Law, this does not suggest that there is a need to amend the current appeals framework in the Law. Doing so may weaken the protection of the citizen and so a cautious approach is to retain the appeals provisions in their current form.

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

64. This proposal was generally supported by respondents. The proposed settlement procedure allows the JCRA in certain cases to benefit from a shorter and quicker administrative process. The intention is that this allows for a more efficient use of resources and reduces the risk that a decision is appealed. Furthermore, settling businesses obtain a discount on the financial penalty, whilst also benefitting from a fast and efficient procedure.

65. Whilst appreciating that a settlement process could achieve benefits for both the JCRA and businesses, one respondent asked the Government to provide more detail on how the process would work practically. This respondent emphasised the importance of dialogue with the JCRA in the context of settlement proceedings. This respondent also suggested it may be beneficial to allow settlement in cases where there is no admission of liability by the undertaking(s) involved. Furthermore, this respondent suggested that the proposed settlement discounts of 20% (for settlement pre-Statement of Objections) and 10% (for settlement post-Statement of Objections) may not be sufficient to incentivise a business to enter into settlement discussions with the JCRA.

66. Two respondents objected to this proposal, however, only one respondent substantiated their views. This respondent argued that settlement could undermine the rights and freedoms of businesses to conduct themselves under the law until the regulator obtains a Court order to the contrary. It was furthermore argued that introducing settlement provisions in the Competition law may encourage 'sloppy or arrogant' decision making by the JCRA. This respondent also expressed a concern as the proposed procedure requires an admission on the part of the undertaking that it has breached the Competition Law. This carries with it a potential exposure to civil claims under Article 51 of the Law. This respondent also stated that if the JCRA has confidence in its view that there has been a Competition Law breach, it should use its extensive powers under the Law to enforce it.

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

67. Stakeholders generally supported this proposal. One respondent emphasised that businesses agreeing commitments with the JCRA should not be exposed to potential liability for civil damages under Article 51 of the Competition Law.

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

68. There was wide support for this proposal. One respondent supported this proposal as the agreements to which the offence relates are "clearly wrong".

69. One further respondent provided a particularly detailed response outlining their support for this proposal. This respondent argued in detail:

    a. That criminal cartel sanctions should be introduced in Jersey, as such sanctions can help to secure deterrence of cartel activity.

b. That criminal cartel sanctions can help to bolster administrative enforcement of cartel law in Jersey, in particular through its potential positive impact upon the operation of the administrative leniency policy in Jersey.
c. That the criminal cartel offence should be defined in such a way that: (i) it captures the 'moral wrongfulness' of cartel activity; and (ii) it does not 'chill' legitimate commercial behaviour.
d. That the best way of achieving (c) is to provide for a 'carve out' from the criminal cartel offence for those cartel agreements that are notified to customers prior to their implementation or are published in a specified format prior to their implementation.

70. Another respondent expressed their general support for the proposal but noted that they have not seen any evidence of cartels operating at the moment. However, this respondent stated that they do not support the proposal outlined in paragraph 28 of the consultation paper. Here the Government sets out its reasons for not proposing a defence which applies if a person can show that, before making the agreement, they took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purpose of obtaining advice about them before they were made or implemented. This respondent outlined that if professional advice is given that what is proposed does not amount to a criminal offence, that should be a defence. Another respondent suggested that the defence could be amended so that it only applies if the professional advice received is to the effect that the course of action is not in breach of the Competition Law.

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

71. This proposal was generally supported. One respondent noted that penalties with individual consequences are particularly effective as a deterrent. Another respondent stressed that director disqualification can act as a useful complement to corporate penalties in achieving the deterrence of all types of competition law offending (thus not just cartel activity).

72. One respondent outlined their view that the use of director disqualifications should be confined to the most serious and deliberate anti-competitive conduct, due to the significant personal implications for directors and their families. It was also emphasised that any process must involve appropriate checks and balances.

73. A further respondent suggested that the legislation should provide the Court with a genuine discretion whether (or not) to make a disqualification order, rather than a requirement to do so in the circumstances specified.

Government response:

74. As regards the proposal to introduce a new 'unreasonableness' test for Competition Law appeals, several stakeholders expressed concerns which have been summarised above. The Government acknowledges the merit of the concerns expressed by respondents and intends to retain the current appeals regime in Article 53 of the Competition Law.

75. Question 2 concerned the introduction of a settlement procedure in the Competition Law (such as found in equivalent UK and EU legislation). If parties in an investigation agree with the JCRA's findings, settlement can be a helpful tool for parties and the JCRA to close the case quickly and efficiently. Parties furthermore benefit from a reduction in the financial penalty if settlement is agreed with the JCRA. Respondents to the consultation were generally in favour of the proposal to introduce a formal settlement mechanism in the Competition Law. In light of the feedback received, the Government intends to proceed with this proposal.

76. Some concerns were however expressed by stakeholders. One respondent stressed that before a business can agree to settle a case, it would need to understand exactly what the nature of the alleged infringement is, and this may only be achieved through detailed engagement with the JCRA. This view is supported by Government and extensive dialogue with the JCRA is expected to take place before a settlement is reached. It should also be noted that settlement discussions can be initiated either before or after a so-called Statement of Objections is issued, which outlines the JCRA's competition concerns.

77. One stakeholder commented that settlement could put a business between a "rock and a hard place" on the assumption that the JCRA is right. However, it is important to note that the proposed settlement procedure does not involve an obligation (or right) to settle or enter into settlement discussions with the JCRA where these are offered by the Authority. At any time, businesses will be able to withdraw from the settlement procedure and the case will revert to the usual administrative procedure under the Competition Law.

78. Stakeholders also commented that making an admission of liability in relation to the alleged Competition Law infringement carries with it a potential exposure to civil claims under Article 51 of the Competition Law. In this regard it should again be noted that the JCRA cannot force an undertaking to agree to settle a case with it. As outlined, a settling business may withdraw from settlement discussions at any time before confirming in writing. It would then be up to the JCRA to pursue the case in accordance with the normal administrative procedure under the Competition Law. The Government does not propose to remove this requirement (noting also that similar requirements can be found in equivalent EU and UK legislation). It should furthermore be noted that the proposed commitment procedure (see question 3 below) allows parties to engage with the JCRA with a view to addressing competition concerns identified by the Authority, which does not involve establishing an infringement or imposing a financial penalty.

79. One stakeholder suggested that the proposed settlement discounts of 20% and 10% may not be sufficient incentive for businesses to settle a case with the JCRA. The Government will engage with the Authority on this and consider whether settlement discounts can be set at a higher level and there will be a further opportunity for stakeholders to comment.

80. It should furthermore be noted that it is generally accepted that settling parties are significantly less likely to appeal a regulator's settlement decision. This is particularly the case because settling parties would have discussed and agreed the substantive findings with the regulator in the process of the settlement discussions.

81. Question 3 of this consultation paper concerned the proposed introduction of a formal commitment procedure in the Competition Law. There was wide support for this proposal and the Government intends to proceed with this amendment.

82. One stakeholder emphasised that it is important that a business agreeing commitments with the JCRA should not be exposed to potential liability for civil damages under Article 51 of the Competition Law on the basis that commitments involve an implicit admission of misconduct. In this regard, the Government wishes to emphasise that agreeing commitments involves neither an admission of guilt by the undertaking concerned, nor a formal finding of a competition law breach. Instead, it constitutes a finding that there are no longer grounds for action by the JCRA. As such, under the proposals put forward, agreeing commitments with the JCRA would not affect the risk for parties of civil action by an aggrieved person under Article 51 of the Competition Law.

83. Question 4 of the consultation paper sought views on the proposed introduction of a criminal cartel offence in Jersey. Having regard to the generally positive feedback, the Government intends to proceed with this proposal.

84. As outlined in the consultation paper, to counter the wide scope of the new offence, the Government proposes that a number of exclusions and defences is introduced, mirroring those in the Enterprise Act 2002 (Section 188A and B). However in Section 188B(3) the Enterprise Act 2002 also provides a defence which applies if a person can show that, before making the agreement, they took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purpose of obtaining advice about them before they were made or implemented. The consultation paper set out the Government's reasons for not proposing to include a similar defence in the Competition Law.

85. This approach was questioned by two respondents. One respondent expressed a view that if professional advice is given that what is proposed does not amount to a criminal offence, then that should be a defence. Another respondent suggested that the defence is amended so that it only applies if the professional advice received is to the effect that the course of action is not in breach of the Competition Law.

86. The defence included in Section 188B(3) of the Enterprise Act 2002, however, appears to be drafted extremely wide. This section proves that it is a defence for an individual to show that, before making the agreement, he or she took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purpose of obtaining advice about them before they were made or implemented. There is no requirement to show that the advice was followed (or indeed actually received), or to disclose any advice received. However, most fundamentally, in the Government's opinion this defence view is not needed. The proposed 'publication' carve out mirroring Section 188A of the Enterprise Act is considered "an effective, and simple, means to give those who believe they are behaving legitimately the requisite protection, no matter why they believe their arrangement should not be considered unlawful. There is no need for further protection."[2]

87. The Government therefore does not intend to include a defence mirroring Section 188B(3) in the proposed new Competition Law framework.

88. The Government furthermore wishes to emphasise that the introduction of a criminal cartel offence should be complemented by a leniency programme for individuals. The threat of personal liability may make it easier for the JCRA to detect cartels if individuals are allowed to use leniency programmes for their own benefit. The

[2] Angus MacCulloch, *The Quiet Decline of the UK Cartel Offence: A Principled Victory in the Face of Practical Failure*, 2021.

existence of a leniency programme for individuals could hence be effective in reducing the criminal sanctions applied. As such, it is possible that although there are not many charges, this is partly due to the system working well, as individuals are incentivised to look for personal immunity by applying for a whistle-blower programme.

89. Question 5 of this consultation paper invited stakeholders to comment on the proposal to enhance the JCRA's powers to seek director disqualifications if:

    - a director's company commits a breach of the Competition Law; and
    - the Court considers that the director's conduct makes him or her unfit to be concerned in the management of a company.

90. Having regard to the support expressed by respondents, the Government proposes to proceed with this proposal. Two respondents however suggested that the Court should have a discretion whether (or not) to make the disqualification order (rather than a requirement to do so). The Government accepts these suggestions and proposes that the new legislation will allow the Court a discretion in this regard.

Competition Law Consultation Paper 4: Other Miscellaneous Amendments

91. There was wide support for the minor and technical amendments proposed in this consultation paper. No additional comments or views were received in relation to these proposals. The Government therefore intends to proceed with the proposals outlined in this paper.

Next steps

92. The Minister has approved and authorised the publication of this paper setting out the Government's response to the Competition Law consultation that was published on 21 February 2023.

93. Once draft legislative amendments have been prepared, a further round of stakeholder engagement will take place, enabling interested parties to submit any further comments.