JERSEY COMPETITION REGULATORY AUTHORITY

Impacts of Competition Policy in the Bailiwick of Jersey

22 September 2008

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I. Introduction & Executive Summary

In this study, the Jersey Competition Regulatory Authority ("JCRA") attempts to measure some of the effects competition policy has had in Jersey, since that policy was first implemented by the States of Jersey in the early part of this decade. By *competition policy* we mean the adoption of Jersey's Competition Law, the Competition (Jersey) Law 2005, combined with current States policy to open hitherto state monopolies to competition, as evidenced by the Telecommunications (Jersey) Law 2002 and the Postal Services (Jersey) Law 2004.

Traditionally, assessing the impact of competition policy has been fraught with difficulty and, as a result, such assessments have not been commonly undertaken by regulatory agencies.[1] This is especially so for younger agencies in small economies, such as the JCRA in Jersey. One reason for this is the difficulty in attributing changes that occur in markets to specific regulatory actions. Another is that the impact of regulatory actions can arise, by definition, only after the actions have taken place, and their full impact often takes time to develop. The Office of Fair Trading ("OFT") in the UK, for example, states that in-depth evaluations of regulatory actions can usually only be undertaken at least three years after project completion, when the full effects of an intervention have, or should have, taken place.[2]

In light of these difficulties, in this study the JCRA does not attempt to calculate the total impact of competition policy on Jersey's economy; nor do we attempt to estimate the effects of all JCRA interventions undertaken over the past several years. Instead, we examine the preliminary estimated effects, or likely effects, arising from specific regulatory actions that the JCRA has undertaken in each of our three current areas of competence: Competition Law Enforcement, Telecommunications Regulation, and Postal Regulation. In each one of these areas, the JCRA estimates the impacts arising from regulatory actions include the following:

- *Competition Law Enforcement* – Jersey's Competition Law first came into effect in May 2005. One of the significant actions that has occurred since then was the JCRA's intervention that led to the removal of the 1% scale fee that formerly applied to property conveyancing in Jersey. From this action, the JCRA estimates that consumers in Jersey have saved an aggregate of approximately **£2 million** per year, equating to approximately **£5.5 million** in estimated total savings since the start of 2006. Thus, while this case is just one of the numerous interventions the JCRA has made under the Competition Law, our preliminary estimate is that it alone has generated estimated annual savings to consumers in Jersey of a magnitude of at least four times the annual grant the JCRA currently receives from the States of Jersey for Competition Law enforcement activities (£480,000).

- *Telecommunications Regulation* – The implementation of the Telecommunications (Jersey) Law 2002 ushered in a new era in the provision of telecommunication services in Jersey, one focussed on the

[1] *See*, for example, Office of Fair Trading, *Approach to calculating direct benefits to consumers* at p. 3 (Sept. 2007) ("*Impact assessments and evaluation are relatively new to competition authorities*.").
[2] *See ibid*. at p. 10.

satisfaction of user demand through, whenever appropriate, the promotion of competition. This has resulted in many changes in telecommunication services in Jersey. In this study, we examine market effects in just two areas: fixed-line calls to the UK and mobile calls. As detailed below, the JCRA's preliminary estimates of consumer savings arising from price reductions in these areas are approximately **£5 million** (for fixed-line calls to the UK) and approximately **£2 million** (for mobile calls).

- *Postal Regulation* – The regulation of Jersey's postal market is the JCRA's newest core competency, which only began on 1 July 2006 with the incorporation and licensing of Jersey Post ("JP"). Thus, unlike Competition Law and Telecommunications Regulation, insufficient time has passed to assess, even on a preliminary basis, the effects of regulatory actions. Looking forward, however, the price control that came into effect on 1 January 2008 is expected to keep JP's price increases for core postal services well below Jersey's overall inflation rate over the next three years.

The estimated savings highlighted above are the JCRA's best estimates, based on available data. They also are conservative estimates.

The regulatory actions that serve as case studies herein represent only a few of the actions that the JCRA has undertaken in its role as the primary enforcer of Jersey's Competition Law and regulator of the postal and telecommunications sectors. These examples were selected based on the availability of data and the time that has passed since the intervention occurred. So, for example, while the JCRA has engaged in many enforcement actions under Jersey's Competition Law, conveyancing was selected for analysis because the JCRA was able to estimate market effects over a two-plus year period, utilizing both price estimates provided by lawyers and data for total residential property sales in Jersey provided by the States of Jersey's Statistics Unit. Furthermore, because the JCRA has been active in Jersey's telecommunications sector since 2003, a longer time compared to either competition law enforcement or postal regulation, data was available to estimate market effects in two distinct areas – fixed-line calls to the UK and mobile calls.

In addition to estimating the impact of past regulatory actions, this study also discusses the broader impact of competition policy in deterring anticompetitive conduct that otherwise might have occurred. Recent work by the OFT in the UK suggests that, in the overall areas of preventing cartels and anticompetitive mergers, the deterrent effect of competition policy is much more significant than the effects arising directly from specific past enforcement actions. The OFT's findings in the UK are consistent with recent experience in Jersey, in which the JCRA is aware of at least one cartel, and at least one anticompetitive merger, that have not proceeded in light of the Competition Law. Additional anticompetitive actions likely have been deterred but are never brought to our attention.

In addition to benefits arising, either directly or indirectly, from the JCRA's enforcement efforts, international experience demonstrates that an economy on a whole benefits from competition in the form of increased efficiency, innovation and productivity. This has been a key rationale for the adoption of competition laws in countries around the world, in economies big and small, including in Jersey. The benefits accruing to an economy, however, from increases in efficiency, innovation and productivity, are generally seen as unquantifiable.

A further benefit of competition policy is the JCRA's role as one of the leading experts on the application of competition law in small economies. The JCRA participates in the development of international best practices in the application of competition law, which we then apply in Jersey. By our participation in these efforts, the JCRA successfully advocates that best practices which are developed take into account the economic circumstances that exist in jurisdictions large and small. In this modest context, we are helping to ensure that Jersey's interests are taken into account internationally.

The JCRA has accomplished these achievements while adhering to strict standards of fiscal responsibility. The JCRA's annual grant for Competition Law enforcement has been at the same level since 2005, meaning that this expenditure has decreased in real terms by approximately 16% during this period. The JCRA has also reduced licence fees during the past few years and, when appropriate, made refunds to licensed operators. The size of the JCRA's staff complement of 9 also has remained the same since 2005, the year the Competition Law came into effect.

Finally, even an effectively enacted and enforced competition policy cannot shelter a country from global macroeconomic trends, which recently have been inflationary, especially in vital areas such as food and fuel. These trends affect all countries, large and small. An effective competition policy, however, helps to ensure that the effects on consumers of such global macroeconomic trends are minimized, and not made worse by anticompetitive activities such as cartels or abuses of dominance.

II. Competition Law

Jersey's competition law, the Competition (Jersey) Law 2005, prohibits anticompetitive arrangements (Part 2 of the Law), abuses of dominance (Part 3 of the Law), and anticompetitive mergers and acquisitions (Part 4 of the Law). Parts 2 and 3 of the Law came into full effect on 1 November 2005, and one of the JCRA's initial, and continuing, enforcement priorities has been the elimination of fixed or recommended fees among competitors in Jersey. One of our most significant achievements in this area has been the removal of the formerly fixed fee for conveyancing, which is discussed in greater detail, below.

1. Case Study on the Elimination of Fixed Conveyancing Fees

On 8 December 2005, the JCRA announced that the members of the Law Society of Jersey had decided to eliminate the scale fee that had applied since 1954 to conveyancing services for the purchase or sale of property in Jersey.[3] The scale fee required all Law Society members to charge a fee of no less than 1% of the value for the provision of conveyancing services for the purchase or sale of property in Jersey, or charge no fee at all.[4] The scale fee had the effect of producing a common price

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

[4] Limited exceptions were allowed for some first-time home buyers.

(1% of the value) among lawyers in Jersey for the provision of conveyancing services for residential property transactions. According to public reports, the Law Society had previously enforced this rule by denying requests from individual lawyers to charge less than the 1% fee.[5]

The JCRA notified the Law Society that the scale fee likely would infringe the Competition Law's prohibition on price fixing agreements among competitors and urged the Law Society to voluntarily eliminate the fee to avoid potential enforcement action. The JCRA thus welcomed the Law Society's decision to eliminate the 1% scale fee. At the time, the JCRA stated that *"[t]his will enable conveyancing lawyers to compete with each other on price, bringing potentially lower prices to consumers."*[6]

In the subsequent two and a half years, this prediction largely has come true. Through information gained by the JCRA during an informal survey of conveyancing lawyers from thirteen law firms in Jersey undertaken from March to May 2008, the JCRA found that conveyancing fees now vary substantially among suppliers and that consumers shop around for the best price for conveyancing services. This is precisely the type of behaviour one would expect to see in a competitive market. In this market, consumers have benefitted overall in terms of reduced prices. Whereas under the old rule fees were set at 1% of the value, today we understand that fees generally range from 0.5% to 0.75%, with fees even lower (0.2% or 0.3%) in some instances. Taking a conservative estimate of fee reductions (to equate to a fee of 0.75%), the JCRA estimates that, overall, consumers in Jersey have saved approximately **£2 million per year**, or approximately **£5.5 million in total**, as a result of the abolition of the scale fee, as detailed in Table 1.

Table 1: Estimated Conveyance Fee Savings				
Year	**Total Value of Residential Property Sales in Jersey**[7]	**Total Fees based on the former 1% scale fee**	**Total Fees based on an average fee of 0.75%**	**Estimated Savings**
2006	£800 million	£8 million	£6 million	£2 million
2007	£900 million	£9 million	£6.75 million	£2.25 million
2008 (1st half)	£500 million	£5 million	£3.75 million	£1.25 million
Total Est. Savings				**£5.5 million**

[5] *See* Christine Herbert, *Lawyers at odds over 1% conveyancing fee*, Jersey Evening Post, p. 21 (6 June 2005) (reporting on the Law Society's denial of a request from a law firm to offer an introductory discount of 10-20% for the provision of conveyancing services).

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

[7] From States of Jersey Statistics Unit. Because we were told that the removal of the scale fee has had its greatest impact on residential property transactions, the value of commercial and land-only transactions have been excluded.

The following points also came through in the JCRA's survey:

- Concerning residential properties, we were told that some lawyers provided limited forms of discounting prior to the elimination of the scale fee. For example, because under the former rule a lawyer could charge 1% *or nothing* for conveyancing services, lawyers could offer "two for one" deals, under which if a client retained the same lawyer for both the sale of one property and the purchase of another, the lawyer could charge the client 1% for one transaction but nothing for the other. Such discounts were discretionary, however, and by their nature available only to clients engaging in multiple property transactions, who had to retain the same lawyer for all of them. Moreover, we are uncertain of the frequency of such offers under the former 1% rule in the residential property market, especially in light of evidence that the Law Society otherwise enforced compliance with the rule.[8] The market-wide reductions in fees that have occurred over the past two-plus years would not have been possible without the elimination of the scale fee rule.

- While, as indicated above, overall savings have been substantial, the level of savings on individual property transactions varies. This is because the work required of the conveyancing lawyer often is not dependant on the value of the property. Thus, because lawyers now base their fees on the estimated amount of work involved, individual savings tend to be more for higher value transactions compared to lower value transactions.[9] Also, because more work is involved in the sale of a share transfer property as opposed to a freehold,[10] savings tend to be less for share transfers, especially those of lower value. We received little to no evidence, however, of consumers actually being worse off in terms of fees (i.e., being charged a fee of more than 1%) in the current market.

- Many lawyers expressed a concern that while fees have been reduced, service levels also have suffered. They accused some lawyers (always unnamed) of putting less than the required effort into conveyancing work, and noted that some prices quoted in the market appear too low to reasonably cover a lawyer's costs. In a competitive marketplace, consumer choice is not only driven by price, but also by important factors such as quality and trust. Low price may not necessarily result in the best service, and if individual lawyers actually are providing inadequate services to their clients we would expect, over the longer term, that their businesses will suffer as a result. Moreover, Law Society members are subject to the ethical obligations to their clients set out in the Law Society's Code of Conduct, and can face potential disciplinary action if ethical standards of service are not upheld. We are not aware of any disciplinary actions being taken by the Law Society against a lawyer for the provision of inadequate conveyancing services since the removal of the 1% scale fee.

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[8] *See supra* Note 5.

[9] For example, if a lawyer's estimated costs for providing conveyancing services are £3,000, this would result in greater savings, in terms of percentage, for the purchase of a £1 million property (a 0.30% fee) compared to a £400,000 property (a 0.75% fee).

[10] We were told that for share transfer acquisitions, in addition to conducting a title search and other work normally associated with a freehold acquisition, the lawyer acting for the purchaser also has to conduct due diligence on the company holding the property.

- Some lawyers also said that under the former 1% rule, a lawyer may have had greater latitude to not charge a client for additional services that may be required in particular real estate transactions. Such services would be provided at no charge, or would be considered by the lawyer to be included in the 1% conveyancing fee. In the current environment, we were told that lawyers have a greater incentive to charge clients for all individual extra services provided. We are uncertain, however, how frequently lawyers are required to undertake services in addition to conveyancing services when handling property transactions. Additionally, we are uncertain how frequently lawyers provided extra services for "free" under the old scale fee. In any event, if under the old 1% rule the fee a lawyer charged for conveyancing was excessive compared to the work actually provided, the extra services provided to the client were not really "free".

- Finally, while lawyers agreed that the removal of the scale fee resulted in them earning smaller fees in terms of percentage, some also said that the removal of the scale fee has permitted them the flexibility to treat conveyancing as a business opportunity to gain new clients through offering competitive fees, and keeping those clients through offering quality services.

In summary, the results of this case study show that consumers in Jersey have benefitted strongly from lower conveyancing fees as a result of the removal of the former 1% rule (although the old caveat of *you get what you pay for* may still apply in some instances) and that lawyers and law firms are actively competing against each other for the provision of conveyancing services in Jersey.

2. Other JCRA Actions under the Competition Law

Conveyancing is just one of the many JCRA interventions under the Competition Law. In addition, since the Competition Law came into effect in 2005:

- The JCRA has considered nearly 200 Competition Law inquiries and conducted over 20 investigations into alleged Competition Law infringements. These enforcement efforts have resulted in the removal of fixed or recommended fees in Jersey among dentists, driving instructors, registered taxi-cabs, building contractors, plumbers and electricians.[11] Furthermore, a recent JCRA investigation resulted in the elimination of both price signalling and the use of recommended resale prices in Jersey's coal distribution industry, changes intended to facilitate greater competition and consumer choice.[12]

- The JCRA also has granted two exemptions under the Competition Law, one covering an agreement among general practitioners ("GPs") concerning after-hours medical care in Jersey, and another concerning a fuel distribution agreement between Esso and Roberts Garages.[13] Both exemptions are subject to

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[11] Additional information about each of these matters may be found on our website, www.jcra.je.
[12] *See* JCRA Media Release, *Jersey's Largest Coal Distributors Agree to Follow JCRA Mandated Code of Practice* (13 Mar. 2008).
[13] *See*, respectively, JCRA Decisions C015/06.2 (23 Apr. 2007) and C105/06 (25 June 2007).

strict conditions intended to facilitate competition and protect consumers. For example, under the exemption granted to the GP After-Hours Cooperative, members of the cooperative must justify to the JCRA that proposed price increases are cost-justified, and are currently prohibited from charging patients fees over and above those charged for consultations.[14]

- In the area of mergers and acquisitions, the JCRA has issued 25 merger decisions since May 2005. Of these, 23 have been unconditional approvals, while 2 have been conditional approvals.[15] The 2 conditional approvals involved matters that risked substantially lessening competition in Jersey, had not the JCRA intervened. In one, the JCRA prevented the largest supplier of temperature-controlled freight services in Jersey from acquiring additional warehouse space at Elizabeth Harbour. This decision facilitated the occupation of the warehouse by another freight company, which commenced its own independent operations in Jersey.[16] In the other, the JCRA mandated that Spar follow an island-wide pricing policy after its proposed acquisition of the r-Store chain in Jersey.[17] The purpose of this was to ensure that consumers located in rural areas would not be discriminated against in the form of higher prices. In addition to these 2 cases, there have been other instances where, in response to our recommendation, parties have restructured their proposed mergers in a pro-competitive manner, such as reducing the length or scope of noncompetition clauses.

- In 2008 the JCRA collected £20,000 in fines from two foreign multinational companies operating in Jersey for failing to comply with the Competition Law.[18] As the Competition Law requires, the JCRA passed on all proceeds from these fines to the States of Jersey.

- When requested, the JCRA provides advice to the States of Jersey, States Departments, the Minister for Economic Development and Scrutiny Panels on important issues such as the Island's retail strategy, the potential sale of JT, bull semen importation, the provision of free police services at special events, the future of Jersey's dairy industry and other matters.

- Finally, the JCRA has provided both formal and informal guidance to numerous companies and individuals on compliance with Jersey's Competition Law. It also has produced consumer information, such as articles appearing in the *Jersey Evening Post* and *Consumer Council Newsletter*, to inform consumers on how they can help detect potentially anticompetitive conduct.

These actions of the JCRA in Jersey reflect similar actions undertaken by competition law enforcement authorities in other jurisdictions, both large and small, to the benefit of their consumers and economies.[19]

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[14] *See* JCRA Decision C015/06.2 at ¶ 43.
[15] These decisions are available on our website, www.jcra.je.
[16] *See* JCRA Decision M005/05 (3 July 2006).
[17] *See* JCRA Decision M114/07 (19 Sept. 2007).
[18] *See* JCRA Decision M152/08 (13 Dec. 2007) and JCRA Decision M170/08 (24 Jan. 2008).
[19] *See* Charles Webb, *Multum in Parvo: competition law in small economies compared*, Jersey Law Review, Vol. 10, Iss. 3 at p. 356 (Oct. 2006) (reviewing competition law enforcement efforts in various

III. Telecommunications

Regulation of telecommunications in Jersey was the JCRA's first core competency, which started at the beginning of 2003, and remains a vitally important area of focus. The JCRA therefore has a longer period in which to measure effects in the telecommunications sector, compared to our more recent responsibilities in competition law enforcement and postal regulation. Because of this, in this study the JCRA examines changes that have occurred in two areas: fixed-line calls to the UK and mobile telephony.

1. Case Study on Fixed-line Calls to the UK

Prior to 2002, Jersey Telecom Limited ("JT") enjoyed a monopoly in the provision of fixed-line calls to the UK and priced these calls at 6 pence per minute. In July 2003 Newtel Limited attempted to enter this market with a bypass number facility using a Freephone (800) access. JT initially blocked access to Newtel's Freephone number. After the JCRA's intervention JT stopped this practice, but then charged Newtel an access fee to provide this service, which was initially set at 3.9 pence per minute. Following a JCRA investigation, in December 2004 JT agreed to stop charging for accessing Freephone numbers.[20] Newtel responded to this by further reducing its prices for calls to the UK.

In this way, fixed-line calls from Jersey to the UK have been liberalised since 2002 as a result of the JCRA's interventions and entry by Newtel and Cable & Wireless (which introduced its own services in this market in 2006). During this time, JT has cut its own prices for fixed-line calls to the UK by nearly half, from a pre-liberalisation price of 6 pence per minute in 2002 to 3.5 pence per minute today. Based on confidential traffic data, the JCRA estimates that these price cuts have resulted in approximately **£5 million** in savings to JT customers from 2003 to the start of 2008. This number represents estimated savings to JT's customers alone for making fixed-line calls to the UK. In addition, other customers in Jersey have benefitted from greater choice and even further price reductions by switching to the services of either Newtel or Cable & Wireless, although the JCRA lacks the necessary traffic data to make estimates of these savings.

2. Case Study on Mobile Telephony

Prior to 2006, JT was the only provider of mobile telephony in Jersey. In July 2004, similar to changes taking place in other markets, JT introduced a new mobile tariff structure based on an inclusive bundle of calls and/or text. After that, the level of JT's mobile tariffs then remained stable until 2006, the year competition for mobile telephony was first introduced in Jersey. In March and July 2006 JT reduced its prices for various categories of mobile calls. JT made these reductions prior to Cable

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small jurisdictions including in Jersey, Barbados, Greenland and Malta); *see also* Global Competition Review, *Singapore Targets School Transport Assoc.* (4 Aug. 2008) (reporting on the Singapore Competition Commission's recommendation that the Singapore School Transport Association withdraw its recommended prices).

[20] *See* JCRA Media Release, *Jersey Telecom to Remove Restrictions on Subscriber Access to other Service Providers* (16 Dec. 2004).

& Wireless introducing its Sure mobile telephony service in September 2006. JT's price reductions are detailed in Table 2, below.

Table 2: JT 2006 Price Reductions for Mobile Calls (pence per minute)			
Customer Type	**Call Type**	**Tariff pre-March 2006**	**Tariff post-July 2006 (current)**
Post Pay	Local mobile and fixed calls	15p	7p
Post Pay	National (to UK) day rate mobile calls	40p	20p
Post Pay	National (to UK) evening/weekend rate mobile calls	30p	10p
Post Pay	National (to UK) daytime landline calls	30p	10p
Pre-pay	Local mobile and fixed calls	15p	12p
Pre-pay	All times National (to UK) mobile	50p	35p
Pre-pay	All times National (to UK) landline	50p	25p

Subsequently, in June 2007, Airtel-Vodafone launched its service, becoming the third mobile telephony provider in Jersey, in competition with JT and Cable & Wireless.

Based on JT's total call minutes for the different types of calls identified in Table 2 during the period of July 2006 to June 2008, plus the ratio between pre-paid and post-paid mobile subscribers on JT's network, the JCRA estimates that total savings for JT's customers alone, arising from the price reductions identified in Table 2, have been approximately **£1.8 million**. Adding estimated savings derived by customers of Cable & Wireless and Airtel-Vodafone from both daytime and evening mobile calls to the UK over the same time-period results in total estimates savings of approximately **£2 million**. This figure represents estimates savings to Jersey consumers, based on the price reductions that have occurred since March 2006, compared to JT's pre-March 2006 prices.[21]

In addition, in the past 12 months, JT has made no less than eight downward pricing changes in its mobile portfolio, across all types of user. These include:

- free calls within closed business user groups (following Airtel's lead);
- increase free included minutes from 25 to 75 for new and renewing contracts;
- reduction in MMS charges from £0.21 to £0.14 for post-paid users;
- reduced and simplified international charges (Europe down from £0.60 or £0.40 to a single tariff of £0.25); and

[21] The JT, Cable & Wireless and Airtel-Vodafone traffic data on which these estimates are based is confidential.

- reduced and simplified out-roaming tariffs.

Assessing the value of these reductions is difficult, given the diversity of charges in international calling, but there are clear benefits for consumers.

These consumer savings in mobile telephony prices have not come at the cost of less service or a lack of investment. Indeed, JT continues to make substantial upgrades to its mobile network, including the introduction of its mobile 3G service,[22] and both Cable & Wireless and Airtel also recently have made substantial network investments.[23] In this respect, increased competition in mobile telephony has not only resulted in reduced prices, but also in increased investment, expanded services and increased consumer choice in Jersey.

3. *Other JCRA Actions under the Telecommunications Law*

In addition to the case studies in fixed line calls to the UK and mobile telephony discussed above, the JCRA has had other significant achievements in its role as Jersey's telecommunications regulator. These include the following:

- In May 2005 the JCRA directed JT to produce detailed separated accounts for its core network, local access network, retail fixed, broadband and mobile business activities.[24] Similar to regulators in other jurisdictions, this provides the JCRA with vital transparency into JT's internal operations, and assists us in our ability to determine if JT is competing on a fair and equal basis.

- In February 2008 the JCRA announced it had obtained the agreement of all three mobile operators on the introduction of mobile number portability ('MNP') in the Channel Islands by 1 December 2008.[25] This milestone came after the JCRA vigorously contested JT's appeal against the introduction of MNP in Jersey. The JCRA is now coordinating, with the Office of Utility Regulation in Guernsey, the MNP implementation process in cooperation with JT, Cable & Wireless and Airtel-Vodafone. The introduction of MNP in Jersey is expected to lead to further price reductions in mobile telephony charges, as well as further enabling consumer choice.

- In July 2008 the JCRA launched its mobile phone mast locator website.[26] This website presents an interactive map that enables consumers to view the location of each mast and available data on high frequency wireless emissions. The JCRA will be updating this information through an emissions audit during the last quarter of 2008.

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[22] *See* Jersey Telecom Press Release, *Jersey's first 3G (third generation) mobile network* (5 May 2006) (detailing the introduction of JT's 3G mobile service as part of a £12 million investment programme).
[23] *See* BBC News, *Island gets £20m phone network* (10 May 2006) (reporting on investments of £20 million and £15 million in Jersey by, respectively, Bharti and Cable & Wireless).
[24] *See* JCRA Direction re: Jersey Telecom Limited – Separated Accounts (12 May 2005).
[25] *See* JCRA Media Release, *Mobile Number Portability in Channel Islands by 1st December 2008* (12 Feb. 2008).
[26] *See* JCRA Media Release, *JCRA Launches New Website on Mobile Phone Masts in Jersey* (25 July 2008).

- Finally, in September 2008 the JCRA proposed capping JT's ability to increase prices for certain fixed-line telephone services (including local calls, calls to the UK and international calls) to levels below Jersey's Retail Price Index ("RPI") over the next three years.[27] This proposed new price control would replace and update similar limitations the JCRA originally placed on JT in April 2004.[28]

IV. Postal

As noted above, the regulation of postal services in Jersey is the JCRA's newest core competency, having come into force on 1 July 2006 with JP's incorporation and licensing. Therefore, unlike competition and telecommunications, insufficient time has passed to make an *ex post* estimate of consumer effect.

Looking forward, however, the JCRA's price control on JP's core postal services is expected to result in significant consumer savings over the next three years. This price control was announced on 22 November 2007.[29] It applies to core postal services, which include services widely used by consumers in Jersey, such as local letters, letters to the UK, letters to Guernsey and letters sent to destinations outside of the British Isles. The price control limits JP's ability to increase its prices for these services over the three-year control period. For 2008, the price control limits overall price increases for core postal services to 4% below Jersey's rate of inflation, as measured by RPI. In 2009 and 2010, the price control limits overall price increases for core postal services to 1.8% below RPI. Thus, the effect of the price control is to keep price increases for core postal services over the three years well below annual increases in Jersey's RPI.

Furthermore, in addition to the price cap, the JCRA is undertaking other major postal initiatives. For example, in June 2008 the JCRA launched a consultation on JP's quality of service standards.[30] Through this consultation, the JCRA is soliciting the views of postal customers in Jersey on important matters such as whether JP's existing quality of service indicators are appropriate and whether JP should be required to offer customers compensation for lost or damaged mail. In addition, the JCRA also has started to issue postal licences to other operators that compete with JP for the provision of postal services in Jersey.

V. Deterrent Effects

The value of competition policy to an economy cannot be measured solely by the estimated effects arising directly from the enforcement actions of authorities like the JCRA. The risk of investigation and potential sanctions under a competition law deters parties from engaging in anticompetitive conduct in the first place. To date in Jersey, the JCRA is aware of at least one potential cartel, and at least one potentially anticompetitive merger, that did not proceed because doing so would have likely

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[27] *See* JCRA Media Release, *JCRA Proposes Limits on Jersey Telecom Fixed-Line Services* (16 Sept. 2008).
[28] *See* JCRA Decision Paper and Direction 2004-2 (29 Apr. 2004).
[29] *See* JCRA Media Release, *JCRA Finalises Price Caps on Jersey Post for Core Postal Services* (22 Nov. 2007).
[30] *See* JCRA, *Jersey Post Quality of Service, Consultation Document 2008-P1* (25 June 2008).

infringed Jersey's Competition Law. In addition, experience abroad suggests that there are other examples of anticompetitive conduct being deterred which never come to the JCRA's attention. Either way, consumers, and Jersey's economy overall, both benefit.

The deterrent effect of competition law has been the subject of recent studies by the OFT in the UK.[31] Based on information gained from nearly 500 lawyers, economists and companies throughout the UK, the OFT found *"that the deterrent effect is significantly greater than the direct effect of enforcement in all areas of merger control and enforcement of competition law against both anti-competitive agreements and conduct."*[32] The OFT went on to state that:

> *"The research confirms that the OFT's merger control and competition law enforcement work plays an important role in preventing other anticompetitive behaviour from taking place and that the benefits of OFT work go well beyond the direct financial benefits in terms of lower prices that consumers get as a direct result of our merger and infringement decisions."*[33]

Concerning merger control in particular, the OFT estimates that there is a deterrence ratio of five to one – meaning that for every one merger either blocked or modified by UK authorities based on competition concerns, at least five merger proposals were abandoned on competition grounds before the OFT became aware of them.[34]

In Jersey, the JCRA is aware of at least one potential cartel, and at least one potentially anticompetitive merger, that did not proceed in light of the Competition Law. These two examples are within the two areas that the OFT's work suggests competition law has its greatest deterrent effect: the prevention of cartels and the avoidance of anticompetitive mergers. These examples are the following:

- <u>Cartel Prevention</u> – In November 2007 the JCRA was provided with information which showed that one competitor attempted to fix prices with another competitor in Jersey.[35] This attempt was in the form of two text messages, sent after one company offered lower prices to a common customer. These text messages explicitly requested that the discounting company *"move price up"* and that the two companies agree on a *"joint price"* to the customer. The company receiving the messages promptly brought them to the JCRA's attention. In response, the JCRA instructed the companies to not agree on this proposal and to not engage on any subsequent discussions of this nature. Had the companies agreed on a common price, this would have resulted in the customer being charged higher prices, and would have been a serious infringement of Jersey's Competition Law, and specifically its prohibition on price fixing agreements.

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[31] *See* Office of Fair Trading, *The deterrent effect of competition enforcement by the OFT, Discussion Document* (Nov. 2007).
[32] *Ibid.* at p. 5.
[33] *Ibid.*
[34] *See* OFT, *Positive Impact 07/08* at ¶ 7.9 (July 2008).
[35] *See* JCRA Media Release, *JCRA Stops Potential Price Fixing Agreement* (2 Dec. 2007).

- Avoidance of Anticompetitive Mergers – In the second quarter of 2008, the JCRA was approached by two companies that were considering a merger. If implemented, the proposed merger would have resulted in a monopoly in a market in Jersey, and the two companies indicated that a strong motivating factor for the merger was a desire to consolidate the market and increase their margins. The JCRA expressed strong concerns to the companies that the merger would result in a substantial lessening of competition in Jersey, and thus would give the JCRA grounds for its prohibition under the Competition Law. The JCRA was subsequently informed that the parties, upon further reflection, no longer intended to proceed with the merger.

In addition, there are most likely other instances where the Competition Law has deterred parties from engaging in anticompetitive conduct in Jersey, that never come to the JCRA's attention. This may be particularly the case in a small market economy in which *"[m]arket conditions . . . are more conducive than in larger ones to collusive or cooperative conduct, given the limited number of firms operating in many industries that are protected by high entry barriers."*[36] Therefore, the potential benefits – both direct and indirect – that competition policy may offer to a small economy *"are much greater, relatively, than those to be gained in larger, less concentrated markets."*[37]

VI. Broader Economic Benefits

International experience, in jurisdictions large and small, demonstrates that competition increases efficiency and consumer welfare. In this way, competition is not an end unto itself, but a means to an end. When firms compete against each other, consumers benefit in terms of lower prices, higher quality, more innovation and greater choice. Concurrently, competition increases efficiency in three main ways:

- in relation to productive efficiency, competition drives prices down towards costs and forces firms to produce efficiently to remain competitive and profitable;

- in relation to allocative efficiency, consumer choice between competitive products efficiently allocates resources in the economy as resources respond to consumer demand and flow to the production of goods and services most valued by consumers; and

- in relation to dynamic efficiency, competition encourages firms to develop innovative products and invest in new technological processes in order to keep ahead of the pack.

These potential benefits were cited by the States during its consideration of Jersey's Competition Law:

[36] Gal, COMPETITION POLICY FOR SMALL ECONOMIES at p. 165 (2003).
[37] *Ibid.* at p. 7.

> *"The potential benefits of competition can be summarised into 3 main areas. Firstly, competition forces undertakings to keep costs down, as a failure to maintain competitive prices will result in a loss of customers to their competitors. From the consumer's point of view, this results in the twin benefits of lower prices and increased choice. Secondly, competition forces undertakings to reduce their cost structure and allocate resources efficiently and productively into activities that consumers want. This will benefit Jersey's economy because resources, and the vital factor of labour resources, are focused on goods and services for which there is demand at a profitable price. Thirdly, competition forces undertakings to innovate, to develop new products and use new technology to gain a competitive advantage."*[38]

The JCRA plays a vital role in promoting competition, and the benefits that flow from it, through its enforcement of the Jersey Competition Law and making sure that businesses do not interfere with the market-driven competitive process. In a functioning market economy, businesses compete against each other and consumers make choices based on factors such as price, quality, service and convenience. Public price comparisons, such as those done in Jersey by the *Jersey Evening Post*, the Consumer Council and the States' Statistics Unit, provide valuable information to help consumers make these choices, but are not themselves sufficient to protect the competitive process. Specifically, without the Competition Law, businesses in Jersey would face no adverse legal consequences through impeding the competitive process by engaging in anticompetitive conduct such as forming cartels, abusing dominant market positions, or monopolising markets in Jersey through mergers. In a cartel, for example, while different companies may appear to exist in a market, in reality consumers have no choice because all the competitors agree to charge the same price – to their benefit solely and to the detriment of their customers. Such conduct hurts consumers and the economy overall, and does little if anything to increase the efficiency of the firms in the cartel (indeed, without competitive pressures, they are likely to become more inefficient).

While the broader economic benefits of competition policy are widely recognised, *"it is very difficult to quantify the long-term benefits to consumers from the increased productivity and efficiency that arise from increased competition."*[39] The OFT cited this difficulty in its recent studies undertaken on the effects of competition law in the UK, concluding that *"we cannot generally quantify the dynamic effects of increased competition on innovation, and efficiency/productivity."*[40] Therefore, although widely recognized as arising from competition policy, the JCRA does not attempt to quantify these broader economic benefits to Jersey in this study.

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[38] States of Jersey, *Draft Competition (Jersey) Law 200-, Lodged au Greffe on 9th March 2004 by the Economic Development Committee* at p. 1.
[39] Fiammetta Gordon, *Measuring outcomes*, Competition Law Insight at p. 10 (1 July 2008).
[40] OFT, *Positive Impact 07/08* at ¶ 2.8 (July 2008).

VII. International Expertise

While small in size, with only 9 full-time staff members, the JCRA provides Jersey with substantial, internationally recognized expertise in the application of competition law and policy in small economies. The JCRA's Chairman, Lord Kingsland QC, is a barrister with extensive knowledge in competition law, a former member of the European Parliament, and a current member of the House of Lords. Our non-executive board members bring together senior-level experience in both the public and private sectors, and include a former chief executive and a current commissioner of the UK's Competition Commission. The JCRA's Executive Director is an internationally published author and speaker on competition law issues, with a specific focus on the application of competition law and policy in small market economies. Finally, the JCRA's staff has a combined approximate total of 90 years experience in the application of competition and regulatory law, gained in Europe, Asia, Australia and North America.

Through our expertise, the JCRA has become a leader abroad in the application of competition law and policy in small economies. Specifically, the JCRA is an active member in the International Competition Network ("ICN"), a forum that brings together competition law enforcers from around 100 enforcement agencies in 91 countries.[41] The goal of the ICN is to encourage convergence and the development of best practices in competition law enforcement. Through active participation in the ICN, the JCRA is able to:

- keep informed of the latest international developments in best practices on the application of competition law, and apply them to its enforcement efforts in Jersey;

- maintain cooperative working relationships with competition law enforcers in other jurisdictions, including in Jersey's neighbours such as the UK and France;

- inform others of developments taking place in competition law enforcement in Jersey; and

- most critically, advocate that the best practices the ICN adopts take account of the economic conditions in small jurisdictions like Jersey.

Tangible evidence of the last point is the ICN's recently adopted "recommended practices" on the assessment of dominance. These recommended practices set forth the procedures ICN member states should follow in their assessments of whether a company has a dominant position in a market. Based on work done by the JCRA, plus our advocacy efforts within the ICN, these recommended practices include specific guidance on the assessment of dominance in small economies.[42] Building

[41] *See* www.internationalcompetitionnetwork.org.

[42] *See* ICN, Unilateral Conduct Working Group, *Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws,* at ¶ 9 (Apr. 2008); *see also* ICN, Unilateral Conduct Working Group, *Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies*, at p. 58-59 (May 2007) (section written by the JCRA, surveying views of ICN members on the assessment of dominance in small and isolated economies).

on this work, in 2009 the ICN plans to engage in a special project focussing on the general application of competition law in small economies. Naturally, the JCRA intends to take a leading role in this project and advocate that any best practices which may be developed take account of economic circumstances that exist in a small island economy like Jersey. In this modest way, the JCRA acts to protect Jersey's interests abroad, and gives it a voice in these important matters.

VIII. Fiscal Responsibility

The JCRA has achieved the accomplishments discussed in this study while adhering to strict standards of fiscal responsibility. The JCRA's annual grant from Economic Development for Competition Law enforcement activities currently is £480,000, and has been budgeted at this same level since 2005. This means that, in real terms, the States' spending on Competition Law enforcement has decreased by 16% since the start of 2005, based on the increase in Jersey's RPI since that time. Furthermore, the current level of annual grant is slightly below the expected annual expenditure of £500,000, which was anticipated at the time the draft Competition Law was considered by the States.[43]

In telecommunications, the JCRA's licence fees for major operators are set as a percentage of their regulated turnover.[44] This percentage has decreased by over 60% since 2002: in 2002, licence fees were set at 2% of regulated turnover; currently the JCRA has set them at 0.75%. Moreover, when the JCRA has a carry-over of income from licence fees from one year to the next, we have often been in a position to refund these amounts to licensed operators, both in the telecommunications and postal sectors.[45]

The JCRA's staffing level also has remained constant since 2005, the year the Competition Law came into effect. Although, as to be expected, there has been some turnover in individual staff members, the JCRA's overall staff complement of 9 has remained the same since that time.

In its various roles as the enforcer of Jersey's Competition Law, regulator of Jersey's telecommunications and postal sectors, and advisor to the States on matters of markets and economics, the JCRA's current responsibilities encompass analogous responsibilities spread over four agencies in the UK: Ofcom, the Competition Commission, the OFT and Postcomm. The point of this comparison is not to suggest that Jersey has under-resourced competition law and regulation. To the contrary, we think that in creating the JCRA and giving it multiple, but analogous, responsibilities, the States made the correct choice in structuring a regulatory model appropriate for

[43] *See* States of Jersey, *Draft Competition (Jersey) Law 200-, Lodged au Greffe on 9th March 2004 by the Economic Development Committee* ("The likely cost base of administration and implementation of such a Law will initially be £350,000 and then £500,000 from 2005 onwards.").
[44] Licence fees are set as a percentage of regulated turnover for Class II and III telecommunications licensees. For Class I licensees, a small annual fixed fee is levied.
[45] *See,* for example, Christine Herbert, *Regulator refunds £100,000 in telecom fees*, Jersey Evening Post (4 May 2006).

the size of Jersey's economy. It is a model that other small economies have followed as well.[46]

IX. Conclusion

In conclusion, as detailed above, Jersey's competition policy, implemented through JCRA enforcement actions under the Competition Law, Telecommunications Law and Postal Law, has resulted in substantial consumer savings, which are ongoing. These results should not be seen as surprising or extraordinary. In most situations, free and open markets provide the greatest consumer benefit. The JCRA only intervenes in rare instances to address serious problems (such as cartels, abuses of dominance or anticompetitive mergers) that prevent markets functioning in the interests of consumers. This means that it is in the nature of competition policy that there will only ever be a few cases and, consequently, the effects of those cases should be substantial, in that they allow markets to function properly in consumers' interests. Furthermore, as detailed in this study, the deterrent effects of Competition Law and its broader economic effects mean that its value extends well beyond estimated savings arising from past enforcement actions.

As observed in the Introduction & Executive Summary, it is important to note that Jersey, like all countries, will remain subject to global economic trends that recently have been inflationary. According to the Bank of England, during the first half of 2008 world agricultural prices increased by 60%, oil prices rose by more than 80% and world gas prices increased by 160%.[47] These trends affect jurisdictions large and small. An effective competition policy, however, helps to ensure that the effect on consumers of such rising costs is minimized, and that global economic trends are not exacerbated domestically through anticompetitive activities such as cartels or abuses of dominance.

Finally, in terms of competition policy in Jersey, these are still early days. Unlike jurisdictions such as the UK, USA and EU, where competition laws have been in force for decades, Jersey's Competition Law has only been in force for less than three years, and important markets such as telecommunications and postal still are in the process of liberalisation. As discussed above, measuring the impacts of regulatory actions can only be attempted several years after they occur. While our achievements so far have been significant, this is no licence for complacency. Looking forward, the JCRA intends to continue to use the tools at our disposal – through Jersey's Competition Law, Telecommunications Law and Postal Law – to further consumer welfare and economic efficiency, to the ultimate benefit of Jersey's economy and those who live here.

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[46] In Barbados, for example, the Barbadian Fair Trading Commission enforces the jurisdiction's competition and consumer protection laws plus acts as the regulator of the telecommunications and energy industries. *See* www.ftc.gov.bb.

[47] Letter from the Bank of England to the Chancellor of the Exchequer at p. 2 (16 June 2008).