



Competition (Jersey) Law 2005 Guidelines

4. Trade Associations & Professions

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1. WHAT THIS GUIDELINE IS ABOUT

The Competition (Jersey) Law 2005 (the Law) prohibits arrangements between two or more undertakings that have as their object or effect the hindering of competition within Jersey (the Part 2 prohibition). This Guideline deals with how the Part 2 prohibition applies to trade associations, professions and other self-regulating bodies. It should be read in conjunction with the JCRA Guideline **Anti-Competitive Arrangements**.

The definition of ‘undertaking’ is wide and may include an association of undertakings. The internal relationship between the undertakings that form the association is also likely to be considered as an arrangement between undertakings. Other measures operated or made by an association of undertakings such as rules, decisions or recommendations are likely to be considered as arrangements between the individual members if they are intended to be binding or are actually implemented. The relationship of an association of undertakings with third parties is likely to be considered as an agreement between undertakings for the purposes of the Part 2 prohibition.

Examples of the rules, decisions, recommendations or other activities of associations of undertakings that may hinder competition and therefore breach the Part 2 prohibition are described in section 2 of this Guideline and the possibility of exemption for such activities is explained in section 3.

The Part 3 prohibition may also apply to conduct of trade associations, professions and self-regulating bodies and/or their members. The Part 3 prohibition applies to conduct on the part of one or more undertakings that amounts to the abuse of a dominant position; therefore such organisations themselves may constitute undertakings, or their members may comprise ‘one or more undertakings’, the conduct of which may fall within the scope of the prohibition. This is not covered in detail in this guideline and further reference should be made to the JCRA Guideline **Abuse of a Dominant Position**.

The involvement of an association of undertakings (assuming the association is itself an undertaking) in an infringement of a Part 2 or Part 3 prohibition could result in fines being imposed on the association itself, its members, or both.

Disclaimer

This Guideline is not a substitute for the Law. Anyone with particular questions concerning the application of this Guideline or the Law to specific facts should seek legal advice. Proof that a person has failed to comply with this Guideline is not proof that a person failed to comply with the Law. The JCRA may, however, rely on non-compliance with the Guideline as evidence toward establishing an infringement of the Law. This Guideline remains subject to amendment or revocation by the JCRA.

2. SCOPE OF THE PART 2 PROHIBITION

The fact that members of an association of undertakings are acting through the association does not affect the way in which the Law applies to their decisions, rules, recommendations or other activities: their position is no better and no worse than if they were acting in the same manner outside the forum of such an association. In each case the Part 2 prohibition applies only if the relevant activity has the object or effect of hindering to an appreciable extent competition in a relevant Jersey market. Any such activity that does fall within the Part 2 prohibition may be considered for exemption: a number of the examples below will often be candidates for exemption (further details on exemptions are given in section 4 below) but rules, recommendations or decisions which result in price fixing are unlikely to be exempted.

The remainder of this part sets out examples of the decisions, rules, recommendations or other activities of associations of undertakings that may breach the Part 2 prohibition. This is a non-exhaustive list: it includes examples of activities that generally would fall within the Part 2 prohibition, although the particular circumstances of a case may mean that a particular activity may not be prohibited. Equally, there will clearly be instances of activities not listed in the examples that are prohibited. More general examples of anti-competitive behaviour that may fall within the Part 2 prohibition can be found in the JCRA Guideline **Anti-Competitive Arrangements**.

Pricing

Collective price-fixing or price-coordination of any product or service is likely to breach the Part 2 prohibition, whatever form it takes. The JCRA believes that any collective decisions or recommendations as to prices and charges, including discounts and allowances, is likely to have the object or effect of hindering competition, and is unlikely to be exempted.

Information exchange

General

There are circumstances where there can be no objection to the exchange of information, whoever the exchange is made by, even between competitors, and whether or not under the aegis of an association of undertakings. For example, the collection and publication of statistics are legitimate functions of associations of undertakings.

The exchange of information may, however, have an appreciable effect on competition where it serves to remove uncertainties in the market and therefore eliminate competition between undertakings. This will be the case even though the exchange might appear innocuous. It does not matter that the information could have been obtained from other

sources. Whether or not the information exchange has such an appreciable effect will depend on the circumstances of each individual case: the market characteristics; the type of information; and the way in which it is exchanged. As a general principle, the JCRA will consider the number of undertakings operating in the market, the frequency of exchange and the sensitivity and confidentiality of the information that is exchanged.

The general approach of the JCRA to information exchange is set out below.

Exchange of price information

The exchange of information on prices may lead to price co-ordination and therefore eliminate competition which would otherwise be present between the undertakings. This will be the case whether the information exchanged relates directly to the prices charged or to the elements of a pricing policy, for example, discounts, costs, terms of trade and rates and dates of change.

The circulation of historical information or the collation of price trends may be less likely to have an appreciable effect on competition. An example may be where it forms part of a structured scheme of inter-firm comparison which is intended to spread best industrial practice, in particular if the information is collected, aggregated and disseminated by an independent body. Many associations of undertakings organise the exchange of such information amongst members. For example, bench-marking exercises are often operated by associations or undertakings on behalf of their members. Much of this activity may have little effect on competition and therefore may not be caught by the Part 2 prohibition.

The exchange of specific information on prices between competitors is, however, likely to reduce the uncertainties inherent in the competitive process and to facilitate the co-ordination of market conduct, whether the exchange is organised by the members themselves or, as is often the case, by or through an association of undertakings.

Exchange of non-price information

The exchange of information on matters other than price may have an appreciable effect on competition depending on the type of information exchanged and the market to which it relates. The exchange of statistical data, market research and general industry studies, for example, is unlikely to have an effect on competition provided that the information exchanged does not enable confidential or sensitive business information to be shared.

In general, the exchange of aggregated information on output and sales should not affect competition provided that it is sufficiently historic and cannot influence future competitive market behaviour. There may, however, be an appreciable effect on competition if it is possible to disaggregate the information and identify the participants. This may also be the case if the exchange relates to recent, current or future information.

Advertising

Restrictions on advertising, whether relating to the amount, nature or form of advertising, restrict competition to some degree. Whether the effect is appreciable depends on the purpose and nature of the restriction, and on the market in which it is to apply. Bona-fides rules or decisions of undertakings aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful and decent are unlikely to have an appreciable effect on competition, but restrictions which more generally prevent members from using advertising are another matter. Rules or decisions of associations of undertakings prohibiting members from soliciting for business, from competing with other members, or from advertising prices, or prices below a minimum or recommended level, are all likely to be caught by the Part 2 prohibition.

Joint buying/selling

Any joint activity, for example joint buying or selling or joint research, co-ordinated through an association of undertakings will be subject to the Part 2 prohibition to the same extent as if they were done outside the medium of an association of undertakings, for example, by the undertakings individually in an agreement.

Codes of conduct

A code of conduct may seek to introduce best practice into a particular sector and may include provisions, for example, for dealing with consumer complaints and a redress procedure. A code is unlikely to be successful in promoting consumer protection unless it is widely adopted and effectively enforced, but at the same time it may limit the way participants can compete. If, however, the structure of the market is competitive and the code does not deal with prices or involve any element of market sharing, the effects on competition are less likely to be appreciable.

Technical standards

Associations of undertakings may play a role in the negotiation and promulgation of technical standards in an industry. This will limit the members in the make-up of the products or services that they can offer and there is therefore a restriction of competition. If entry barriers were to be raised significantly as a result of adoption of the standard, the effects on competition could be appreciable.

Terms of membership

Rules of admission as a member of an association should be transparent, proportionate, non-discriminatory and based on objective standards. Those that are not may breach the Part 2 prohibition. Terms of membership will have an appreciable effect on competition where the effect of exclusion from membership is to put the undertaking(s) concerned at a competitive disadvantage. Similarly, procedures for expelling members of an association may have an appreciable effect on competition, particularly where they are not based on reasonable and objective standards or where there is no proper appeals procedure in the event of refusal of membership or expulsion.

Certification

An association may certify or award quality labels to its members to demonstrate that they have met minimum industry standards. While such a scheme has benefits for consumers in the form of quality assurances, it may lead to a restriction of competition. A scheme is less likely to have an appreciable effect on competition and breach the Part 2 prohibition where certification is available to all manufacturers that meet objective quality requirements. However, the standards must be objective and reasonable. Where manufacturers must accept additional obligations governing the products that they can buy or sell, or restrictions as to pricing or marketing, the scheme is likely to have an appreciable effect on competition and be caught by the Part 2 prohibition.

3. EXEMPTION

Any arrangement between undertakings that falls within the Part 2 prohibition can be considered for exemption (see also the JCRA Guideline **Anti-Competitive Arrangements**).

The JCRA will consider any application for an exemption of a decision, rule, recommendation or other activity of an association of undertakings against the criteria laid down in Article 9 of the Law which provides that, to qualify for exemption, an activity:

- a) is likely to improve the production or distribution of goods or services, or to promote technical or economic progress in the production or distribution of goods or services;
- b) will allow consumers of those goods or services a fair share of any resulting benefit;
- c) does not impose on the undertakings concerned terms that are not indispensable to attainment of the objectives mentioned in sub-paragraphs (a) and (b); and
- d) does not afford the undertakings concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.