



Competition (Jersey) Law 2005 Guidelines

2. Anti-Competitive Arrangements

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1. INTRODUCTION

The Competition (Jersey) Law 2005 (the Law) prohibits arrangements between two or more undertakings which hinder competition in Jersey or part of it, regardless of where the arrangements may have originated.

The terms used in Part 2 of the Law and the concepts relevant to its application are considered later on in this Guideline.

Types of anti-competitive arrangements to which Part 2 of the Law may apply are considered below. Certain types of arrangements caught by Part 2 of the Law may be exempted where they satisfy certain statutory criteria. The types of exemption available and the criteria which need to be satisfied are also dealt with later on in this Guideline.

A breach of Part 2 of the Law means that the arrangement is void and that the offending parties may be liable to financial penalties. In addition, third parties who consider that they have been harmed may have a claim for damages in the Royal Court. These consequences are also considered in this Guideline.

Part 2 of the Law is modelled on Article 81 of the EU Treaty. Article 60 of the Law places an obligation on the JCRA and the Royal Court to ensure consistency with European Community competition law as far as possible.

A Note on European Competition Law

Throughout this Guideline, we refer to precedents and principles from competition law in the European Union. Under Article 60 of the Law, the JCRA must attempt to ensure that as far as possible, questions arising in Jersey are dealt with in a manner consistent with the treatment of corresponding questions arising under E.U. competition law. Relevant sources include judgments by the European Court of Justice or Court of First Instance, decisions taken and guidance published by the European Commission, and interpretations of E.C. competition law by member state courts and competition authorities. Article 60, however, does not prevent the JCRA from departing from European precedents based on particular circumstances in Jersey.

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. RELEVANT TERMS

Undertaking

‘Undertaking’ includes any natural person, or group of persons, capable of carrying on commercial or economic activities relating to goods or services, whatever its legal status. It includes companies, firms, businesses, and partnerships, individuals operating as sole traders, agricultural co-operatives, trade associations and non profit-making organisations. It also includes the States, a Committee of the States, a body created by Act of the States and any States Authority, to the extent that they are carrying on an economic activity. An economic activity includes any activity consisting of offering goods or services in a market. Thus, to the extent that the States, or a body created or controlled by the States, engages in an economic activity, as opposed to solely acting in the public interest, its activities are potentially subject to scrutiny under the Law.

Part 2 of the Law does not apply to arrangements between persons that form part of the same undertaking; i.e. the same economic unit. In particular, an arrangement between a parent and its subsidiary company or between two companies that are under control of a third will not be arrangements between undertakings if the subsidiary has no real freedom to determine its course of action on the market and, although having a separate legal personality, enjoys no economic independence.¹ Whether or not the undertakings form a single economic unit will depend on the facts of each case.

Arrangement

Arrangement has a wide meaning and covers arrangements whether legally enforceable or not, written or oral; it includes so-called ‘gentlemen’s agreements’. There does not have to be a physical meeting of the parties for an arrangement to be reached: an exchange of letters or telephone calls may suffice if a consensus is arrived at as to the action each party will, or will not, take.

The fact that a party may have played only a limited part in the setting up of the arrangement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the arrangement (although these facts may be taken into consideration in deciding the level of any financial penalty).

¹ Case 22/71 Beguelin Import v GL Import Export [1972] CMLR 81

Associations of undertakings

Trade associations and professional and self-regulatory bodies are also included within the scope of the Part 2 prohibition. The internal relationship between the undertakings which 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 also likely to be considered as arrangements between the individual member undertakings 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. In each case the Part 2 prohibition applies only if the relevant activity has the object or effect of hindering competition in a relevant Jersey market. It will be a question of fact in each case whether an association of undertakings is itself a party to an arrangement. The Law's application to trade associations and similar bodies is discussed further in the JCRA's Guideline **Trade Associations & Professions**.

Concerted practices

'Arrangement' includes the EC competition law concept of concerted practices. A concerted practice may exist where there is informal co-operation without any formal agreement or decision.

In considering if a concerted practice exists, the JCRA normally will follow relevant European Community precedents established under Article 81 of the EU Treaty. The evidence that will be required to establish an infringement includes:

- the existence of positive contacts between the parties; and
- parallel behaviour as a result of such contacts that leads to conditions of competition that do not correspond to normal conditions of the market.

The following are examples of factors which the JCRA may consider in establishing if a concerted practice exists:

- whether the parties knowingly enter into practical co-operation;
- whether the behaviour in the market is influenced as a result of direct or indirect contact between undertakings;
- the structure of the relevant market and the nature of the product involved; and
- the number of undertakings in the market, and where there are only a few undertakings, whether they have similar cost structures and outputs.

The Island of Jersey

Part 2 of the Law applies only if the arrangement is, or is intended to be, implemented within the Island or any part of it.

The hindering of competition

Part 2 of the Law prohibition applies where the object or effect of the arrangement is to hinder competition. Any arrangement between undertakings might be said to hinder competition to some degree, in that it restricts the freedom of action of the parties. That does not necessarily mean that the arrangement has or will have an appreciable effect on competition, however, and the JCRA does not adopt such a narrow approach. The JCRA will assess the effect of an arrangement on competition in the Island or part of it by examining it in its market and economic context.

The appreciable effect test

An arrangement will infringe Part 2 of the Law only if it has as its object or effect hindering to an appreciable extent competition in the Island or part of it.

The JCRA takes the view that an arrangement generally will have no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25 per cent, although there will be circumstances in which this is not the case.

The JCRA will, in addition, generally regard any arrangement between undertakings that:

- directly or indirectly fixes prices; or
- shares markets; or
- imposes minimum resale prices; or
- is one of a network of similar agreements which have a cumulative effect on the market in question;

as being capable of having an appreciable effect, even where the combined market share falls below the 25 per cent threshold.

Other factors

Even where the undertakings' combined market share is higher than 25 per cent, the JCRA may find that the effect on competition is not appreciable. Other factors concerning the content of the arrangement and the structure of the market or markets affected by the arrangement, such as whether competitors would be able to constrain the

conduct of the parties, barriers to entry or the characteristics of buyers and the structure of the buyers' side of the market, will be considered in determining whether the arrangement has an appreciable effect.

Further details on defining the market are published in the JCRA Guideline **Market Definition**.

3. EXAMPLES OF ANTI-COMPETITIVE ARRANGEMENTS

Arrangements to which the Part 2 prohibition applies include those that:

- (a) directly or indirectly fix purchase or selling prices or any other trading condition;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or source of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

The list is similar to Article 81 of the EU Treaty. It is a non-exhaustive, illustrative list. Some guidance on the JCRA's approach in assessing these types of arrangements and potentially anti-competitive arrangements follows below. It should be noted, however, that any arrangement that has an appreciable effect on competition is likely to fall within Part 2 of the Law irrespective of whether or not it is of a type described in the illustrative list in the Law or in this Guideline, although it may be subject to exemption. The possibility of exemption is considered later on in this Guideline.

Directly or indirectly fixing purchasing or selling prices

Arrangements which explicitly and directly fix prices or the resale prices of any product or service are likely to infringe the prohibition. The JCRA believes that such price-fixing arrangements have appreciable effects on competition.

There are many ways in which prices can be fixed. It may be by fixing the components of a price, setting a minimum price below which prices are not to be reduced, establishing the amount or percentage by which prices are to be increased, or establishing a range outside which prices are not to move.

Price-fixing arrangements may also cover the discounts or allowances to be granted, transport charges, payments for additional services, credit terms or the terms of guarantees, for example. The arrangement may relate to the charges or allowances quoted or to the ranges within which they fall or to the formulae by which ancillary terms are to be calculated.

Arrangements to share markets

Undertakings may agree to share markets, whether by territory, type or size of customer, or in some other way. This may be as well as or instead of the price to be charged, especially where the product is reasonably standardised. Such an arrangement is likely to have an appreciable effect on competition.

There can be arrangements, however, which have the effect of sharing the market to some degree but where that effect is no more than a consequence of the main objective of the arrangement. Parties may agree, for example, each to specialise in the manufacture of certain products in a range, or of certain components of a product, in order to be able to produce in longer runs and therefore more efficiently. Such an arrangement is caught by the prohibition where there is, or is likely to be, an appreciable effect on competition, but may, depending on the circumstances, qualify for an exemption as discussed below.

Collusive tendering ('bid-rigging')

Tendering procedures are designed to provide competition in areas where it might otherwise be absent. An essential feature of the system is that prospective suppliers prepare and submit tenders or bids independently. Any collaboration between actual or potential bidders as to whether, and if so, on what terms they would bid is likely to have an appreciable effect on competition and breach the Part 2 prohibition. See the Guideline **Cartels** for further guidance on bid-rigging.

'Cartels'

Agreements or concerted practices of the three types described above – price fixing, market-sharing and bid-rigging – are commonly referred to as 'cartels'. See the Guideline **Cartels** for further guidance on such arrangements.

Arrangements to limit or control production or investment

An arrangement to limit or control production may appreciably affect competition. Such an arrangement may be the way in which prices are fixed, or may relate to production

levels or quotas. In some limited cases, such as an arrangement intended to deal with structural overcapacity, the arrangement may qualify for exemption.

Competitive pressures may be reduced if undertakings in an industry agree to limit or at least coordinate future investment plans. It is likely that any arrangement to limit or control investment will restrict competition to an appreciable extent.

Joint buying/selling

An arrangement between sellers to fix (directly or indirectly) the price that they are prepared to charge, or to sell only through agreed arrangements, limits competition between them. Such an arrangement may be caught by Part 2 of the Law if it has an appreciable effect on competition.

The same issues potentially arise in arrangements between buyers. Joint buying arrangements may have an appreciable effect on competition.

Information disclosure

The disclosure of information, whether one-way disclosure or an exchange, may have an appreciable effect on competition where it serves to remove uncertainties in the market and therefore eliminate competition between undertakings, such as where information is exchanged on pricing intentions (see below). It does not matter that the information could have been obtained from other sources. Whether or not the information disclosure has an appreciable effect on competition will depend on the circumstances of each individual case: the market characteristics, the type of information and the way in which it is disclosed. As a general principle, the JCRA will consider that the smaller the number of undertakings operating in the market, the more frequent the disclosure, and the more sensitive and confidential the nature of the information which is disclosed, the more likely there is to be an appreciable effect on competition.

Disclosure of price information

The disclosure of information on prices may lead to price co-ordination and therefore eliminate competition which would otherwise be present between the undertakings. This would be the case whether the information disclosed 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-business comparison that is intended to spread best industrial

practice, in particular if the information is collected, aggregated and disseminated by an independent body, for example as part of a bench-marking exercise.

Disclosure of non-price information

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

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-fide decisions aimed at curbing misleading advertising, or at ensuring that advertising is legal, truthful and decent are unlikely to have an appreciable effect on competition.

Standardisation arrangements

An arrangement on technical or design standards may lead to an improvement in production by reducing costs or raising quality, or it may promote technical or economic progress by reducing waste and consumers' search costs. The arrangement may, however, have an appreciable effect on competition if it includes restrictions on what the parties may produce or is, in effect, a means of limiting competition from other sources, for example by raising entry barriers.

Vertical arrangements

Restrictive vertical arrangements (where the parties operate at different levels of the supply chain), such as exclusive supply or purchase agreements or recommending resale prices, may also be prohibited by Part 2 of the law if they have an appreciable effect on competition.

An exclusive supply agreement is one that causes a supplier to sell its products only to one buyer within Jersey for the purposes of the buyer's own use or resale. Whether such an agreement would have an appreciable effect on competition would depend on various factors. The JCRA will consider first whether there are other potential purchasers or distributors that are being excluded from the market because of the exclusivity. The

buyer's market share in its downstream market may be of particular importance: the greater its market share there, the more likely there is to be an appreciable effect on competition. The duration of the supply obligation, entry barriers, the countervailing power of suppliers and the level of trade affected are also relevant.

An exclusive distribution agreement for a particular brand may not have an appreciable effect on the competition in a market if there are available substitutes for that brand, and may therefore not breach the Law. It is therefore necessary to decide what the relevant market is and what products or services are contained in that market. An example where issues might arise would be, for example, if there was only one brand of shower available in Jersey and there were no clear substitutes for it. An exclusive distribution agreement for that brand of shower may be at risk of breaching the Law. Whether an exclusive distribution agreement would breach the Law depends on the facts of each particular case.

Resale price maintenance arrangements are those that restrict a buyer's ability to determine the price of a product or service. This may take many forms such as setting the actual minimum price, fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level or making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level. An example that also amounted to resale price maintenance was where a bed manufacturer threatened to exclude a retailer from a free linen promotion if the retailer continued to discount the price of the manufacturer's beds. Generally speaking, these types of arrangements will be an infringement of the Law.

Setting a maximum sale price or recommending a sale price will generally not infringe the Law provided the supplier has made it clear to the buyer that there is no obligation to follow the recommendations. The supplier must also not take any action to attempt to enforce recommended prices.

Other anti-competitive arrangements

Competition in a market can be restricted in less direct ways than by fixing of prices or the sharing of markets or the other examples set out above – for example, an 'aggregated rebate' scheme under which a customer obtains better terms the more business they place with all the parties to the scheme. Each case will need to be considered in its own circumstances.

Other arrangements where the parties agree to cooperate may fall within Part 2 of the Law if they have an appreciable effect on competition. These include, for example, arrangements for specialisation where each party agrees to produce particular products and supply them to the other, or to co-operate in research and development, and many joint venture agreements, in particular for the development of new products or markets.

4. EXEMPTIONS

An arrangement which falls within the scope of the Part 2 prohibition may be exempted if it satisfies the criteria in Article 9 of the Law. The arrangement will qualify for exemption where it:

- 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.

All conditions must be met. The objective and appreciable advantages must be sufficient to outweigh any disadvantage to competition. This must be judged objectively. The onus of demonstrating that the conditions are met falls upon the parties to an arrangement.

The agreement contributes to improving production or distribution or promoting technical or economic progress...

Examples of improvements in production or distribution include lower costs from longer production or delivery runs, or from changes in the methods of production or distribution, improvements in product quality, or increases in the range of products produced or services provided. In each case the nature of the improvement claimed must be clearly identified and justified.

Examples of the promotion of technical or economic progress include efficiency gains from economies of scale and specialisation in research and development with the prospect of an enhanced flow or speed of innovation and technical progress.

...while allowing consumers a fair share of the resulting benefits

This is not limited to final consumers. It can include the customers of the parties to the agreement. If an improvement (for example, a cost reduction) is seen as benefiting only the shareholders of the parties to the agreement, the condition would not be satisfied. The views of customers and consumers are likely to be important in the consideration of the case for exemption and, in appropriate cases, they will be sought. The resulting benefits are likely to be those which flow from improvements in production or distribution. An arrangement may lead, for example, to the faster development of new products or of new markets or better distribution systems, so that the benefits to consumers also lie in the future. The JCRA takes account of the dynamics of market

conduct and competition in assessing whether or not this condition for exemption is satisfied.

Restrictions which are not indispensable to the attainment of the objectives set out in the first two criteria

To qualify for exemption, agreements may not include restrictions beyond those necessary for the attainment of the benefits that the parties demonstrate is likely to flow from the agreement. The agreement should contain the least restrictive means of achieving its aims. The JCRA will look carefully for any restrictions beyond those necessary to secure those benefits.

The possibility of eliminating competition in respect of a substantial part of the products in question

The JCRA assessment will consider this condition in the overall context of the effect of the agreement on competition. An application for an individual exemption is unlikely to succeed if the parties are unable to show that there will continue to be effective competition in the market(s) for the goods or services with the agreement is concerned. If, after an appropriate market analysis, the JCRA concludes that it is not satisfied that effective competition will continue, there can be no possibility of an exemption.

Block exemptions

Under the Law the Economic Development Committee may, after consulting the JCRA, by Order make block exemptions which exempt particular categories of agreements which are likely to satisfy the statutory exemption criteria. An arrangement that falls within a category specified in the block exemption will be automatically exempt from Article 8 of the Law, and there is no need to notify such an arrangement to the JCRA. Any such block exemption may impose conditions or obligations subject to which the block exemption will have effect.

Small undertakings exemption

The Economic Development Committee may, after consulting the JCRA, by Order provide that small undertakings, as prescribed by the Order, be exempt from Article 8 (1) of the Law.

The Order made may prescribe what constitutes a small undertaking, by reference for example to:

- turnover, earnings, market share or similar measures; or
- number of employees.

An Order made may impose conditions or obligations subject to which an exemption granted by the Order is to have effect.

An Order made under this exemption has no effect if the object or effect of the arrangement is a serious restriction of competition such as price-fixing or market-sharing.

5. CONSEQUENCES OF INFRINGEMENT

Null and void

Any arrangement that infringes the Part 2 prohibition is void and cannot be enforced.

Financial penalties

Financial penalties of up to a maximum of 10 per cent of turnover in Jersey (up to three previous years) of an undertaking may be imposed for an infringement of Part 2 of the Law.

Third party claims

Third parties who consider that they have been harmed as a result of an unlawful agreement have a claim for damages, including punitive damages, in the courts of Jersey.