



# Ports of Jersey – Assessment of Market Power

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## Initial Notice

Jersey Competition Regulatory Authority

**Document No: CICRA 16/26**

**June 2016**

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## 1. 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 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 (as defined in the Law) in Jersey (the **Licence**). 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 CICRA 16/15 (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>2</sup>.

Following the conclusion of the Consultation and having taken into account the comments made in the response, the JCRA is publishing this Initial Notice of its intention to exercise a specified regulatory function under Articles 15 and 23 of the Law, determining that PoJ is dominant on a number of relevant markets.

Interested parties may submit written representations to the JCRA on the content of this Initial Notice.

All representations should be submitted before midnight on 21 July 2016 to:

Jersey Competition Regulatory Authority  
2<sup>nd</sup> Floor, Salisbury House  
1-9 Union Street  
St Helier  
Jersey  
JE2 3RF

Email: [info@cjra.je](mailto:info@cjra.je)

All representations should be clearly marked ‘Ports of Jersey – Assessment of Market Power: Initial Notice’.

The text of this Initial Notice may also be inspected at the above address.

The JCRA intends to make responses to the Initial Notice available for inspection. Any material that is confidential should be put in a separate Annex and clearly marked so that it can be kept confidential.

Should no comments be received by the date specified above, this Initial Notice will come into force on 22 July 2016. If comments are received, the JCRA will consider these before issuing a Final Notice.

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

<sup>2</sup> From PoJ.

## 2. 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>3</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 its consultation on the ports operations licence<sup>4</sup>, the JCRA 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>5</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>3</sup> Law, Article 2(1); Licence, Condition 1(1).

<sup>4</sup> Document No: CICRA 15/26 ([http://cicra.gg/files/Consultation%20Final\[96822\].pdf](http://cicra.gg/files/Consultation%20Final[96822].pdf)).

<sup>5</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 (dominance) in respect of Port Operations.

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

### 3. Approach to market definition

#### Methodology

In its Consultation, the JCRA adopted the following provisional approach to market definition.

##### *Product market*

The JCRA consulted on the approach of defining the relevant product market(s) as a “bundle” of services, rather than attempting to define a market for each individual service provided by PoJ. It did so primarily for the reasons set out in paragraphs 4.5 and 4.10 of the Civil Aviation Authority’s (“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>6</sup>.

##### *Geographic market*

When determining the market in which PoJ operated, the JCRA considered 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 distinct geographic markets<sup>7</sup>.

In reaching this conclusion, the JCRA noted that in determining the relevant geographic market in which airports/sea ports operate, other regulators had considered the competitive constraints imposed on airports and on sea ports by other operators that were in close geographic proximity to them<sup>8</sup>. In the present case, however, both the Airport Area and the Sea Port Area are located on an island (Jersey) where there are no other airports or commercial sea ports. The JCRA considered it unlikely that “off island” providers of airport and sea port services would constitute a significant competitive constraint on the provision of airport operation services and of sea port operation services within the Airport Area and the Sea Port Area respectively.

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<sup>6</sup> <https://publicapps.caa.co.uk/docs/33/CAP1354MPTDraftGuidance.pdf>

<sup>7</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>8</sup> In particular, the UK Civil Aviation Authority considered the competitive constraint exercise on certain London airports by other airports around London. Similarly, a report for the Dutch competition authority (NMa, now the ACM) considered the competitive constraints imposed on the Port of Rotterdam by neighbouring ports, particularly those in the Amsterdam-Rotterdam-Antwerp (ARA) range. [https://www.acm.nl/download/documenten/nma/CRA-rapport\\_openbaar.pdf](https://www.acm.nl/download/documenten/nma/CRA-rapport_openbaar.pdf)

The JCRA was therefore minded to consider that the appropriate geographic markets were likely to be the Airport Area and the Sea Port Area and consulted on that basis.

#### *Responses on methodology*

In its response to the Consultation, PoJ stated that the JCRA should set out clearly its methodology for defining the market(s) on which PoJ operates in Jersey and carrying out a dominance assessment. It suggested possible approaches that the JCRA could take and factors which the JCRA should consider in arriving at its conclusions.

The JCRA considered the merits of carrying out a detailed market definition exercise as suggested by PoJ but considered that it would be disproportionate to do so given the particular features of the market in Jersey and, in particular, the fact that Jersey is an island where the airport and the sea port are the only facilities of their type. Instead, the JCRA has taken a pragmatic, practical approach to market definition; it considers this to be the most appropriate approach in this case given that a detailed, technical analysis would, in all likelihood, lead to a very similar or identical conclusion on market definition.

#### *Conclusion on methodology*

The JCRA has considered the arguments put forward by PoJ in respect of appropriate methodology. However, its conclusion remains that a detailed market definition exercise as advocated by PoJ would be disproportionate given the particular features of the Jersey market and, in particular, the fact that Jersey is an island where the airport and the sea port are the only facilities of their type. The JCRA therefore intends to proceed on the practical, pragmatic assumption that:

- (a) The relevant product markets are the provision of airport operation services and the provision of sea port operation services, split by user group where appropriate;
- (b) The relevant geographic markets are the Airport Area and the Sea Port Area respectively.

#### **4. Approach to Dominance/Significant Market Power**

In assessing whether PoJ has a dominant position on the market for the provision of airport and sea port operation services in Jersey, the JCRA will adopt the approach set out by the CJEU in *Michelin v. Commission*<sup>9</sup>, which defines dominance as:

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<sup>9</sup> Case 322/81 – *NV Nederlandsche Banden Industrie Michelin v. Commission of the European Communities* [1983] ECR 3461, paragraph 30.

*“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 monopoly position (i.e. a market share of 100%) is a clear indication of dominance, in the absence of compelling evidence to the contrary.

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

### **Definition of “airport operation services” (excluding “private” users)**

#### *Consultation*

In its Consultation, the JCRA set out its view that airport operation services are likely to include some, or all, of the following<sup>10</sup>:

- (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) The arrival and departure of airport staff;
- (g) Groundhandling services;

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<sup>10</sup> The JCRA has adopted these preliminary working definitions on the basis of the approach used by the UK Civil Aviation Authority and the definition of airport operation services contained in the Civil Aviation Act 2012, s.68.



- (h) Car parking facilities;
- (i) The provision of facilities for shops, retail businesses and (possibly) offices.

The JCRA's sought the views of interested parties on the services that should be regarded as constituting airport operation services.

### *Responses*

In its response, PoJ expressed some support for an approach to market definition that defined the relevant market as a bundle of airport operation services. However, it stated that the bundle of "airport infrastructure services" should be assessed separately from services relating to groundhandling and refuelling. This was because "the market conditions and provisions of supply are very different for [services relating to groundhandling and refuelling] compared to the airport infrastructure services".

As was made clear in the Consultation<sup>11</sup>, the JCRA recognises that the way in which groundhandling services are supplied may be different to the way in which those services identified by PoJ as "airport infrastructure services" are supplied, and in particular that the services may be provided by a third party. Nevertheless, the JCRA considers that access to and use of airport infrastructure for the purposes of providing groundhandling and refuelling services is an airport operation service offered by PoJ as part of the airport infrastructure services "bundle"; these are services that an airport user would consider necessary for it to be able to use the airport<sup>12</sup>.

In its consultation, the JCRA indicated that its provisional view was that services (a) – (g) listed above should be considered as forming part of the "bundle" of airport operation services that airport users must purchase from PoJ (or a company appointed by PoJ to provide the services on its behalf). It invited comments on that approach and sought the views of interested parties as to whether services (h) (car parking services) and (i) (the provision of facilities for shops, retail businesses and offices) should be regarded as airport operation services. PoJ's response made clear that it did not consider car parking services

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<sup>11</sup> The Consultation stated that the proposed market definition of the "provision of airport operation services within the Airport Area" would include the provision of access and infrastructure needed for the provision of those services.

<sup>12</sup> Even if it were to accept that groundhandling 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 groundhandling 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.

or the provision of facilities for shops, retail businesses and offices to amount to airport operation services.

Having considered PoJ's response, the JCRA concludes that car parking services and the provision of facilities for shops, retail businesses and offices should not be included in the bundle of airport operation services at this time.

### **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 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) 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.

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

### **Definition 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. Airport operation services to “private” users, which would include the provision of access and infrastructure needed for the provision of those services, might include some, or all, of the following:

- (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) The arrival and departure of airport staff;
- (e) Groundhandling services;
- (f) Car parking facilities.

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, appropriate. Its view was that PoJ would have SMP in the market for airport infrastructure services (as defined in its response) to private users. However, PoJ considered that neither refuelling services nor groundhandling 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.

The JCRA has considered the issues raised by PoJ carefully. However, as explained above, although the JCRA recognises that the way in which groundhandling services are supplied may be different to the way in which those services identified by PoJ as “airport infrastructure services” are supplied, and in particular that the services may be provided by a third party, it nevertheless considers that access to and use of airport infrastructure for the purposes of providing groundhandling and refuelling services is an airport operation

service offered by PoJ as part of the airport infrastructure services to private users “bundle” since these are services that such a user would consider to be necessary for it to be able to use the airport. For the reasons set out above, the JCRA considers that the geographic market for the provision of those services is no wider than Jersey airport and it therefore does not consider it necessary to consider whether it would be appropriate to (further) segment the market by user group.

In its consultation, the JCRA set out its provisional view that car parking services might not form part of the “bundle” of airport operation services that private airport users must purchase from PoJ (or a company appointed by PoJ to provide the services on its behalf). PoJ’s response made clear that it did not consider car parking services amounted to airport operation services to private airport users. Having considered PoJ’s response, the JCRA concludes that car parking services should not be included in the bundle of airport operation services to private airport users at this time.

### **Decision on market definition and market power in provision 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 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.

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

### **Definition of commercial sea port operation services**

In its Consultation, the JCRA set out its view that it might be appropriate to define a market for the provision of commercial port operation services within the Sea Port Area, which would include the provision of access and infrastructure needed for the provision of those services, and that commercial port operation services might include some, or all, of the following:

- (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. stevedoring services; 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;
- (h) Car parking facilities;
- (i) (Possibly) the provision of facilities for shops and retail businesses.

In its response, PoJ makes the following observations.

First, it considers that passenger port operations services and freight port operations services are likely to form separate product markets.

Second, it states that services related to the arrival and departures of passengers are provided by the commercial operator and not by PoJ and therefore do not form part of the commercial port operation services “bundle”.

Third, it does not consider that either car parking services or the provision of facilities for shops and retail businesses should form part of the port operation services “bundle”, since there are numerous other providers of these services located in close proximity to the Sea Port Area.

Considering these points in turn:

- (a) The JCRA does not consider that it is necessary to segment the market for port operations services into a “passenger” and a “freight” submarket. This is because it considers that the infrastructure used in the provision of services to passengers and to freight is likely to be substantially the same. In deciding not to segment this market, it has also taken into account the fact that the market position of PoJ would not change, irrespective of the market definition used;
- (b) For reasons similar to those set out above in relation to groundhandling services, namely that PoJ provides access to and use of its infrastructure for the provision of services related to the arrival and departure of passengers, the JCRA considers that services facilitating the arrival and departure of passengers and of cargo form part of the commercial port operations services “bundle”;
- (c) The JCRA accepts that, at the present time, it would not be appropriate to include the provision of car parking facilities and the provision of facilities for shops and retail businesses within the commercial port operations services “bundle”.

## **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 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. stevedoring services; 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.

## **8. 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.



## 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 within the Sea Port Area, 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.

## 9. Next steps

The text of this Initial Notice is available for inspection at the JCRA's offices at:

Jersey Competition Regulatory Authority  
2<sup>nd</sup> Floor, Salisbury House  
1-9 Union Street  
St Helier  
Jersey  
JE2 3RF

Interested parties may make written comments on the content of this Initial Notice by writing to the JCRA at the above address or by e-mail to [info@cicra.je](mailto:info@cicra.je). All representations should be clearly marked 'Ports of Jersey – Assessment of Market Power: Initial Notice'. The JCRA intends to make responses to the Initial Notice available for inspection. Any material that is confidential should be put in a separate Annex and clearly marked so that it can be kept confidential.

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