



# Ports of Jersey – Assessment of Market Power

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## Final Notice

Jersey Competition Regulatory Authority

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## **1. Executive Summary**

Ports of Jersey Limited (PoJ) was incorporated by the States of Jersey in 2015 and operates the airport and the sea ports on the Island. Customers seeking to travel to or from the island have no alternative other than to use its services.

The JCRA is responsible for the economic regulation of the sector and places particular emphasis on the oversight of those services provided by PoJ in which it is the dominant supplier. A monopoly position is a strong indication of dominance, in the absence of information to the contrary.

Having conducted its own research and after taking into consideration submissions received from PoJ, the JCRA has determined that PoJ is dominant in the provision of a number of services.

In determining PoJ to be dominant the JCRA may therefore price regulate charges made by PoJ for those services and considers this to be appropriate given that, absent such a control, PoJ could raise prices independent of customers of competition within Jersey. In addition this determination places certain additional obligations on PoJ in respect of price regulated services and fair competition.

## 2. Introduction

The States of Jersey adopted the Air and Sea Ports (Incorporation) (Jersey) Law 2015 (the **Law**) on 2 June 2015. The Law requires that any person carrying out Port Operations, as defined in that Law, must have a licence issued by the Jersey Competition Regulatory Authority<sup>1</sup> (**JCRA**).

On 1 November 2015, the JCRA issued to Ports of Jersey Limited (**PoJ**) a licence to carry out Port Operations in Jersey (the **Licence**). The scope of activities covered by the licence requirement is defined as:

*Port facilities and services provided by a Principal Port Operator within a Designated Sea Port Area or Airport Area in Jersey.*

Under Condition 22.2 of the Licence, the JCRA may determine the maximum level of charges that PoJ may apply for Port Operations within a relevant market in which it has been found to be dominant.

On 22 March 2016, the JCRA published consultation document '*Port Operations – Price Regulated Services*'<sup>2</sup> (the **Consultation**), in which it set out the approach that it proposed to adopt in determining the market(s) on which PoJ holds a dominant position. One response was received<sup>3</sup>.

Following the conclusion of the Consultation and having taken into account the comments made in the response, on 22 June 2016 the JCRA published '*Ports of Jersey – Assessment of Market Power, Initial Notice*'<sup>4</sup> (the **Initial Notice**) stating its intention to exercise a specified regulatory function under Articles 15 and 23 of the Law, determining that PoJ was dominant on a number of relevant markets.

On 15 July 2016, PoJ and its economic adviser met with officers of the JCRA to set out PoJ's views on the content of the Initial Notice. Following this meeting, on 20 July 2016 PoJ submitted written comments on the Initial Notice.

The JCRA has taken into account the written and oral submissions made by PoJ. It now issues this Final Notice of the relevant markets on which PoJ holds a dominant position for the purposes of Conditions 22 and 23 of its Licence.

**Note: The exercise by the JCRA of a regulatory function under this Final Notice relates to the issue of market dominance / significant market power only. For the avoidance of doubt, nothing in the Final Notice should be interpreted as either defining the scope of**

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<sup>1</sup> Exceptions are provided for under the Law

<sup>2</sup> CICRA 16/15

<sup>3</sup> From PoJ

<sup>4</sup> CICRA 16/26

**Port Operations as set out in the Law or the scope of activities provided by a Port Operator under the Licence issued to PoJ.**

### 3. Legal framework and issues

#### Introduction

The legal framework and issues are reproduced below for completeness.

#### Definition of Port Operations

Under the terms of the Licence, PoJ is licensed to carry out Port Operations. Port Operations are defined as:

- (a) the provision of facilities and services for and in relation to commercial passenger travel and freight transport into and out of Jersey, by air or by sea;
- (b) the provision of facilities and services for and in relation to non-commercial travel and private pursuits around, into and out of Jersey, by air or by sea, and specifically (in the case of harbour operations) within Jersey territorial waters, and
- (c) the management, maintenance and operation of such facilities and services<sup>5</sup>.

(PoJ is also required to carry out certain public service obligations (**PSOs**), which do not form part of the Port Operations covered by the Licence.)

As explained in the consultation on the ports operations licence<sup>6</sup>, the JCRA Licence interprets the scope of the activities covered by the Licence as: “ports facilities and services provided by a Port Operator within a designated Sea Port Area or Airport Area in Jersey”. Sea Port Area and Airport Area are defined as those areas transferred to PoJ on incorporation<sup>7</sup>.

#### Price Regulated Services

Condition 22.2 of the Licence provides that:

*“The JCRA may determine the maximum level of charges the Licensee may apply for Port Operations **within a relevant market in which the Licensee has been found to be dominant**. A determination may:*

- (a) *provide for the overall limit to apply to such Port Operations or categories of Port Operations or any combination of Port Operations;*
- (b) *restrict increases in any such charges or to require reductions in them whether by reference to any formula or otherwise; or*

<sup>5</sup> Law, Article 2(1); Licence, Condition 1(1).

<sup>6</sup> Document No: CICRA 15/26 ([http://cicra.gg/files/Consultation%20Final\[96822\].pdf](http://cicra.gg/files/Consultation%20Final[96822].pdf)).

<sup>7</sup> Document No: CICRA 15/42 (<http://cicra.gg/files/Ports%20Licence%20Exemption%20-%20Initial%20Notice.pdf>)

- (c) *provide for different limits to apply in relation to different periods of time falling within the periods to which any determination applies.”* (emphasis added).

It follows that, before it can regulate prices on any market under Condition 22 of the Licence, the JCRA must have made a determination that PoJ holds a dominant position on that market.

### **Fair Competition**

Condition 23 of the Licence prohibits PoJ from abusing any significant market power and/or established position in any Port Operations. It must comply with any Direction issued by the JCRA for the purpose of preventing any market abuse.

It follows that, before it can make a decision for the purpose of preventing market abuse under Condition 23 of the Licence, the JCRA must have made a determination that PoJ holds a position of significant market power in respect of Port Operations.

For the avoidance of doubt the JCRA treats the concepts of Significant Market Power and Dominance as equivalent consistent with established practice.

## 4. General approach to market definition

### Overview

As set out in the Consultation and the Initial Notice, in identifying hypothetical market definitions on which to consult, the JCRA considered the approach of other regulators and competition authorities in this sector.

It is also relevant that PoJ has only recently been incorporated and at this early stage of economic regulation by the JCRA of PoJ all parties are developing their capacity and capability to ensure the appropriate context is developed to deliver the benefits envisioned by the commercialisation of PoJ.

As part of this initial work, the JCRA therefore did consider whether it should carry out a first principles exercise in defining a number of precise narrow sub-markets on which PoJ might hold dominant positions (e.g. the market for the provision of cargo handling services at Jersey Airport) or alternatively whether it should consider the market power of PoJ as a whole within the Sea and Air Port Areas (together, the **Ports**) by reference to a bundle of services.

In line with the approach adopted by the Civil Aviation Authority (**CAA**), the JCRA then consulted on the approach of defining the relevant product market(s) as a bundle of airport operation services<sup>8</sup> and a bundle of sea port operation services, rather than defining markets for separate products provided by PoJ. It did so informed by the reasons set out in paragraphs 4.5 and 4.10 of the CAA draft guidance, which explain that a product-by-product analysis is likely to be of limited use in the context of this type of Significant Market Power (**SMP**) exercise<sup>9</sup>. This is because the key perspective in making the assessment is that of users of the Ports and the options available to them<sup>10</sup>.

To illustrate the general point, an airport user such as an airline would look at the services offered by PoJ either directly<sup>11</sup> or indirectly<sup>12</sup> as a single bundle, comprising the services necessary for it to use the airport as a whole. Linked to this is a key aspect that the demand for the services of such airlines that use the inputs provided by PoJ, rely on the extent of demand by passengers who wish to fly to or from Jersey. This approach is broadly similar to

<sup>8</sup> As defined in s.1 of the Civil Aviation Act 2012.

<sup>9</sup> <https://publicapps.caa.co.uk/docs/33/CAP1354MPTDraftGuidance.pdf>.

<sup>10</sup> The JCRA did consider that the airport operation services and sea port operation services carried out in the Airport Area and the Sea Port Area respectively should be treated as distinct markets; given that this is an obvious distinction the JCRA did not consider it necessary to invest in empirical research to confirm this point.

<sup>11</sup> E.g. physical infrastructure such as airport apron or services such as air traffic control.

<sup>12</sup> E.g. Swisscom for baggage handling/ATF for refuelling



that taken by the European Commission and other competition law regulators<sup>13</sup> when considering this sector.

When considering the geographic market in which PoJ might operate, the JCRA therefore consulted on the basis that the conditions of competition within the Airport Area and within the Sea Port Area respectively, at least in respect of some products that could comprise part of the “bundle” of services, were likely to be sufficiently homogenous and appreciably different from those in other areas, such that the Airport Area and the Sea Port Area were likely to constitute separate and distinct geographic markets<sup>14</sup>.

In its response to the Consultation and to the Initial Notice on these general methodological approaches, PoJ stated that the JCRA’s approach was unsound. PoJ’s view was that the JCRA should instead carry out a detailed and in-depth market definition exercise starting from “first principles”<sup>15</sup> suggesting an approach similar to that of the CAA, taking into account “stakeholder engagement, empirical analysis and expert opinion”<sup>16</sup>.

Having considered this argument, the JCRA is cognisant of the importance of acting in accordance with established principles of effective regulation<sup>17</sup>, and of its duty under Jersey law to comply with fair process. In fulfilling its role and duties, to the extent possible, it is the JCRA’s intention to apply standard principles of economic regulation to price control, quality standards and the promotion of competition. The JCRA also has a duty under the law to protect and further the interests of port operations, is mindful that it has a duty to impose a minimum of restriction upon persons engaging in commercial activities, and that its approach must be proportionate.

Acting proportionately is context specific. In some circumstances it means applying in-depth analysis and consideration to questions that are complex and where outcomes are likely to be materially different depending on that analysis. It can by contrast also mean dealing with issues that are straightforward, and where the range of likely outcomes is less diverse, in a practical and pragmatic way.

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<sup>13</sup> Case IV/M.786 – *Birmingham International Airport*; Case COMP/M.3823 – *MAG/Ferrovial Aeroportos/Exeter Airport*; Case COMP/M.4164 – *Ferrovial/Quebec/ GIC/BAA*; Case COMP/M.5648 – *OTPP/Macquaire/Bristol Airport*; Case COMP/M.5652 – *GIP/Gatwick*; Case COMP/M.6862 – *Vinci*; Case IV/35.703 – *Portuguese Airports*.

<sup>14</sup> Commission notice on the definition of the relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, p. 5–13, paragraph 8.

<sup>15</sup> For example, by carrying out a formal SSNIP test analysis (PoJ Response to Consultation, p.2).

<sup>16</sup> PoJ Response to Initial Notice, p.6.

<sup>17</sup> As set out in its consultation on the Ports Operation Licence, the JCRA follows the six principles of better regulation, established by BIS ([http://cicra.gg/files/Consultation%20Final\[96822\].pdf](http://cicra.gg/files/Consultation%20Final[96822].pdf)). The JCRA must also comply with the provisions of Jersey law. However, the JCRA would draw to the attention of PoJ and its advisors that Jersey is not part of the UK. Therefore, contrary to the statement made on page 17 of PoJ’s response to the JCRA’s Initial Notice, the JCRA is not a UK regulator.

For the purposes of this decision, there are markets where there is a strong likelihood that SMP does not exist in a particular area of activity or that greater granularity in market definitions would still find that SMP existed across all sub markets in any event.

In such cases, the JCRA has chosen to avoid extensive empirical analysis to establish absence of SMP or that SMP exists on a more granular basis. It has instead sought to come to a position in a practical and pragmatic way.

While the JCRA fully accepts that the type of analysis advocated by PoJ would be appropriate in the case of more complex markets<sup>18</sup>, such as the London airport markets cited by PoJ, the same is not true when considering markets, such as those in which PoJ operates, which are less complex. In particular, and contrary to PoJ's assertion that "the fact that Jersey is an island is almost irrelevant for our airline customers"<sup>19</sup>, for the reasons explained in detail below, the JCRA's view is that the island location of the Airport and the Sea Port is highly material and leads to the conclusion that the geographic markets in this case are no wider than the island of Jersey.

**For the reasons set out in further detail below, the JCRA's view is therefore that its general methodological approach set out in the Initial Notice is appropriate and proportionate, taking into account the particular facts before it.**

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<sup>18</sup> In these markets, there are many different types of airport user and many potential alternative suppliers of airport operation services within the relevant airport catchment areas.

<sup>19</sup> PoJ Response to Initial Notice, p.6.

## 5. Approach to Dominance/Significant Market Power

It is an established principle that a dominance assessment consists of two steps. First, the relevant market must be defined. Second, an assessment of whether the business in question has market power on that market must be undertaken.

In assessing whether PoJ has market power, the JCRA adopts the approach set out by the CJEU in *Michelin v. Commission*<sup>20</sup>, which defines dominance as:

*“a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.”*

For the avoidance of doubt, a finding of dominance will be considered equivalent to a position of significant market power for the purposes of the conclusions on market power.

The JCRA will work on the basis that a sustained monopoly position is a strong indication of dominance, in the absence of compelling evidence to the contrary.

As correctly identified by PoJ in its submissions, the existence of countervailing buyer power (CBP) may however mean that a business with a high market share does not hold a dominant market position.

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<sup>20</sup> Case 322/81 – *NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities* [1983] ECR 3461, paragraph 30.

## 6. Market definition and market power in the provision of airport operation services (excluding private users)

### *Product market – Consultation and Initial Notice*

In its consultation<sup>21</sup>, the JCRA sought the views of interested parties on the services that should be regarded as constituting airport operation services (excluding private users).

In its Initial Notice, having taken into account the observations made by PoJ, the JCRA found that car parking facilities and the provision of facilities for shops, retail businesses and offices should not, at the present time, be included in the bundle of airport operation services and set out its revised position on market definition in the Initial Notice, namely:

#### **Market definition**

*For the reasons set out above, the decision of the JCRA is that a relevant market is the provision of airport operation services (excluding the provision of those services to private users) within the Airport Area, where airport operation services means:*

*(a) Services related to the landing and taking off of aircraft (e.g. the use of the runway and taxiways; the provision of aerodrome air traffic control services);*

*(b) Services related to the manoeuvring, parking and servicing of aircraft (e.g. refuelling services);*

*(c) Services facilitating the arrival and departure of passengers and their baggage (e.g. baggage handling);*

*(d) Services facilitating the arrival and departure of cargo;*

*(e) Services facilitating the processing of passengers, baggage or cargo between their arrival and departure (e.g. security screening; baggage checking in facilities);*

*(f) Services facilitating the arrival and departure of airport staff;*

*(g) Ground handling services,*

*and includes the provision of access and infrastructure needed for the provision of those services.*

### *Response of PoJ*

In its response to the Consultation, PoJ expressed some support for an approach to market definition that defined the relevant market as a bundle of airport operation services.

<sup>21</sup> [http://www.cicra.gg/\\_files/Ports%20SMP%20Consultation%20-%20final.pdf](http://www.cicra.gg/_files/Ports%20SMP%20Consultation%20-%20final.pdf)

However, it stated that the bundle of what it termed “*airport infrastructure services*” should be assessed separately from services relating to ground handling and refuelling. This was because “*the market conditions and provisions of supply are very different for [services relating to ground handling and refuelling] compared to the airport infrastructure services*”.

PoJ made further submissions in its response to the Initial Notice, setting out its views as to why what it terms “*airport infrastructure services*” should be assessed separately from services relating to ground handling and refuelling. In summary, PoJ argued that the two types of service have different conditions of supply with different market players and that it was standard practice in competition assessments to define separate wholesale and retail markets<sup>22</sup>.

### *JCRA analysis*

The JCRA provides below its consideration of the points raised by PoJ regarding the appropriate market definition.

The JCRA’s Initial Notice<sup>23</sup> set out that the relevant market is the provision of airport services (excluding the provision of those services to private users) within the Airport Area, and provided a list of such airport operation services. The list included ground handling and refuelling. The definition also defined the market for airport operation services as including “*the provision of access to infrastructure needed for the provision of those services*”. Ground handling and refuelling are part of the overall bundle of services at Jersey Airport falling under PoJ’s control.

The fact that PoJ chooses to contract out or licence, rather than deliver certain of those services in-house, such as ground handling and refuelling, does not alter the premise that ground handling and refuelling are part of the overall bundle of services provided to or for the benefit of airlines at Jersey Airport, the supply of which is facilitated and ensured by PoJ and which fall under PoJ’s ultimate control<sup>24</sup>.

Other services such as security screening are also contracted out at Jersey Airport where PoJ has a similar position of control over the provision of those services, even if it does not deliver the service in-house. There is no suggestion that security screening at the airport should not form part of the bundle of airport operation services ultimately provided by PoJ.

PoJ has in its response discussed the way in which airlines purchase ground handling and refuelling services from the supplier appointed by PoJ. This downstream activity is not

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<sup>22</sup> PoJ Response to Initial Notice, p.6.

<sup>23</sup> And as discussed with PoJ at a meeting between PoJ and officers of the JCRA on 15 July 2016.

<sup>24</sup> For example, fuel is supplied at Jersey airport by ATF Overseas Holdings (ATF) pursuant to a supply contract between ATF and its customer. However, pursuant to separate contractual arrangements between ATF and PoJ, ATF is required by PoJ to maintain supplies of aviation fuel at Jersey airport.

relevant to the assessment of the market for the provision of airport operation services. It is not apparent that the way in which airlines purchase such services from those contracted or licensed by PoJ to do so alters the fundamental premise that these services form part of an overall bundle of airport operation services the availability of which is ensured by, and ultimately under the control of, PoJ .

The JCRA therefore considers that ground handling and refuelling services are essentially airport operation services whose ultimate availability is arranged and offered by PoJ as part of a “bundle”; these are services that an airport user such as an airline would consider necessary for it to be able to use the airport<sup>25</sup>.

### *Geographic market – Consultation and Initial Notice*

In its Initial Notice, the JCRA set out its conclusion that the relevant geographic market was the Airport Area, where Airport Area is defined as those areas transferred to PoJ on incorporation.

### *Response of PoJ*

In its responses, PoJ disagrees with this finding. It puts forward two lines of argument, which follows its own suggested product market definitions of:

- (a) the provision of airport infrastructure services; and
- (b) the provision of services related to ground handling and refuelling.

#### 1. “Airport infrastructure services”

- (a) PoJ places particular emphasis on the ability of airlines to reroute their operations networks so as to switch flights from Jersey to other regional airports, arguing that this provides evidence that the geographic market is wider than Jersey airport<sup>26</sup>. In an Annex to its response to the JCRA’s Initial

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<sup>25</sup> Even if it were to accept that ground handling services did not form part of the airport operation services bundle, the JCRA’s view is that the market for the provision of infrastructure and access necessary to perform those services is no wider than Jersey airport. Although the analysis in merger cases may be different to that in the present case, the JCRA nevertheless considers the conclusions of the European Commission on the relevant geographic market for the provision of ground handling services (e.g. Case No COMP/M.7021 – *Swissport/Servisair*, paragraph 44) and of refuelling services (e.g. Case No COMP/M.7387 – *BP/Statoil Fuel and Retail Aviation*, paragraph 41) to be material and persuasive in this case.

<sup>26</sup> In its response to the Initial Notice, PoJ states that the JCRA has not considered the evidence put forward by PoJ in its response to the Consultation, evidence that it describes as “strong” (Response, p.8) and which should have prompted the JCRA to undertake further work and gather further supporting evidence. It is unclear to the JCRA exactly which evidence is being referred to. The JCRA notes that in its response to the Consultation, PoJ makes some general, high level comments about the ability of airlines to move business away from a number of London airports in response to threatened price rises and [§<]. The JCRA did not

Notice, it provides some evidence which, in its view, supports this contention, including [redacted];

- (b) PoJ suggests that the ability of passengers to switch between airports is not relevant to market definition<sup>27</sup>;
- (c) PoJ states that given the fact that “aircraft fly between airports and are not affected by whether there is land or sea between those airports, the fact that Jersey is an island is almost irrelevant for [PoJ’s] airline customers when deciding whether or not to include Jersey Airport in [its] network”<sup>28</sup>.

## 2. “Services related to ground handling and refuelling”

In its response to the Consultation, PoJ argues that the geographic market for the provision of other airside and landside ground handling services is wider than Jersey airport and may even be a worldwide market. It further argues that the geographic market for refuelling services is likely to be wider than Jersey airport and is likely to include the other airports to and from which Jersey has direct routes.

### *JCRA analysis*

The consistent decision making practice of other authorities in this area has been to assess the relevant geographic market for the provision of airport operation services by reference to an airport catchment area. A key starting position is the assessment of options available to consumers who have the intention of flying to or from a given location or catchment area. Airports providing airport operation services generally compete with other airports in the same catchment area offering those services<sup>29</sup>. The organisation of port activities for third parties at a single port may therefore constitute a relevant market.

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consider that it was able to draw any helpful conclusions by considering the ability of airlines to switch their business away from London airports, which may be in a materially different position to Jersey airport. Nor was it able to attach any weight to mere assertions about [redacted].

<sup>27</sup> Arguments set out by PoJ on pages 3-5 of its Response to the JCRA’s Initial Notice.

<sup>28</sup> PoJ, Response to Initial Notice, page 6.

<sup>29</sup> The JCRA notes the point made by PoJ (Response to Initial Notice, p.6) that capacity constraints may prevent airlines from switching between airports within a single catchment area (i.e. that the relevant geographic market might be narrower than a particular airport catchment area) but does not consider this to be relevant here. For the reasons explained in this Final Notice, the Decision of the JCRA is that the relevant catchment area in this case is the island of Jersey, in which PoJ is the sole provider of airport operation services. Therefore the issue of whether there is countervailing buyer power because of an airline’s ability to switch services away from Jersey airport to another airport in its catchment area because of capacity constraints at Jersey airport does not arise.

In assessing the extent of an airport's catchment area, previous decisions make clear that an airline's choice of routes and airports ultimately depends on passengers' demand and the choices available to them.

This means that, rather than considering all routes to any location to be substitutable for each other with no regard to the demand of passengers to fly to or from Jersey for example, airlines will instead consider the overall profitability of providing services from a particular geographic area (which may include one or more airports). They will then decide whether or not to operate a route on that basis. Essentially, airlines are likely to assess whether they wish to service passenger demand in a particular catchment area and then to select between the alternative potential suppliers of airport infrastructure/operation services based on that assessment. As the European Commission (the "Commission") explained in the *Portuguese Airports* case<sup>30</sup>:

*"The relevant market is the market in services linked to access to airport infrastructures for which a fee is payable [i.e. airport operation services]. As the Court of Justice of the European Communities has held in the 'Port of Genoa case', the organisation of port activities for third parties at a single port may constitute a relevant market within the meaning of Article 86. Likewise, the Court considered piloting services in the Port of Genoa to constitute the relevant market in its judgment in 'Corsica Ferries II'. The Court based its reasoning on the fact that, if an operator wishes to offer a transport service on a given maritime route, access to port installations situated at either end of that route is essential to the provision of the service. This reasoning can easily be transposed to the air transport sector and access to airports."*<sup>31</sup>

This position was confirmed in Commission Decision C(2005)3144 – *MAG/Ferrovial Aeropuertos/Exeter Airport*<sup>32</sup>, where the relevant geographic market for the provision of airport infrastructure (operation) services was described as follows:

*"airlines' choice of airport is likely to be a function of demand in the catchment area of a particular airport and the costs of operating from a particular airport. Airlines are the direct customers of airports for their core services, as it is the airline, not the passenger, which decides whether to operate a route and pay the airport charges. **However, the airlines' choice of routes and airports ultimately depends on passengers' demand.** Passengers will choose between airports based*

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<sup>30</sup> Commission Decision of 10 February 1999 relating to a proceeding pursuant to Article 90 of the Treaty (Case No IV/35.703 – *Portuguese Airports*), OJ L 69/31, 16.3.1999.

<sup>31</sup> Paragraph 14, emphasis added.

<sup>32</sup> Commission Decision C(2005) 3144 of 8.8.2005, referring case No COMP/M.3823 – *MAG/Ferrovial Aeropuertos/Exeter Airport* to the competent authorities of the United Kingdom pursuant to Article 9 of Regulation (EC) No 139/2004.



*on what could be called the generalised cost of the journey (airline ticket price, cost of getting to and from the airport, cost of parking and journey time).”<sup>33</sup>*

Similarly, in Case No COMP/M.5648 – OTPP/Macquarie/Bristol Airport, the Commission stated that, in determining the relevant geographic market for the provision of airport infrastructure (operation) services, it had tended:

*“to focus on the appropriate size of the catchment area of airports, taking into account factors such as the size and density of population, level of wealth and type and size of business in the area.”<sup>34</sup>*

The Commission considered that Bristol airport and Birmingham airport were not in the same catchment area, noting in particular that CAA surveys showed that Birmingham airport accounted for at most 1% of passengers travelling to or from Bristol’s core catchment area of Somerset and that Bristol airport accounted for under 0.5% of passengers travelling from Birmingham airport’s core catchment area of the West Midlands. Similarly, in Case No COMP/M.4164 – Ferrovial/Quebec/GIC/BAA, the Commission confirmed that the size of an airport’s catchment area was determined by the factors set out above, and stated that:

*“Southampton and Bristol airports were also not seen as substitutes for airline infrastructure services by the majority of the airlines. It can be left open whether Southampton airport is in the same geographic market as the London airports in view of the train links, **which allow consumers in central and South West London easy access to Southampton.**”<sup>35</sup>*

In Case No COMP/M.4439 – Ryanair / Aer Lingus<sup>36</sup> the European Commission stated that:

*“Customers normally wish to fly from a specific origin to a specific destination. While the “point” of origin and the “point” of destination may in reality be defined as an “area” from and to which customers are ready to fly, and while the O&D-approach also may include other means of transport in specific cases, the vast majority of airline customers book their flights according to plans to get from a specific city or region to another specific city or region. Following a small but significant and non-transitory price increase, these customers would not change their travel plans and choose another destination from Ireland<sup>63</sup>. Although the Commission acknowledges that some customers might consider flying to different city or holiday airports without having a clear preference for one destination (“destination insensitive customers”), it appears unrealistic to assume that a significant proportion of passengers would not care whether they flew to Rome, to Faro or to Riga or even to Turin. On the contrary, there are*

<sup>33</sup> Paragraph 16, emphasis added.

<sup>34</sup> Paragraph 12.

<sup>35</sup> Paragraph 20, emphasis added.

<sup>36</sup> [http://ec.europa.eu/competition/mergers/cases/decisions/m4439\\_20070627\\_20610\\_en.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m4439_20070627_20610_en.pdf)

*obvious differences between each destination which are highly relevant for the customers' choice of destination, even in the case of leisure passengers (language spoken, tourist infrastructure, climate and other individual features of the country/city). Furthermore, in the case of business passengers or passengers visiting friends and relatives, any substitutability of different destinations is unlikely as the purpose of their journey is itself connected with a specific destination (place of a business meeting or place of residence of friends or relatives). For the vast majority of passengers, therefore, a flight from Ireland to one destination is not simply substitutable with a flight to another destination. On the contrary, from a demand-side perspective, every combination of a point of origin and a point of destination forms a separate market from a customers' viewpoint."*

The practical application of the principle on which the JCRA's Initial Notice was based is clearly supported by the above cases.

In its response to the Initial Notice, PoJ suggests that it would be extremely unusual to take into account the extent to which passengers can choose between different airports in determining the relevant market. It further states that it "would expect the JCRA to provide a significant body of evidence to justify it being an appropriate approach"<sup>37</sup>.

It is the view of the JCRA that the above cases make clear that it is the likely demand of passengers that determines the extent of the relevant catchment area, which in turn is a key factor in defining the scope of the geographic market. The appropriate basis on which to assess the relevant geographic market is therefore a context where a consumer intends to fly (to or) from Jersey and not that passengers or airlines can choose to fly to or from any destination.

Applying these principles to this case, it is the view of the JCRA that the geographic market for the provision of airport operation services cannot be any wider than the island of Jersey. On the assumption that airlines wish to offer flights to customers based in Jersey (because of the size and density of the Jersey population, the level of wealth and type and size of business in Jersey), and customers in Jersey wish to purchase flights from airlines flying to and from Jersey, Jersey passengers have no alternative but to use Jersey airport and so PoJ is the only possible supplier of airport operation services to those airlines to that end.

These conclusions apply equally to the provision of access to infrastructure needed for provision of ground handling and refuelling services<sup>38</sup>, which, for the reasons set out above,

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<sup>37</sup> PoJ Response to Initial Notice, p. 3.

<sup>38</sup> This approach is wholly consistent with that of other regulators. See, for example, Case No COMP/M.7021 - SWISSPORT/SERVISAIR, paragraph 43; Case M.7965 - WORLD FUEL SERVICES CORPORATION / CERTAIN AVIATION FUELS ASSETS BELONGING TO EXXON; CAA's Notice of Determination under Section 8 of the Civil

the JCRA considers form part of the bundle of airport operation services. The JCRA does not consider that the relevant geographic market can be any wider than the island of Jersey and may be limited to Jersey airport since a provider of ground handling or refuelling services at Jersey airport has no choice but to use the infrastructure provided by PoJ at Jersey airport whether provided in-house or contracted or licensed out to a third party.

### *Market power*

PoJ has 100% of each of the markets identified above. It follows that, in the absence of compelling evidence to the contrary, PoJ has SMP on these markets.

In its response to the Consultation and to the Initial Notice, PoJ states that airports may be subject to buyer power from airlines. It gives the examples of BA threatening to switch its business away from London City airport, of Ryanair threatening to move its business away from Stansted and of Ryanair threatening to move business from Manchester to Leeds-Bradford in response to a rise in airline charges<sup>39</sup>. PoJ also provides a number of examples which it states demonstrate [X]<sup>40</sup>.

The JCRA notes that in order for there to be buyer power on the demand side, there must either be credible alternative suppliers to which customers could turn or customers must be able to sponsor new market entrants<sup>41</sup>. It follows that the question of whether or not countervailing buyer power exists is highly fact specific.

The JCRA considers that arguments that airports other than Jersey airport may be drawn on as substitutes to provide countervailing buyer power from airlines or broad statements that there is potential for countervailing buyer power to be exercised in the industry in general terms<sup>42</sup> do not support the proposition that Jersey airport is subject to such countervailing buyer power. The position that airlines can provide their services to other airports does not have particular relevance to arguments around countervailing buyer power for purposes of an SMP analysis, unless those airlines have an alternative airport to Jersey for consumers wishing to fly to or from Jersey. There is no such feasible alternative given Jersey airport is the only airport in Jersey.

In relation to the specific examples given by PoJ, the JCRA notes that:

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*Aviation Act 2012 – Heathrow Airport, fn 34 states that: “ground handling services are often provided by the airlines or to the airlines by third parties. However, the ground handlers pay fees to the airport operator relating to use and access to infrastructure. In these cases the airport charges would still affect the airline through the charges levied on the ground handlers.”*

*(<http://publicapps.caa.co.uk/docs/33/CAP%201133.pdf>).*

<sup>39</sup> Response to Consultation, page 13.

<sup>40</sup> Response to Initial Notice, Annexes 1 and 2.

<sup>41</sup> Case COMP/E-1/38.113 – Prokent-Tomra, paragraph 89.

<sup>42</sup> E.g. the citation of the Copenhagen Economics Report on p.13 of PoJ’s Response to the JCRA’s Initial Notice.

- Manchester and Leeds-Bradford airports are likely to be regarded by airlines as substitutable for one another<sup>43</sup> (i.e. they are within the same geographic market);
- Stansted airport is likely to be within the same geographic market as Luton and Southend airports<sup>44</sup>;
- Given its geographic location, it is likely that London City airport faces competition to some extent from nearby airports<sup>45</sup> (i.e. that there are other airports within the same geographic market).

These examples therefore demonstrate that airlines can exercise countervailing buyer power with respect to an airport **where they could reasonably switch their business to another airport within the same catchment area/geographic market**. The same cannot be said for the position of airlines in relation to Jersey airport. There are no credible alternative suppliers to which airlines wishing to fly into Jersey can turn and so the question of countervailing buyer power does not arise<sup>46</sup>.

In its response to the JCRA's Initial Notice, PoJ has stated that the JCRA has failed to consider the impact of spare capacity at Jersey airport. The paragraph cited by PoJ relates to the ability of an airline to constrain the behaviour of an airport by switching marginal aircraft or services away from that airport. An airport that has little spare capacity is unlikely to be constrained by a threat to switch volume growth to another airport, since that airport does not have capacity to accommodate the volume growth. An airport that does have spare capacity is more likely to be constrained by such a threat. The JCRA does not consider this point to be relevant here in any event, since there are no alternative airports to which airlines could switch for the purposes described.

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<sup>43</sup> See, for example, Case No COMP/M.4439 – *Ryanair/Aer Lingus*, paragraph 131, in which the Commission cites an OFT report on UK airports stating that *"There is therefore strong evidence that the set of potential substitutes to Manchester airport includes Liverpool and Leeds Bradford airports but could potentially include others. This accords with the views expressed to the OFT that there is an area of overlap between Manchester, Liverpool and Leeds-Bradford airports, in which all three airports compete."*

<sup>44</sup> CAA's Notice of Determination under Section 8 of the Civil Aviation Act 2012 – Stansted Airport, paragraph 2.2 (<http://publicapps.caa.co.uk/docs/33/CAP%201135.pdf>)

<sup>45</sup> See, for example, Case No COMP/M.6447 - *IAG/ BMI*

<sup>46</sup> [§<].

## **Decision on market definition and market power in provision of airport operation services (excluding private users)**

### **Market definition**

For the reasons set out above, the decision of the JCRA is that the relevant market is:

1. The provision of airport operation services (excluding the provision of those services to private users) in Jersey, where airport operation services means:
  - (a) Services related to the landing and taking off of aircraft (e.g. the use of the runway and taxiways; the provision of aerodrome air traffic control services);
  - (b) Services related to the manoeuvring, parking and servicing of aircraft;
  - (c) Services facilitating the arrival and departure of passengers and their baggage (e.g. baggage handling);
  - (d) Services facilitating the arrival and departure of cargo;
  - (e) Services facilitating the processing of passengers, baggage or cargo between their arrival and departure (e.g. security screening; baggage checking in facilities);
  - (f) Services facilitating the arrival and departure of airport staff;
  - (g) Ground handling services

and includes the provision of access and infrastructure needed for the provision of those services.

### **Market power**

PoJ's share of this market is 100%. There is no compelling evidence to suggest that this market share does not give rise to a position of significant market power and the JCRA's decision is therefore that PoJ holds a dominant position on this market.

## 7. Market definition and market power in the provision of airport operation services to private users

In its Consultation, the JCRA set out its view that it might be appropriate to define a separate market for the provision of airport operation services to “private” users within the Airport Area. In this context, the JCRA proposed to define private users as the operators of privately owned aircraft. In its Initial Notice the JCRA set out the following:

### **Market definition**

For the reasons set out above, the decision of the JCRA is that the relevant market is the provision of airport operation services to private users within the Airport Area, where airport operation services to private users means:

- (a) Services related to the landing and taking off of aircraft (e.g. the use of the runway and taxiways; the provision of aerodrome air traffic control services);
- (b) Services related to the manoeuvring, parking and servicing of aircraft (e.g. refuelling services; provision of hangar space);
- (c) Services facilitating the arrival and departure of passengers (e.g. advance security screening; provision of private lounge facilities);
- (d) Services facilitating the arrival and departure of airport staff;
- (e) Groundhandling services,

and includes the provision of access and infrastructure needed for the provision of those services.

### **Market power**

PoJ's share of this market is 100% and the JCRA's decision is therefore that PoJ holds a dominant position on that market.

### *Responses of PoJ*

In its response to the consultation, PoJ agreed that defining the market by reference to a bundle of airport operation services provided to private users would be, at least in part, be appropriate. Its view was that PoJ would have SMP in the market for airport operation (infrastructure) services (as defined in its response) to private users. However, PoJ considered that neither refuelling services nor ground handling services should form part of that bundle and that the geographic market for both was likely to be wider than Jersey airport. PoJ also suggested that the JCRA should distinguish between user groups when defining the market for those services.

In its response to the JCRA's Initial Notice, PoJ accepts that it has significant market power on the market for the provision of airport operation (infrastructure) services to private users in Jersey<sup>47</sup>. It maintains that the provision of infrastructure needed for the provision of other airside and landside ground handling services does not form part of this airport operation (infrastructure) services market.

For the reasons set out above with respect of airport operation services to users other than private users the JCRA considers that the provision by PoJ of access to infrastructure needed for the provision of ground handling services is an airport operation service.

As explained above in the context of considering the market for the provision of airport operation services excluding private users of Jersey airport, and for the same reasons, the JCRA's view of that the relevant geographic market for the provision of airport operation services to private users is no wider than the island of Jersey. Private users wishing to fly to or from Jersey have no alternative to Jersey Airport.

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<sup>47</sup> It is unclear to the JCRA why, having accepted that it has SMP on the market for the provision of airport operation services within Jersey, it nevertheless continues to dispute the way in which the JCRA has defined this market (see PoJ's response to the JCRA's Initial Notice, p.14). Since PoJ accepts that it has SMP on this market, the JCRA does not propose to give further consideration to these points.

## **Decision on market definition and market power in provision of airport operation services to private users**

### **Market definition**

For the reasons set out above, the Decision of the JCRA is that the relevant market is the provision of airport operation services to private users in Jersey, where airport operation services means:

- (a) Services related to the landing and taking off of aircraft (e.g. the use of the runway and taxiways; the provision of aerodrome air traffic control services);
- (b) Services related to the manoeuvring, parking and servicing of aircraft;
- (c) Services facilitating the arrival and departure of passengers (e.g. advance security screening; provision of private lounge facilities);
- (d) Services facilitating the arrival and departure of airport staff;
- (e) Ground handling services,

and includes the provision of access to infrastructure needed for the provision of those services.

### **Market power**

PoJ's share of these markets is 100% and the JCRA's decision is therefore that PoJ holds a dominant position on these markets.



## 8. Market definition and market power in the provision of commercial sea port operation services

### Definition of commercial sea port operation services

In its Initial Notice, the JCRA set out its Decision regarding market definition and SMP as follows:

#### Market definition

For the reasons set out above, the decision of the JCRA is that the relevant market is the provision of commercial sea port operations services within the Sea Port Area, where commercial sea port operations services means:

- (a) Services related to the arrival and departure of commercial and passenger vessels (e.g. tug and pilotage services, provision of navigation aids);
- (b) Services related to the manoeuvring, docking and servicing of commercial and passenger vessels (e.g. the provision of access to piers and quays);
- (c) Services facilitating the arrival and departure of passengers (e.g. checking in services; passenger holding services within terminal buildings);
- (d) Services facilitating the arrival and departure of cargo (e.g. freight storage);
- (e) Services facilitating the processing of passengers, baggage or cargo between their arrival and departure, e.g. security screening; baggage checking in facilities;
- (f) The arrival and departure of port staff;
- (g) Stevedoring services,

and includes the provision of access and infrastructure needed for the provision of those services.

#### Market power

PoJ's share of this market is 100% and the JCRA's decision is therefore that PoJ holds a dominant position on that market.

#### *Responses of PoJ*

In its responses to the Consultation and to the Initial Notice, PoJ made the following observations.

- 1) It considered that passenger port operations services and freight port operations services were likely to form separate product markets.
- 2) It stated that services related to the arrival and departures of passengers were provided by the commercial operator and not by PoJ and therefore did not form part of the commercial port operation services “bundle”.
- 3) It stated that the provision of stevedoring services should be considered to form a distinct product market for the same reasons that the provision of groundhandling services to airlines constituted a product market distinct from the provision of airport operation (infrastructure) services.
- 4) It agreed that it had market power on the market for the provision of commercial sea port operations services to freight customers.

#### *JCRA analysis*

##### 1. Segmentation of the passenger and freight product markets

The JCRA has considered the points made by PoJ in relation to the segmentation of port operation services between passenger and freight markets.

In its discussion in the section on general methodological approach, the JCRA explained that a proportionate approach can mean dealing with issues that are straightforward and the range of likely outcomes less diverse, in a practical and pragmatic way.

For the purposes of this decision, there are markets where there is a strong likelihood that SMP is not likely to exist in a particular area of activity or that greater granularity in market definitions is still likely to find that SMP exists across all sub markets in any event.

In such cases, the JCRA would choose to avoid extensive empirical analysis to establish absence of SMP or that SMP exists on a more granular basis. It would instead seek to come to a position in a practical and pragmatic way.

Given the Sea Port Area is the only such area in Jersey, PoJ would be the only provider of commercial sea port operation services. For this reason the JCRA does not consider that it would be appropriate to segment the market for the provision of commercial sea port operation services further for the purposes of the current SMP assessment.

For completeness, in response to the point made by PoJ regarding the ability of ferry passengers to switch to alternative modes of transport, the JCRA notes that it is the operators of passenger services who are the direct customers of PoJ, not ferry passengers. It is therefore the ability of these operators to switch their business to alternative providers of

ports services in the catchment area<sup>48</sup> that is relevant and not the ability of ferry passengers to choose alternative modes of transport. Since the Sea Port is the only sea port in Jersey, operators of passenger services wishing to provide ferry services to and from Jersey have no alternative but to use the Sea Port and therefore the relevant geographic market for the provision of commercial sea port operation services to operators of passengers services can be no wider than the island of Jersey<sup>49</sup>.

## 2. Services facilitating the arrival and departure of passengers

The JCRA considers that the responses of PoJ relating to the treatment of services facilitating the arrival and departure of passenger are to an extent, based on a misunderstanding of the JCRA's Decision as set out in its Initial Notice, which was that PoJ was active on the market for the provision of infrastructure needed for the provision of those services for the benefit of vessel operators at the Sea Port (i.e. PoJ's customers) and ensure their availability and not that PoJ (currently) provided the downstream services itself. The JCRA does not consider that there is any compelling argument to remove these from the bundle of sea port operation services.

## 3. The provision of stevedoring services

PoJ suggests in its response that it does not have market power on this market because it has entered into a long term exclusive contract with a provider of stevedoring services. Dominant companies may, for their own commercial reasons, decide to enter into such contracts and their ability to do so does not indicate that their customers are able to exert countervailing buyer power<sup>50</sup>.

Stevedoring is part of the overall bundle of services at Jersey Sea Port falling under PoJ's control. The fact that PoJ chooses to contract out or licence, rather than deliver certain services in-house, such as stevedoring, does not alter the premise that ground stevedoring is part of the overall bundle of services provided to or for the benefit of Jersey Sea Ports users, the supply of which is facilitated and ensured by PoJ and which fall under PoJ's ultimate control<sup>51</sup>.

Other services such as security screening are also contracted out at Jersey Harbour where PoJ has a similar position of control over the provision of those services, even if it does not

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<sup>48</sup> Which is defined by passenger demand.

<sup>49</sup> *Portuguese Airports* case, paragraph 14 (fn. 23 – 24 above).

<sup>50</sup> Long term exclusive contracts entered into by dominant companies are more likely to be problematic under the competition law rules, since such contracts are more likely to give rise to anti-competitive foreclosure of the dominant company's competitors. The JCRA therefore does not understand PoJ's argument that a long term contract supports the view that PoJ's customers have CBP.

<sup>51</sup> For example, fuel is supplied at Jersey airport by ATF Overseas Holdings (ATF) pursuant to a supply contract between ATF and its customer. However, pursuant to separate contractual arrangements between ATF and PoJ, ATF is required by PoJ to maintain supplies of aviation fuel at Jersey airport.

deliver the service in-house. There is no suggestion that security screening at the harbour should not form part of the bundle of sea port operation services ultimately provided by PoJ

The JCRA considers that the provision of stevedoring services forms part of the bundle of commercial sea port operations services.

### **Decision on market definition and market power in provision of commercial sea port operation services**

#### **Market definition**

For the reasons set out above, the decision of the JCRA is that the relevant market is the provision of commercial sea port operations services in Jersey, where commercial sea port operations services means:

- (a) Services related to the arrival and departure of commercial and passenger vessels (e.g. tug and pilotage services, provision of navigation aids);
- (b) Services related to the manoeuvring, docking and servicing of commercial and passenger vessels (e.g. the provision of access to piers and quays);
- (c) Services facilitating the arrival and departure of passengers (e.g. checking in services, passenger holding services within terminal buildings);
- (d) Services facilitating the arrival and departure of cargo;
- (e) Services facilitating the processing of passengers, baggage or cargo between their arrival and departure;
- (f) Services relating to the arrival and departure of port staff;
- (g) Stevedoring services,

and includes the provision of access and infrastructure needed for the provision of those services.

#### **Market power**

PoJ's share of these markets is 100% and the JCRA's decision is therefore that PoJ holds a dominant position on these markets.

## **9. Market definition and market power in the provision of sea port operation services to marine leisure port users**

### **Definition of sea port operation services to marine leisure port users**

In its Consultation, the JCRA set out its view that it might be appropriate to define a market for the provision of port operation services to marine leisure port users within the Sea Port Area. These services might include some, or all, of the following:

- (a) Services relating to the arrival and departure of private vessels (e.g. provision of navigation aids; port control services);
- (b) Services relating to the mooring of private vessels (e.g. marinas, moorings);
- (c) Services relating to the provision of facilities to marina users (e.g. showers; laundry services);
- (d) The arrival and departure of port staff and boat owners;
- (e) The provision of facilities for chandlers and other related marine services;
- (f) Car parking facilities.

The JCRA's provisional view was that services (a) and (b) should be considered to form the bundle of port operation services that marine leisure port users must purchase from PoJ.

PoJ's response supported this view and the JCRA therefore finds that, at the present time, it would not be appropriate to include services (c) – (f) within the marine leisure port service bundle.

In its response to the JCRA's Initial Notice, PoJ agreed that it had SMP on the market for the provision of sea port operation services to marine leisure port users in Jersey.

## **Decision on market definition and market power in provision of sea port operation services to marine leisure port users**

### **Market definition**

For the reasons set out above, the decision of the JCRA is that the relevant market is the provision of sea port operation services to marine leisure port users in Jersey where sea port operation services to marine leisure users means:

(a) Services relating to the arrival and departure of private vessels (e.g. provision of navigation aids; port control services); and

(b) Services relating to the mooring of private vessels (e.g. marinas, moorings),

and includes the provision of access and infrastructure needed for the provision of those services.

### **Market power**

PoJ's share of this market is 100% and the JCRA's decision is therefore that PoJ holds a dominant position on that market.

## **10. Next steps**

Having considered and responded to the representations made by PoJ in accordance with Article 23(4) of the Law, the JCRA exercises a specified regulatory function under Articles 15 and 23 of the Law, determining that PoJ holds a dominant position on a number of markets as set out in this Final Notice.

This Final Notice will come into effect on 6 October 2016.