JERSEY

Response of the Jersey Competition Regulatory Authority ("JCRA") to the ICN Survey on Competition Law in Small Economies
26 September 2008

The JCRA welcomes the opportunity to respond to the *Survey on Competition Law in Small Economies* (the "Survey"), and to participate in this Special Project for the 2009 ICN Annual Conference. As the competition enforcement authority for the Bailiwick of Jersey in the Channel Islands, the application of competition law in a small economy is of particular relevance to our organization and to our jurisdiction's economy on a whole.

1. Does the size of the economy affect the application of competition law, and if so how?

The ultimate goal of competition law in Jersey is to further consumer welfare through actions that promote lower prices, greater choice and increased innovation. This was made clear by the States of Jersey (the jurisdiction's parliament) when it initially considered the adoption of a competition law in the early part of this decade:

> *"It is worth setting out here the purpose of promoting competition in Jersey's economy. The starting-point has been the need to endeavour to bear down on inflation. With strong competition, businesses must work hard to win and keep customers. As a result, competition bears down on prices and drives up quality and choice. . . . Indeed, many commentators agree that the relatively low levels of inflation now seen by the developed economies are linked to the presence of strong competition policy."*[1]

These goals are similar to the goals set by or for national competition authorities in many other jurisdictions, both large and small.

To achieve these goals, the States of Jersey established the JCRA in 2001,[2] and subsequently enacted Jersey's competition law, the Competition (Jersey) Law 2005 (the "Law"). Jersey's competition law follows closely EC Competition Law with prohibitions on anticompetitive arrangements (Part 3 of the Law), abuses of dominance (Part 4 of the Law), and a mandatory system of merger control (Part 5 of the Law). Article 60 of the Law requires both the JCRA and Jersey's Royal Court[3] to attempt to ensure, so far as possible, that *"questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under Community law in relation to competition within the European Community."*

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[1] States of Jersey, *A Competition Law for Jersey*, Presented to the States on 8 January 2002 by the Industries Committee at ¶ 7.
[2] *See* Competition Regulatory Authority (Jersey) Law 2001.
[3] Jersey's Royal Court has the authority to hear appeals of JCRA decisions.

In light of this legislative framework, the JCRA has a central focus on the promotion of consumer welfare. Competition is not an end in itself, but is the primary means to promote consumer welfare.

To achieve this goal, the JCRA follows an effects-based approach to competition law, in line with current EC practice. An effects-based approach means that the JCRA examines the actual or potential effects of a practice on markets in Jersey in its determination of whether or not there is an infringement of the Law. Thus, in the JCRA's Guideline on Abuse of Dominance, we state that *"[t]he JCRA would find an undertaking's behaviour an abuse only after a detailed examination of the market concerned and the effects of the undertaking's conduct."*[4] Similarly, our Guideline on Anti-Competitive Arrangements states:

> *"Any arrangement between undertakings might be said to hinder competition to some degree, in that it restricts the freedom of action of the parties. That does not necessarily mean that the arrangement has or will have an appreciable effect on competition, however, and the JCRA does not adopt such a narrow approach. The JCRA will assess the effect of an arrangement on competition in the Island or part of it by examining it in its market and economic context."*[5]

In conclusion, the JCRA concurs with the view expressed in the OECD Global Forum on Competition's Secretariat Note in 2003 that *"like other market-related factors, small economy considerations may influence whether a particular practice will have anticompetitive effects, but that they do not require a different approach."*[6] That is, small economies do not require a different application of competition law; however, the economic circumstances of markets in small economies may materially influence the outcome of the competition law assessment.

2. The notion of a "Small Economy"

This question essentially asks which criteria are relevant in defining a "small" economy.

No matter how one defines a "small" economy, Jersey would be included. Jersey is a 45-square mile island with a population of a little over 90,000 and a gross domestic product of around US$5.1 billion.[7] In addition to being a small economy, being an island means that Jersey is also a relatively isolated economy. Jersey is located approximately 12 nautical miles from France and approximately 87 nautical miles south of the UK. Although it is much closer to France, for largely historical and cultural reasons Jersey is currently much more dependant on the UK as its major trading partner. The JCRA has previously found that over 95% of all goods imported

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[4] JCRA, Guideline on Abuse of a Dominant Position at 3.

[5] JCRA, Guideline on Anti-Competitive Arrangements at 6.

[6] See OECD Global Forum on Competition, Competition Policy and Small Economies – Note by the Secretariat ¶ 13 (7 Feb. 2003).

[7] While constitutionally linked to the UK through a common allegiance to the British Monarchy, Jersey is not part of the UK and has a special relationship with the EU. The jurisdiction has its own parliament, is responsible for its own internal affairs and, increasingly, maintains a distinct international identity.

into Jersey (which include a majority of the food products available in the island) come via ocean freight from Portsmouth in the southern UK.[8] Similarly, virtually all of Jersey's exports are shipped via ocean freight from Jersey to Portsmouth.

Because Jersey would be considered as a small economy under virtually any conceivable definition, there is little utility for us to define or consider the outer threshold of what should be considered to be a small economy.

3. Anticompetitive Agreements

Concerning anticompetitive agreements, the Survey asks:

- How, if at all, should [small economy] elements be taken into account? What is the importance of open borders in this context? Is there evidence for more oligopolies in small economies? If so, what type of competition policy is best suited to cope with the implications that oligopolies have on competition? Could the enhanced risk of collusion and anticompetitive conduct justify harsher sanctions or a different focus of the competition laws?

- Vertical restraints are often linked to imports in small economies. Does this require or justify a different analysis of vertical restraints, especially of resale price maintenance and of parallel import bans, in small economies? Moreover, could the fact that the risk of foreclosure is higher justify a different analysis?

<u>Overview of the Application of Jersey's Competition Law to Anticompetitive Agreements</u>

Part 2 of the Law takes a prohibition approach to anticompetitive arrangements, based on Article 81 of the EC Treaty. Under this approach, "*an undertaking must not make an arrangement with one or more undertakings that has the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey.*"[9] Such arrangements are considered to be anticompetitive, and Article 8(4) of the Law states that an arrangement is void *"to the extent that it is, or contains or is tainted by an anticompetitive arrangement."* Such arrangements are also subject to JCRA investigation and enforcement under the Law.

Under Part 2, as noted above, an arrangement is anticompetitive if it has the object <u>or</u> effect of appreciably hindering competition in Jersey or any part thereof. In light of Article 60 of the Law, the JCRA normally will consider a narrow category of arrangements as having the object to appreciably hinder competition. For example, these are arrangements between undertakings that directly or indirectly fix prices or other terms of trade, share markets or customers, or impose minimum resale prices. For other arrangements, a determination of whether they have the effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey

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[8] JCRA Decision M 005/05, Ferryspeed (C.I.) Limited/Channel Express (C.I.) Limited ¶ 20 (3 July 2006).

[9] Art. 8(1), Competition (Jersey) Law 2005.

or any part thereof requires a *"careful definition by the JCRA of the relevant market in any particular case having regard to all relevant and reasonable factors."*[10]

Even if an arrangement is found to appreciably hinder competition in Jersey or any part thereof, it may still be subject to an exemption granted by the JCRA under Article 9 of the Law, or to certain potential exemptions granted by Jersey's Minister for Economic Development (the "Minister").[11] The JCRA's grant of an exemption under Article 9 is governed by the same criteria as set out in Article 81(3) of the EC Treaty, and to date the JCRA has granted two such exemptions.[12] The Minister has yet to grant an exemption under the Law.

Oligopolies and their Implications in a Small Economy

In its consideration of a draft of the competition law, the States of Jersey considered giving the JCRA specific powers concerning oligopolies:

> *"It is important that there should be an explicit power for the JCRA to investigate putative, or actual, complex monopolies which might fall out with the two prohibitions, for example where a group of companies all adopt similar behaviour or engage in parallel activities but where there is no evidence of collusion or agreement."*[13]

However, specific powers in this area were not included in the final, enacted version of the Law. Any enforcement against oligopolies must therefore fall under the legal requirements of either anticompetitive arrangements (Part 2 of the Law) or abuse of dominance (Part 3 of the Law).

Under Part 2, a major JCRA focus has been the removal of fixed or recommended fees in Jersey's trade and professional associations. One of the biggest victories in this area was the removal of a fixed fee for conveyancing services in real estate transactions, which had been enforced by Jersey's Law Society since 1954.[14] The JCRA estimates that this action alone resulted in consumer savings in Jersey of approximately £2 million per annum, on an ongoing basis.[15] In addition, JCRA intervention under the Law also has led to the removal of recommended or fixed fees in Jersey among dentists, driving instructors, taxi-cab operators, building contractors, plumbers, and electricians.[16]

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[10] States of Jersey, *A Competition Law for Jersey*, Presented to the States on 8 January 2002 by the Industries Committee at ¶ 4.

[11] These are, potentially, block exemptions, small undertakings exemptions, public policy exemptions, or exemptions involving land agreements.

[12] *See* JCRA Decision C015/06.2 Concerning the General Practitioners Out-of-Hours Cooperative (23 Apr. 2007) and JCRA Decision C015/06.2 Concerning the Motor Fuels Supply Agreement between Esso Petroleum Company Ltd and Roberts Garages Ltd (25 June 2007).

[13] States of Jersey, *A Competition Law for Jersey*, Presented to the States on 8 January 2002 by the Industries Committee at ¶ 9.

[14] JCRA Media Release, *JCRA Welcomes Lawyers' Steps to Eliminate Scale Conveyancing Fee* (8 Dec. 2005).

[15] See JCRA, *Impacts of Competition Policy in the Bailiwick of Jersey* (22 Sept. 2008).

[16] Additional information about each of these matters may be found on our website, www.jcra.je.

It is difficult to say whether the former apparent prevalence of trade association fixed or recommended fees in Jersey had anything to do with small economies having more oligopolies. The JCRA is aware of trade association fixed or recommended fees being a focus of enforcers in other small jurisdictions, such as in Barbados, Greenland and Singapore. The JCRA also is aware, however, that the removal of trade association fixed or recommended fees has been an enforcement priority across Europe, in jurisdictions large and small.

Vertical Restraints

The Survey also asks about vertical restraints in a small economy, and whether they require a different analysis than in a larger economy. The draft JCRA Guideline on Vertical Arrangements states that, much like all arrangements under Part 2, a narrow category of vertical arrangements (principally, vertical price fixing) will be seen as having the object of appreciably hindering competition in Jersey. Apart from that, vertical arrangements require a detailed assessment of their actual or potential effects on competition, in light of the conditions that exist in markets in Jersey:

> *"For example, exclusive distribution agreements may restrict competition by preventing competition between alternative distributors. Similarly, exclusive purchasing agreements (by preventing the customer from sourcing products from alternative suppliers) may restrict competition between alternative suppliers for sales to a particular customer. Whether these potential restrictions amount to real restrictions for the purpose of the Law, however, depends on whether they restrict competition in practice to an appreciable extent. If, for example, from an economic perspective, the size of the Jersey market is such that only a single distributor is viable in any event, then any contractual exclusivity will have no practical effect of restricting competition which might otherwise have taken place, and thus the exclusivity will not be caught by the Law."*[17]

An interesting application of the Law to a vertical restraint in a Jersey context was the JCRA's investigation into the coal distribution industry. Here, the JCRA found that the use of recommended resale prices by the two coal distributors in Jersey had anticompetitive effects. Specifically, because the recommended retail prices tended to correspond to the distributors' own retail prices, they facilitated common retail pricing on a vertical level between the distributors and the retailers. The JCRA also found that the recommended retail prices facilitated coordination on a horizontal level between the two distributors. The end result was little to no price diversity from any source of supply for coal products in Jersey.

To address this situation, the JCRA mandated that the distributors cease issuing recommended retail prices.[18] This elimination of recommended retail prices is not, in our view, a novel application of the Law, or a departure from normal competition law

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[17] JCRA, Draft Guideline on Vertical Arrangements at 2.

[18] *See* JCRA Media Release, *Jersey's Largest Coal Distributors Agree to Follow JCRA Mandated Code of Practice* (13 March 2008). The JCRA also mandated the elimination of certain price signaling practices by the distributors.

principles in a small economy. Indeed, our inclusion of this remedy was guided by Paragraphs 225-228 of the Commission Guidelines on Vertical Restraints, which state in relevant part:

> *"The possible competition risk of maximum and recommended prices is firstly that the maximum or recommended price will work as a focal point for the resellers and might be followed by most or all of them. A second competition risk is that maximum or recommended prices may facilitate collusion between suppliers."*[19]

> *"Especially in a narrow oligopoly, the practice of using or publishing maximum or recommended prices may facilitate collusion between the suppliers by exchanging information on the preferred price level and by reducing the likelihood of lower resale prices. The practice of imposing a maximum resale price or recommending resale prices leading to such effects may also infringe Article 81(1)."*[20]

The elimination of recommended retail prices in Jersey's coal distribution industry represented an application of these principles to specific facts and circumstances that existed in a relevant product market within a small economy.

4. Abuse of Dominance

Concerning abuse of dominance, the Survey asks whether a specific regime should apply to the conduct of dominant undertakings in a small economy. It also asks whether a different approach should apply in a small economy toward collective dominance issues.

<u>The Assessment of Dominance in a Small Economy</u>

Part 3 of the Law follows a behavioural approach to the assessment of dominance, consistent with Article 82 of the EC Treaty, upon which Part 3 is based. In drafting the Law, the States of Jersey observed that:

> *"The basic definition of a dominant position should be that an undertaking is in such a position when it has the economic strength to behave to an appreciable extent independently of its competitors, customers and suppliers."*[21]

This definition is reflected in the JCRA Guideline on Abuse of Dominance. Specifically, after defining relevant product and geographic markets, the JCRA will assess the undertaking's position in the market. The Guideline states that *"[m]arket share is an important factor but does not, on its own, determine whether an undertaking is dominant."*[22] According to the Guideline, the JCRA may presume that

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[19] European Commission, *Guidelines on Vertical Restraints*, C291/1 ¶ 226 (13 Oct. 2000).
[20] *Ibid*. ¶ 228.
[21] States of Jersey, *A Competition Law for Jersey*, Presented to the States on 8 January 2002 by the Industries Committee at ¶ 5.
[22] JCRA, Guideline on Abuse of a Dominant Position at 6.

an undertaking with a market share persistently above 50% has a dominant position, although this presumption is rebuttable upon evidence that the undertaking in question does not, in fact, have the economic strength to behave to an appreciable extent independently of its competitors, customers and suppliers.[23] On the other hand, the JCRA considers it unlikely that an individual undertaking will be dominant with a market share below 40%, absent strong evidence to the contrary.[24] These presumptions are based on the JCRA's interpretation of relevant EC law under Article 60, but have not yet themselves been considered by Jersey's Royal Court. They thus should be considered as agency practice in Jersey.

In addition to market share, other important factors listed in the Guideline in determining whether or not a dominant position exists are the relative position of competitors in the relevant market, how market shares have changed over time, barriers to entry and the potential for new competition, buying power, and the presence of government regulations that may prevent the exercise of market power.

The assessment of dominance under the Law in Jersey thus corresponds to the *Recommended Practices on the Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws* adopted at the 7th Annual ICN Conference in April 2008. Point 9 of these Recommended Practices specifically addresses the assessment of dominance in small economies, and states that *"the analytical framework used to assess market power is the same in small and/or isolated economies, but market factors may result in more limited competition."* The Comment to this Recommended Practice states:

> *"The basic framework used to assess dominance/substantial market power is not altered by an economy's relative size or openness to trade. However, such factors can influence the ultimate outcome of the dominance/substantial market power assessment. This influence stems from the relative isolation or openness of the economy, scale economies, and the corresponding effect on barriers to entry. If an economy is small and/or isolated from external trade, this may result in higher barriers to entry which could facilitate a finding of dominance/substantial market power."*[25]

This Recommended Practice arose from a Report on the Assessment of Dominance/Substantial Market Power presented at the 6th Annual ICN Conference in May 2007.[26] This Report specifically asked whether an economy's size and its openness to trade affect the assessment of dominance. The Report states that a majority of jurisdictions that responded to this query (16 out if 18) stated that the basic framework used to assess dominance is not altered by an economy's relative size or openness to trade. Such factors, however, can heavily influence the ultimate outcome of the dominance assessment.[27] The Report also noted that there was mixed

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[23] *See ibid.*
[24] *See ibid.*
[25] ICN, Unilateral Conduct Working Group, *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws, Recommended Practices* ¶ 9, comment.
[26] *See* ICN, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies* (May 2007).
[27] *See ibid.* at 58.

evidence from responding ICN jurisdictions on whether dominance in a small economy may be presumed at different levels of market share (lower or higher), compared to larger economies.[28]

Abuse

Similar to virtually all jurisdictions large and small, the mere possession of a dominant position in Jersey does not infringe the Law. An infringement arises from an abuse of a dominant position. Article 16(2) of the Law lists examples of actions that can be considered as an abuse of a dominant position, which correspond to the examples listed in Article 82 of the EC Treaty.

While the law is the same, different economic circumstances that exist in Jersey as a small, relatively isolated island economy may substantially affect outcomes. For example, while application of the essential facilities doctrine may have been called into question in large economies like the United States in light of the decision of the U.S. Supreme Court in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), its potential application remains potentially relevant in Jersey's specific circumstances. As the States of Jersey observed when considering a draft of the competition law, *"[t]here is no question of Jersey duplicating its harbour, its airport, or its electricity grid."*[29] Thus, for example, while different ports may be considered as substitutes in larger economies like the United States, France, or the United Kingdom, such would not be the case in Jersey where, as noted above, the JCRA has found that virtually all of island's imports and exports flow through the commercial harbour in the capital city, St Helier.[30]

Collective Dominance

Issues of collective dominance have not arisen in Jersey since Part 3 of the Law first came into effect on 1 November 2005. However, on this issue the JCRA's Guideline on Abuse of Dominance states:

> *"The Law prohibits abuses of a dominant position by one or more undertakings. This language mirrors that contained in Article 82 of the EC Treaty and means that a dominant position may be held by two or more independent undertakings, provided that from an economic point of view they present themselves or act together in a particular market as a collective entity. The JCRA intends to follow, as far as possible, guidance under European Community law concerning questions of collective dominance."*[31]

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[28] *See ibid.*
[29] States of Jersey, Draft Competition (Jersey) Law 200-, Lodged au Greffe on 9 March 2004 by the Economic Development Committee.
[30] *See supra* Page 3, Note 8. It should be noted that this discussion is hypothetical only, in that the JCRA has not had the opportunity to decide under the Law whether St Helier harbour is, in fact, an essential facility.
[31] JCRA, Guideline on Abuse of a Dominant Position at 8.

5. Mergers

Concerning merger enforcement, the Survey asks:

- Are there any differences with respect to the substance of the merger control regime? Are there different justifications for having a merger control regime in small economies? Should there be different guidelines for geographic market definition? How might the size of the economy affect the application of legal presumptions? Which types of remedies are best suited for small economies?

- On the level of the procedural regime, what are the appropriate criteria triggering an intervention or an inquiry into a merger project: turnover thresholds; structural criteria, such as the degree of organisational integration (existence of branches or subsidiaries) of one or both of the merging companies; effect on competition? Should there be a mandatory or a voluntary notification regime, with or without a prohibition to proceed without clearance?

Are there any differences with respect to the substance of the merger control regime?

Under Part 4 of the Law, the JCRA must determine if a proposed merger or acquisition *"would substantially lessen competition in Jersey or any part of Jersey."*[32] The methodology the JCRA uses to make this determination corresponds to that used in other jurisdictions, i.e., defining relevant product and geographic markets and assessing levels of market concentration both before and after the proposed merger, assessing the potential for unilateral or coordinated anticompetitive effects, considering factors such as market entry and buyer power, and considering potential efficiencies arising from the merger.[33]

While the methodology the JCRA uses to assess the competitive effects of a proposed merger may reflect that used in larger economies, the economic circumstances that exist in Jersey, as a small island economy, may materially influence the outcome of the merger assessment.

An example of this is the JCRA's decision in the merger between Ferryspeed (C.I.) Limited and Channel Express (C.I.) Limited.[34] In this case, the JCRA concluded that the proposed merger would result in a substantial lessening of competition in a relevant market defined as the provision of seaborne temperature-controlled freight services between St Helier and Portsmouth, based on both unilateral and coordinated anticompetitive effects. During our assessment, it was argued that, even if the market is highly concentrated, entry barriers were low. Based on our assessment we did find that *"barriers to entry into the relevant market may not prevent new entry absolutely."*[35] However, increased costs that new entrants would face compared to incumbent operators, arising from factors such as limited ferry capacity and suitable warehouse space in Jersey, led the JCRA to conclude that entry likely would not occur *"on a scale required for new entrants to place competitive pressure on the*

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[32] Art. 22(4), Competition (Jersey) Law 2005.
[33] JCRA, Guideline on Mergers and Acquisitions at 7-12.
[34] *See* JCRA Decision M005/05 (3 July 2006).
[35] *Ibid.* ¶ 134.

incumbent firms in the relevant market."[36] While overcoming such increased costs may be possible in larger economies, the JCRA concluded that this was not likely in Jersey's economic circumstances as a small island economy:

> *"Although such scale effects may be overcome in a rapidly expanding market, or by new entrants being willing to cross-subsidize losses in the short-term to gain sufficient scale, we conclude that neither of these factors is relevant in a Jersey context. Data cited above shows that demand for freight services to and from Jersey is stable, and may even be decreasing. Moreover, Jersey's small size makes short-run cross-subsidization of losses an unlikely rational business strategy."*[37]

Thus, the JCRA concluded that entry would not be sufficient, likely or timely to counteract or deter the substantial lessening of competition resulting from the proposed acquisition.

<u>Are there different justifications for having a merger control regime in small economies?</u>[38]

In many jurisdictions large and small, the justification for merger control is that it enables authorities to assess the competitive effects of mergers before they occur, and to take effective *ex ante* enforcement action against those that would result in a substantial lessening of competition. The arguments favouring merger control may even be stronger in small and isolated economies, however, because of their generally more concentrated markets and higher barriers to entry, compared to larger economies.[39] Furthermore, because enforcement agencies in small economies tend to have fewer resources than in large economies, it may be more difficult for them to take effective post-merger enforcement action against resulting anticompetitive effects. For example, the potential abuse of a dominant position may be avoided through effective merger control enforcement. Effective merger control may also be a way for enforcement agencies to prevent conditions conducive to oligopolistic coordination.

<u>Should there be different guidelines for geographic market definition?</u>

Geographic market definition depends on the economic circumstances of the proposed merger under review. In particular, this depends on both demand and supply side substitution and the area in which that substitution takes place.[40]

Geographic market definition is thus a highly fact-specific inquiry. The facts in many mergers the JCRA has reviewed have indicated the presence of a geographic market broader than Jersey, based primarily on evidence of customers not limiting their

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[36] *Ibid.*
[37] *Ibid.*
[38] The response to this particular question is based on *Conference: Small economies and competition policy – A fair deal?* Concurrences N° 3-2008 at 8-12 (www.concurrences.com).
[39] *See* Gal, COMPETITION POLICY FOR SMALL MARKET ECONOMIES at 159 ("two structural elements are more commonplace in small economies: a small number of competitors and high entry barriers").
[40] *See* JCRA, Market Definition Guideline at 9-10.

selection of the goods or services in question to Jersey-based suppliers. Examples of these cases have involved the provision of trust and fund administration services,[41] home shopping,[42] and the provision of English legal advice.[43] Many of these cases have not required the JCRA to reach a definitive conclusion on the outer boundaries of the relevant geographic market, for even if the market was confined to a Jersey-only analysis, the proposed acquisitions under review would not have resulted in a substantial lessening of competition.

In other cases, the JCRA concluded that the relevant geographic market was limited to Jersey, as the evidence indicated that substitution by non-Jersey based suppliers of the goods or services in question either does not occur or is not likely. This was the conclusion, for example, concerning the JCRA's analysis of the supply of oysters in Jersey.[44]

Finally, consistent with the Law's standard that the JCRA may prohibit an acquisition if it would substantially lessen competition in Jersey *or any part of Jersey*, the JCRA may define a relevant geographic market to be smaller than the whole island of Jersey, when the evidence indicates that both supply and demand-side substitutability do not extend to the entire island. An example of this was the JCRA's review of a proposed merger of convenience stores in its decision concerning the proposed acquisition by Spar (Channel Islands) Limited of several stores from C.I. Newsagents.[45] Here, the JCRA concluded that the relevant geographic market was a radius of between ½ to 1 mile around each retail outlet.[46] This definition was based on evidence of economic circumstances particular to Jersey, and consistent with precedent from the UK.[47]

<u>How might the size of the economy affect the application of legal presumptions?</u>

The issue of legal presumptions in merger review has not yet been considered by the Royal Court in Jersey. Nor are specific presumptions for merger review defined in our Guidelines. If the question arose, Article 60 of the Law may require a consistent interpretation in Jersey to that taken under EC competition law, but this issue has not been decided.

<u>Which types of remedies are best suited for small economies?</u>

As of 15 September 2008, the JCRA had imposed remedies, in the form of conditional clearance decisions, concerning two proposed mergers: the merger between Ferryspeed (C.I.) Limited and Channel Express (C.I.) Limited,[48] and the proposed acquisition by Spar (Channel Islands) Limited of several stores from C.I. Newsagents.[49]

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[41] *See* JCRA Decision M001/06 (18 Apr. 2006), JCRA Decision M007/06 (7 July 2006), and JCRA Decision M145/07 (3 Sept. 2006).
[42] *See* JCRA Decision M266/08 (19 May 2008).
[43] *See* JCRA Decision M192/08 (21 Apr. 2008).
[44] *See* JCRA Decision M193/07 (25 Feb 2008).
[45] *See* JCRA Decision M114/07 (19 Sept. 2007).
[46] *See ibid.* ¶ 32.
[47] *See ibid.* ¶¶ 30-32.
[48] *See* JCRA Decision M005/05 (3 July 2006).
[49] *See* JCRA Decision M114/07 (19 Sept. 2007).

Concerning the former, the JCRA required the divestiture of a warehouse at Jersey's principal commercial harbour at St Helier. The divestiture of this warehouse removed the potential of the acquiring party to further strengthen its dominant position as a result of the proposed acquisition, and facilitated the entry of a new competitor.[50] Therefore, the considerations behind ordering divestiture in this matter were little different than those supporting structural remedies in larger jurisdictions.

Small economy considerations were more relevant, however, to the imposition of behavioural remedies concerning the proposed acquisition by Spar (Channel Islands) Limited of several stores from C.I. Newsagents.[51] As noted above, this matter involved the proposed merger of the two largest convenience store chains in Jersey. The merger analysis concluded that the acquisition would result in a substantial lessening of competition in convenience stores in a particular part of the island; however, concerns were whether or not a potentially small divestiture package was viable and whether the divested stores could be operated efficiently. The JCRA therefore imposed behavioural remedies instead of ordering divestiture. The principal one of these remedies was a commitment by the acquirer to follow an island-wide pricing policy. The JCRA was satisfied that this commitment addressed the risk of a substantial lessening of competition because (i) it would guarantee the same store prices as the acquirer sets in local markets in which it would continue to face vigorous competition (i.e., competitive prices would be "transferred" to the concentrated local market); and (ii) because Jersey's largest local markets remained competitive, the island-wide pricing would be determined mainly by conditions in the competitive local markets, thereby denying the acquirer the ability to significantly increase prices. Jersey's small size also would assist the JCRA in monitoring compliance.

We make no presumption that such a remedy may be applicable in larger economies, where costs and incentives may differ materially in different local markets. In Jersey's particular economic circumstances, however, imposing a national pricing policy was an effective way to protect consumer interests while permitting the merger to proceed.

What are the appropriate criteria triggering an intervention or an inquiry into a merger project?[52]

In Jersey, the current reportability thresholds are based on each merging party's share of supply or purchase of goods or services supplied to, or purchased from, persons in Jersey.[53] While such thresholds may not follow the ICN's Recommended Practice that "*notification thresholds should be based on objectively quantifiable criteria*,"[54] they have worked well in Jersey's context, and may be particularly well suited for very small economies. Share of supply thresholds are more closely related to the

[50] *See* JCRA Decision M005/05 ¶ 160 (3 July 2006).
[51] This discussion of the behavioral remedies in the Spar case is based on that appearing in *Conference: Small economies and competition policy – A fair deal?* Concurrences N° 3-2008 at 12.
[52] The response to this particular question is based on *Conference: Small economies and competition policy – A fair deal?* Concurrences N° 3-2008 at 9-11.
[53] These thresholds are detailed in the Competition (Mergers and Acquisitions) (Jersey) Order 2005.
[54] ICN, Recommended Practices for Merger Notification Procedures ¶ II.B.

central focus of merger control – determining whether a proposed acquisition would substantially lessen competition – compared to criteria such as the turnover or assets of the merging parties. In the JCRA's experience, this makes it easier to explain to merging parties, in a jurisdiction where competition law is a new concept, why they must undergo the merger review process. Such thresholds also allow the JCRA and merging parties a certain degree of flexibility in deciding whether or not individual cases require notification and approval. To facilitate this, the JCRA welcomes pre-notification meetings with merging parties. Jersey's share of supply thresholds also have allowed the JCRA to concentrate its very limited enforcement resources on the most meaningful merger cases, as Jersey has a relatively high ratio of "complex" merger cases compared to the total number of filings received (around 20%).[55] Finally, recent internal analysis we have undertaken shows that if Jersey had turnover-based merger thresholds at levels similar to those that exist in other small island jurisdictions, this would not have materially reduced the number of merger filings we have received over the past three years, and may have had the negative effect of materially increasing the number of required merger filings.

<u>Should there be a mandatory or a voluntary notification regime, with or without a prohibition to proceed without clearance?</u>[56]

Part 4 of the Law sets out a mandatory merger clearance regime in Jersey. Specifically, Article 20(1) states that the parties must not execute a merger or acquisition satisfying one or more of Jersey's reportability thresholds except with, and in accordance with, the JCRA's approval. This means that *"the merging parties must not implement the merger, or otherwise engage in joint commercial activities, until the merger has been approved by the JCRA."*[57] The Law contains no distinction between Jersey-based entities and foreign-based entities operating in Jersey: the jurisdiction's merger and acquisition requirements potentially apply, based on the respective share of supply of the merging parties in Jersey, irrespective of the domicile or nationality of the parties involved.

The JCRA's experience supports the adoption of a mandatory system of merger review, as opposed to a voluntary system. In Jersey, competition law is a new concept which the JCRA has taken great efforts in explaining to local businesses, consumers, and other interested parties. In these circumstances, a mandatory merger filing requirement makes legal obligations black and white and reduces the scope for misunderstandings. Specifically, it may prevent a potential cavalier *("come and get us if you can")* attitude among certain businesses and their dealings with a newer enforcement agency.

Working closely with local law firms and their clients involved in potential mergers and acquisitions, we have strived to explain the difference between a merger satisfying the procedural notification test (meaning that, while not necessarily

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[55] A "complex" merger case is defined as one requiring either (i) a Phase II or equivalent investigation (regardless of outcome), (ii) conditional clearance (either after Phase I or II), or (iii) prohibition. The data supporting this estimate appears in *Conference: Small economies and competition policy – A fair deal?* Concurrences N° 3-2008 at 9-10.

[56] The second paragraph of the response to this particular question is based on *Conference: Small economies and competition policy – A fair deal?* Concurrences N° 3-2008 at 9.

[57] JCRA, Guideline on Mergers and Acquisitions at 6.

anticompetitive, the merger requires notification to, and approval by, the JCRA), and the JCRA concluding that it would result in a substantial lessening of competition (thereby giving us grounds for prohibition or conditional approval). To facilitate this, as noted above, the JCRA encourages pre-filing discussions with merging parties and their counsel, and the Law in Jersey and the JCRA's own internal procedures are flexible enough to permit this procedure.

6. Conclusion

We hope this response has sufficiently answered the questions presented and, in doing so, provided a summary of the current state of competition law enforcement in Jersey. We would be pleased answer any follow-up questions the co-chairs may have that arise from the JCRA's response to the Survey.