

Note on the need to reform how the JCRA undertakes its duties

1. The JCRA is entering a new phase of its operation following the decision to demerge from CICRA in June 2020. As new institutional arrangements, personnel and modes of operation will need to be adopted, it seems appropriate to consider how the JCRA might function so as to best serve the needs of consumers and businesses in Jersey.
2. A consequence of being a small market is that the regulatory body will generally need to generate economies of scope and scale in its own operations by undertaking a wider range of tasks than regulatory bodies in larger markets. The administrative merger between the JCRA and GCRA in 2010 was one attempt to release some economies of scale, but the Government's decision to combine responsibilities for competition law with regulatory duties across telecoms, ports and post within the JCRA in Jersey is another. The same approach of combining competition and regulatory duties has been adopted in some other relatively smaller markets, including the Netherlands, New Zealand and Australia¹. In other markets, such as Germany, regulatory oversight of other sectors, notably energy and rail, has been combined with telecommunications and posts. In Spain, the CNMC oversees both competition policy and a wide range of regulated sectors following the merging of various public bodies in 2013.
3. Having a common set of resources and a wide range of potential tasks to undertake means that the JCRA itself must decide where it focuses its attention (in markets where functions have been divided between different public bodies, these allocation decisions have already been made by the Government). Moreover, since the comparative costs of regulation in small markets are also much higher than in large markets – the Oxera report found the JCRA costs each Jersey consumer about £10/year, compared to the UK Competition Markets Authority costing around £1² – the question of resource allocation is of even greater importance in small markets such as Jersey.
4. The JCRA has sought to explain how it allocates resources by publishing a statement in January 2020 which describes how it prioritises its work³. This is a welcome development, not least because it appears the JCRA had previously employed a similar approach without publishing its details⁴. However, we explain below that it is also important the JCRA show how the principles have been applied in practice and how they justify the actions it proposes to take.

¹ Other small countries, such as Malta, the Caribbean states, and Mauritius, retain separate competition and regulatory authorities

² Oxera 2015, p.33

³ <https://www.jcra.je/media/598203/cicra-prioritisation-principles.pdf>

⁴ Oxera 2015, p.7. The position is also confused by the fact that the JCRA website suggests the principles were produced in 2016, whilst the document itself is dated 2020.

5. The principles that have been adopted by the JCRA raise some important questions:
- a. The JCRA says it will prioritise work that is ‘actionable’, by which it means it has legal powers to take effective action to resolve the concerns that have arisen. This would clearly be appropriate if the JCRA had a set of legal powers that allowed it to intervene effectively in those markets where the greatest detriments from consumers or businesses were likely to arise. However, this approach can be problematic when a public body has extensive powers in relation to some sectors, but not in relation to others. It can also be problematic if the standard of proof required from the regulator varies when intervening in different markets. In such cases, the allocation of resources is likely to be distorted, with a bias towards intervention in those markets where the regulator has more effective tools or faces a lower burden of proof. These may, or may not, be the markets in which the greatest risks or harms to consumers or businesses arise.
 - b. In the JCRA’s case, there are a number of reasons to think that applying the ‘actionable’ principle will lead to a misallocation of resources, likely with too much emphasis being placed upon the sectoral regulation of telecoms, ports and post and too little on overseeing other parts of the Jersey economy. First, the application of Part 2 and Part 3 provisions of the Competition (Jersey) Law 2005 will generally rely upon the JCRA receiving information from market participants or consumers that abuses have occurred (which means that some abuses are likely to go undetected) and the JCRA then demonstrating, to the requisite legal standard, that the law has been violated. Sectoral regulation, in contrast, only requires the JCRA to hypothesise that the intervention it purposes will produce net benefits compared to some alternative course of action. This is a much lower threshold than competition law. The evidence shows that, given the choice, sectoral regulators will invariably favour their sector regulatory powers rather than competition law powers when intervening in markets⁵. In some cases, this means sector regulation rather competition law is used to tackle the same issue. In the case of the JCRA, it is likely to mean a bias in favour of intervention in regulated sectors and against the enforcement of competition law in other sectors.

⁵ A review by the UK Government found “Sectoral regulation and enforcement of licence conditions is often the most appropriate way of dealing with competition issues in regulated sectors. There have, however, been very few antitrust cases or MIRs in these sectors, and the Government is concerned that general competition law may not be being enforced as proactively as it could be, and that the cases that are brought may not be always managed as well as they should”, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192722/12-512-growth-and-competition-regime-government-response.pdf, p.11

- c. One way to ensure that competition authorities do not underenforce is to give them additional competition law powers to review and regulate markets without having to prove abuse. Both the UK Competition and Markets Authority and the JCRA have such ‘market review’ powers and similar powers are now being proposed by the European Commission’s Competition Directorate in order to improve its capacity⁶. However, as the JCRA itself notes, its market review powers are deficient⁷. In particular, the JCRA lacks the power to demand information from parties that are subject to investigation or to impose sanctions if they refuse to co-operate, and the JCRA can only make recommendations for remedies to Ministers, who may or may not choose to adopt them. It would be difficult for the JCRA to be confident that a market review would be effective or ‘actionable’ under these circumstances. This is in contrast with the UK Competition and Markets Authority, which has the legal powers both to demand information to assist in its enquiries and to impose its own remedies (in addition to making recommendations to Government or other bodies where appropriate). The 2015 Oxera report made various proposals to improve this situation, but they do not appear to have been acted upon. In the meantime, the inadequacy of the JCRA’s existing market review powers mean that any reviews it contemplates are unlikely to meet the ‘actionable’ threshold which the JCRA uses to allocate its resources. This again means that competition law is likely to remain underenforced.
- d. The last review undertaken by CICRA was into the freight market and concluded in July 2017 with no action being taken⁸, and, before that, the fuel market review which published in 2015⁹. The JCRA/CICRA’s use of market reviews has been much less significant than the Competition and Markets Authority in the UK, as shown below. The JCRA has undertaken only 2 reviews in a period in which the CMA has undertaken 17. There is no obvious reason to suppose that competition functions more effectively in Jersey than in the UK, or that fewer market reviews are required, and some reason to think the opposite might be the case.

⁶ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool>

⁷ The JCRA say “There are also legal constraints on CICRA’s ability to acquire information. An example is when conducting market reviews in Jersey where CICRA has no power to require information from parties and must rely on voluntary provision and cooperation. The likelihood that parties will provide information in circumstances where they cannot be compelled to do so is therefore an obvious consideration when deciding to proceed with a market review”

⁸ <https://www.jcra.je/cases/2017/c1255gj-freight-market-study/c1255gj-media-release-freight-market-review/>

⁹ <https://www.jcra.je/cases/2015/c1135j-fuel-market-review/c1135j-report-statement-of-first-stage-findings-fuel-market-review>

	JCRA/CICRA	CMA ¹⁰
2019	0	2 (Investment consultants, Statutory audit)
2018	0	2 (Heat networks, Loyalty penalties)
2017	1 (Freight market)	5 (Retail banking, Care homes, Digital comparison tools, Private healthcare, Car hire)
2016	0	3 (Energy, Legal services, Aggregates)
2015	1 (Fuel Market)	5 (Property management, Groceries pricing, Payday lending, Private motor insurance, Higher Education)
Total during 2015-19	2	17

- e. The second principle employed by the JCRA is that any activity be ‘realistic’. This is particularly relevant to circumstances in which the Jersey market forms a small part of the operations of multi-national businesses, particularly in the context of mergers. This seems sensible and it is not suggested in this note that the JCRA ought to allocate more resources to activities over which Jersey is likely to have little influence.
- f. The third principle is that any activity be ‘meaningful’, which the JCRA characterises as having a ‘net positive contribution to the functioning of local markets’. The JCRA argues in its statement that many benefits are ‘strategic’ in nature, which it says means that such benefits cannot be quantified. It cites the example of mast emission monitoring as an activity which provides strategic benefits that are not amenable to quantification. Several points arise from this. It is clear the JCRA may undertake activities which have social, environmental or other benefits, as well as economic ones, as many other public authorities do. This should not absolve the JCRA from attempting to value or quantify these benefits and there are variety of techniques that have been developed to do so. Nor should it allow the JCRA to justify an intervention on ‘strategic’ grounds without having to explain, with evidence, precisely what those grounds are and why they should lead to resources being allocated to one activity rather than another. It is interesting to note that the example given by the JCRA, of mast emission monitoring, arose from one of only two

¹⁰ https://www.gov.uk/cma-cases?case_type%5B%5D=markets, includes 2 super complaints. Dates refer to publication of final report

occasions in which a Minister has exercised their powers under Section 8 of the 2002 Telecommunications Law to provide the Authority with ‘strategic direction’¹¹. The need for the Government to provide the JCRA with clear strategic direction is discussed further below.

6. The application of the JCRA’s prioritisation principles might be expected to lead to an over-allocation of resources to sectoral regulation and an under-allocation to competition law enforcement, including market reviews (for which there is some evidence if comparison is drawn with the UK), for the reasons just discussed. It is difficult, however, for an outsider to judge how the JCRA actually applies these principles in practice or why it has made the decisions which it has, since neither the Work Programme documents nor the Annual Report provide any details of how or why the JCRA decided to focus on the work that it has. There is in other words no discernible link between the prioritisation principles statement which the JCRA has published and the activities it lists in the Work Programme. Nor is there any consideration of matters which it may have decided to de-prioritise or any assessment or quantification of the size or nature of the benefits which the JCRA expects consumers or businesses to obtain from each activity. Although the JCRA is right to say that precise quantification of benefits of this kind is often infeasible (and some benefits are more difficult to quantify than others) this does not mean that the JCRA should make no attempt to demonstrate that it has allocated its resources in a way which is likely to best serve the interests of Jersey consumers and businesses.
7. There are various ways in which this exercise could be attempted, or which we could use to assess whether the JCRA’s current practice diverges markedly from what we observe in other countries. One might involve considering how particular markets in Jersey are performing, in terms of relevant market outputs (price, quality etc), in comparison with those in other countries with similar characteristics. Markets that already appear to be performing well, in comparative terms, or which are steadily improving, ought to command less attention than those where consumers are obtaining a poor deal. The market review process under competition law can be seen as a mechanism to identify and then investigate markets which give rise to concerns.
8. Since the JCRA has not undertaken this task in the past, we do not have good comparative data on how each of the sectors regulated by the JCRA performs today. The JCRA has published data on the telecoms sector, but in doing so does not seek to compare the outputs in Jersey with those seen in comparable markets elsewhere¹². All that can be deduced from the 2018 study is that Jersey has mobile penetration levels above the UK or the OECD average, but fixed broadband penetration is

¹¹ <https://statesassembly.gov.je/AssemblyReports/2007/31268-32452-26102007.pdf>

¹² <https://www.jcra.je/media/598088/telecommunications-statistics-and-market-report-2018.pdf>

below the UK although still well above the OECD average¹³. The Jersey Government has also published a ‘telecoms action plan’ in which it says the Digital Policy Unit will assess the performance of the market by reference to international benchmarks, but this again refers only to levels of penetration (rather than prices or other measures of quality such as network speeds), both of which would also normally be considered relevant to any assessment of how well a market is performing.¹⁴

9. Similarly, Ports of Jersey are required by their licence to publish data relating to the punctuality and availability of flights and berths at both the airport and port (and queuing times at the airport), but no attempt is made to compare these figures with the performance obtained at airports or ports in other countries¹⁵. The same applies to Jersey Post, which has regulatory targets for the next day delivery of mail¹⁶. Some form of comparative assessment by the JCRA would allow it to determine whether the data it publishes is indicative of a well-functioning market, to which it need not allocate many resources, or a poorly performing market to which it would need to give priority.
10. Another approach would be to consider the economic significance to Jersey of the various sectors which the JCRA oversees and to compare this both to the way in which the JCRA allocates its resources and the way in which regulatory budgets are allocated in other countries. A few preliminary observations can be made:
 - a. In terms of regulated sectors which the JCRA oversees, the telecommunications industry contributed 2.4% of Jersey’s GDP in 2018¹⁷, Ports of Jersey around 1%¹⁸ and Jersey Post also around 1%¹⁹. Even if the impact of Jersey’s atypical financial services and tourism sectors were to lead them to be excluded (representing around 40% and 20% of GDP respectively), the other economic activities which the JCRA oversees through the

¹³ Ibid, figures 22 and 12 respectively. There is also some comparative data on monthly consumption levels in Jersey and the UK.

¹⁴ The Government says: “We are choosing those indicators, for which there is reliable data on an international level and for which there is collection of relevant data in Jersey. The body responsible for collecting international telecommunications-related data is the International Telecommunications Union (ITU), which collects several datasets, three of which are relevant to this action plan: fixed broadband subscriptions, mobile subscriptions and access to the Internet”,

<https://www.gov.je/Industry/TelecomsStrategy/Pages/JerseyTelecomsStrategyActionPlan.aspx>

¹⁵ <https://www.jcra.je/media/598132/poj1461j-ports-of-jersey-quality-of-service-q3-2019-report.pdf>

¹⁶ <https://www.jcra.je/cases/2018/p1345j-jersey-post-quality-of-service/>

¹⁷ <https://www.jcra.je/media/598088/telecommunications-statistics-and-market-report-2018.pdf>, p.10

¹⁸ Revenues of £48.6 million in 2019 over GDP of £4.624 billion (2018), see

https://e.issuu.com/embed.html?d=annual_report_2019&u=advert-int p.8 and

<https://www.gov.je/Government/JerseyInFigures/BusinessEconomy/Pages/NationalAccounts.aspx#anchor-4>

¹⁹ Revenue of £52 million in 2019, https://www.jerseypost.com/media/1730/annual_report_2018_web.pdf

application of its competition law powers represent around 35% of the Jersey economy, or about 7x the contribution of the three regulated sectors.

- b. In terms of resource allocation by the JCRA, its Annual Report states that in 2019 the JCRA received £300k from the Jersey Government to fund competition law enforcement, a sum which has remained unchanged since 2011. It obtains a further £85k in fees from parties notifying mergers²⁰. Costs of competition law enforcement in Jersey in that year were £571k. The costs of regulating telecoms, ports and posts are funded by the licensees in the respective sectors. The figures are shown in the table below, along with the allocations if costs were instead to be allocated in proportion to economic contribution (measured as Jersey GDP excluding the financial services and tourism sectors).

	Actual (£000s)	If allocated in proportion to economic significance of sector (£000s)
Competition	571 (46%)	1,096 (89%)
Telecoms	539 (44%)	74 (6%)
Ports	110 (9%)	31 (2.5%)
Post	12 (1%)	31 (2.5%)
Total	1,232 (100%)	1,232 (100%)

- c. On this basis there would appear to be a significant misalignment between how the JCRA allocates its resources and the potential economic significance of its interventions, with a very significant over-allocation in telecoms and to a lesser degree ports, and significant under-allocation of resources to competition work.
- d. There are some obvious objections to this approach. One would be that no country allocates its regulatory resources in proportion to the contribution to GDP made by the sector in question, for the reasons already mentioned. Some sectors, particularly those moving from monopoly to a competitive market structure, will require more attention than others. Some sectors have a greater significance for consumers than others, and should attract more resources as a result. However, if we were to assume that these considerations were to apply in a similar way in other countries, we might expect the proportion of total resources applied to sectoral regulation and to competition

²⁰ <https://www.jcra.je/media/598251/cicra-annual-report-2019.pdf>, p.14.

enforcement to be similar across countries. Some figures on the relative allocation of resources between competition enforcement and telecoms in the UK, the Netherlands and New Zealand, as well as the allocation between costs recovered from licensees and those met by the Government, are shown below:

	Jersey (JCRA)	UK (£000s)	Netherlands (€000s)	New Zealand (\$NZ 000)
Competition enforcement	0.571 (51%)	75,000 ²¹ (64%)	54,000 ²² (88%)	13,500 ²³ (68%)
Telecoms	0.539 (48%)	38,000 ²⁴ (32%)	6,600 (7.5%)	6,200 (31%)
Posts	0.012 (1%)	4,500 (4%)	995 (2%)	
Funds from Government	300 (31%)	75,000 (64%)	55,000 (74%)	28,000 (60%)
Funds from licensees (all sectors) ²⁵	661 (69%)	42,500 ²⁶ (36%)	19,000 (26%)	19,000 (40%)

- e. Several points emerge from this:
- i. The figures suggest the JCRA under-allocates resources to competition enforcement activities and over-allocates resources to the telecommunications sector. No country allocates significant resources to postal regulation.

²¹ UK CMA operational expenditure for 2019/20 was £95 million, of which around £20 million was related to Brexit preparations and so excluded from the figure above (as are capital expenditures), see <https://www.gov.uk/government/publications/cma-annual-report-and-accounts-2019-to-2020/annual-report-and-accounts-2019-to-2020#financial-statements>

²² The ACM receives a budget from Government, which we assume to cover costs of competition enforcement but may include other costs (meaning that 88% may be an overstatement and the 7.5% allocated to telecoms an understatement). Costs relating to individual sectors are ‘passed on’ to those sectors and figures are presented at Table 6, p.43, <https://www.acm.nl/sites/default/files/documents/2020-03/2019-acm-annual-report.pdf>

²³ We assume \$4 million of the \$6.8 million of litigation costs incurred by the Commerce Commission relate to competition enforcement, see p.8 at https://comcom.govt.nz/_data/assets/pdf_file/0028/192268/Commerce-Commission-Annual-Report-2019.pdf

²⁴ Ofcom had exception third party litigation costs in 2019/20 so we have considered its 2018/19 and 2017/18 to be representative. In those years, Ofcom spent £38 million and £42 million respectively regulating ‘Networks and services’, which are equivalent to the activities undertaken by the JCRA, see https://www.ofcom.org.uk/_data/assets/pdf_file/0024/156156/annual-report-18-19.pdf, p.116

²⁵ Fees from mergers excluded where identifiable

²⁶ Relates only to funds obtained by Ofcom from licensees in respect of postal and telecoms regulation, ignoring other sources of funds for other activities (eg broadcasting)

ii. The figures suggest that the JCRA is over-dependent on funds obtained from licensees and insufficiently funded by the Jersey Government. Most countries operate a 'mixed economy' in which the majority of costs for competition enforcement and sectoral regulation are funded centrally, whilst some sectoral regulation costs are recovered from licensees. In the case of the JCRA, the opposite is true and the majority of the organisation's costs are met by the licensees, and by the telecoms industry in particular.

11. The JCRA cannot, however, simply reallocate some of its resources from telecoms regulation to competition enforcement or market reviews, as the evidence would suggest it should do. That is because, under current funding arrangements, the JCRA cannot recover costs incurred in connection with competition matters from licensees in the telecoms or another regulated sector. Given its very small size and minimal levels of central funding, the consequence of this would appear to be that the JCRA depends on fees levied on regulated licensees, and regulated telecoms operators in particular, simply in order to sustain a basic level of operations. The JCRA is driven by its current financial arrangements to over-regulate the telecoms sector (relative to that sector's economic significance and relative to the resources that are applied in other countries) simply in order to sustain its operations. The JCRA's prioritisation statement may provide some rationale for the allocation decisions that are made, but it would seem that the current financial predicament of the JCRA also plays a significant role.

12. This is clearly very unsatisfactory. The JCRA needs to be put into a position in which it can apply its resources in a manner intended to best serve the needs of consumers and businesses in Jersey, not simply in order to sustain its own operations. The Jersey Government could address this distortion in several ways. One would involve allowing the JCRA to use funds that are obtained from licensees in sectors it regulates for activities outside of those sectors, including for general competition law enforcement. However, it is not clear why regulated licensees should bear a unique burden when it comes to the costs of overseeing the rest of the Jersey economy. By far the better approach, adopted in the other countries considered above, is to revisit the central funds provided by the Government of Jersey and increase them to a level which allows the JCRA to sustain its operations at a minimum scale even if it were to undertake no additional sectoral regulation duties. Any costs associated with sectoral regulation would then be incremental to the basic competition functions, as would the fees levied on the licensees to meet them.