



Competition (Jersey) Law 2005 Guidelines

9. Applications for Guidance & Exemption

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1. INTRODUCTION

The Competition (Jersey) Law 2005 (the Law) prohibits anti-competitive arrangements (Article 8(1)) and abuses of a dominant position (Article 16 (1)) within Jersey (or part of Jersey)). The Law also prohibits parties to certain merger and acquisitions from executing such transactions without the prior approval of the Jersey Competition Regulatory Authority (JCRA) (Article 20(1)).

The Law provides under Article 43(1) that undertakings can seek guidance from the JCRA on whether a proposed course of action it is considering taking would be a breach of Article 8(1) or 16(1). The Law also provides under Article 9 that the JCRA may exempt an arrangement from Article 8(1) and that any party to the arrangement may apply for such an exemption. (No exemption is available for abuse of a dominant position under Article 16(1)).

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.

The Need to Provide Correct Information to the JCRA

As detailed in this Guideline, both requests for guidance and applications for exemption must be signed by an authorized representative of the applicant. It is an offence under the Law, potentially punishable by fines and/or imprisonment, to knowingly or recklessly provide information that is false or misleading in a material particular to the JCRA. Furthermore, the provision of false, incomplete or misleading information is grounds for the JCRA to withdraw guidance or an exemption. Thus, applicants must ensure that the information they provide to the JCRA is true, accurate, and complete to the best of their knowledge and belief.

2. REQUESTS FOR GUIDANCE

Article 43 of the Law provides that an undertaking can request guidance from the JCRA as to whether a planned course of action would amount to either an anticompetitive arrangement in breach of Article 8(1) or an abuse of dominance in breach of Article 16(1). An undertaking cannot ask for guidance on whether a planned course of action

would breach Article 20(1). Guidance may not be requested for on-going business conduct, because Article 43 only allows guidance on proposed courses of action.

How to make an application

A request for guidance must be made in writing and signed by an authorised representative of the applicant. The request must provide:

- details of the proposed course of action, including a copy of any agreement(s) the parties intend to sign;
- details of the parties involved;
- details of the products or services involved;
- why the request for guidance has been made, i.e. why the party or parties believe that the proposed course of action may raise a compliance issue under Articles 8(1) and/or 16(1);
- details of the industry(ies) or market(s) that might be affected by the course of action;
- a description of how competition works in the industry/market affected, e.g. how vigorous competition is, who the main participants are (including information on market shares, capacities, etc., and identity of the main suppliers and customers, possible new entrants, and what possible substitute products exist);
- all documents prepared by or for the parties analyzing the effect of the proposed course of action on markets or competition (if any); and
- any arguments the party or parties wish to make that the proposed course of action does not infringe Articles 8(1) and/or 16(1), together with supporting evidence such as documents (if any).

The confidentiality of information and documents submitted with an application for guidance is subject to the protections set out in Articles 44 and 45 of the Law. An applicant is not required to disclose information or documents protected from disclosure by legal professional privilege. The JCRA has the discretion to modify the information required, depending on the circumstances.

The applicant for guidance must pay for the JCRA's reasonable work in connection with the application. The fee will range from £200 to £1,000, depending on the complexity of the matter. An applicant for guidance will be required to pay the JCRA's fee before the guidance has been provided, and should discuss the amount of the fee with the JCRA before lodging the application.

The JCRA generally will not publish an application for guidance. However, in some circumstances, the JCRA may be unable to provide the guidance sought without consulting with other parties. In such circumstances the JCRA, with the consent of the applicant, will publish the application or otherwise contact specific third parties concerning the application. If the application contains confidential information, the

applicant will be asked to provide a version of the application for disclosure or publication.

JCRA procedure

The JCRA will consider the information provided and may ask for additional information or documents. The Law provides that if any information or documents that the JCRA reasonably requires in order to give guidance are not provided within a reasonable time, the JCRA need not proceed with the request. If you are sent a request for further information or documents, the request will advise you the date by which you need to respond. The JCRA may also ask you to attend one or more meetings to explain your request in more detail and to answer questions arising from the request.

The JCRA will provide its guidance to you in writing. The guidance will not be published without the applicant's consent and if it is published, the JCRA will consult with the applicant to ensure that all commercially sensitive information has been removed.

Effect of guidance

If the JCRA gives guidance that a proposed course of action is unlikely to breach Articles 8(1) or 16(1), the JCRA cannot investigate the course of action unless:

- it has reasonable cause to suspect that there has been a material change of circumstances since it gave the guidance; or
- it has reasonable cause to suspect that the information on which it based its guidance was incomplete, false or misleading in a material particular; or
- it has reasonable cause to suspect the course of action is a breach of Article 20(1); or
- it receives a complaint concerning the course of action, either before or after it is implemented by the parties.

3. APPLICATIONS FOR EXEMPTION

Article 9 of the Law provides that any party to an arrangement or proposed arrangement to which Article 8(1) would apply (an anti-competitive arrangement) can apply to the JCRA for exemption from the Article for the arrangement. There is no right under the Law to apply for an exemption from Articles 16(1) (abuse of dominance) or 20(1) (mergers & acquisitions).

Qualifications for exemption

The JCRA cannot grant an exemption unless it is satisfied that the arrangement:

- 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;
- will allow consumers of those goods or services a fair share of any benefit resulting from the arrangement;
- 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
- does not afford the undertakings concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.

These criteria are discussed in more detail in the JCRA's Guideline **Anti-Competitive Arrangements**.

How to make an application

Before submitting an application for exemption, an applicant may ask the JCRA for an informal meeting to discuss such matters as whether the proposed application is necessary and, assuming it is, what specific information must be provided to the JCRA.

An application for exemption must be in writing and provide the following information:

- details of the arrangement, including a copy of any agreement(s) the parties have signed or intend to sign;
- details of the parties involved;
- details of the products or services involved;
- details of the industry(ies) or market(s) that might be affected by the arrangement;
- a description of how competition works in the industry/market effected e.g. how vigorous competition is and who the main participants are (including information on market shares, capacities, etc., and identity of the main suppliers and customers, possible new entrants, and what possible substitute products exist);
- all documents prepared by or for the parties analyzing the effect of the arrangement on markets or competition (if any),
- what clauses of the arrangement the applicant thinks may be anti-competitive and why; and
- full reasons as to why the parties believe that the agreement satisfies the criteria for exemption.

An applicant is not required to disclose information or documents protected from disclosure by legal professional privilege. The JCRA has the discretion to modify the information required, depending on the circumstances.

The application must be signed by an authorised representative of the applicant. The confidentiality of information and documents submitted with an application for exemption is subject to the protections set out in Articles 44 and 45 of the Law. The applicant should clearly indicate the information contained in or submitted with the application it believes is confidential and not subject to disclosure by the JCRA to third parties, giving reasons why this information should not be disclosed. After receipt of an application, the JCRA will contact the applicant to confirm the scope of confidentiality. The JCRA will deem both the applicant and, if different, the person to whom the information relates, to have consented to the disclosure of information contained in or submitted with an application that has not been indicated as confidential.

JCRA procedure

As with requests for guidance, the JCRA will consider the information provided and may ask for additional information or documents. If you are sent a request for further information or documents, the request will advise you the date by which you need to respond. The JCRA may also ask you to attend one or more meetings to explain your application in more detail and to answer questions arising from the application.

The Law provides that the JCRA must publish the details of an application for exemption and consider representations made to it on the application. A public version of the application and the time for response therefore will be published in the Jersey Gazette and on the JCRA website. In addition, the JCRA may contact other industry participants (e.g. competitors, customers, suppliers, trade associations) concerning the application and the potential effect of an exemption on competition.

The JCRA will consider the information provided by the applicant together with any representations it receives from other parties when deciding whether an exemption would meet the qualifications referred to above.

If the JCRA grants an exemption, either with or without conditions or obligations, it will publish it in the Jersey Gazette and on the JCRA website. Additionally, the JCRA may publish decisions to *not* grant an exemption. If an applied-for exemption is not granted, the JCRA also likely will conclude that the arrangement hinders competition to an appreciable extent and therefore is prohibited by Article 8(1).

Imposing conditions or obligations

Under Article 9(6) the JCRA may attach conditions or obligations to an exemption. It may also grant the exemption for a set period or back-date an exemption.

Examples of the type of condition that may be required are:

- If an arrangement covers six products and there are competition issues with only one of those products, and exemption could be granted with the condition that the product likely to cause issues is excluded from the arrangement.
- If an arrangement would improve the production of a product, but it included a clause that was so restrictive it would eliminate competition in the distribution of that product, an exemption may be granted, subject to the condition that the clause is removed from the arrangement.

Effect of exemption

If the JCRA grants an exemption for an arrangement, it cannot take any action regarding the arrangement during the period of the exemption. However, an exemption ceases to have effect if a condition or obligation of it is breached. Furthermore, the JCRA may withdraw an exemption, vary or remove a condition or obligation, or impose additional conditions or obligations if:

- the JCRA has reasonable grounds to believe there has been a material change in the circumstances since the exemption was granted; or
- it has reasonable grounds to suspect that the information on which it based its decision to grant an exemption was incomplete, false or misleading in a material particular; or
- there has been a failure to comply with a condition or obligation.

A failure to comply with a condition or obligation may be brought to the JCRA's attention by a third party complaint or otherwise.

4. Informal Approaches

Apart from the formal procedures described above, nothing in the Law prohibits parties from contacting the JCRA on an informal basis to ask about the Law's potential applicability to specific circumstances. Parties may informally approach the JCRA by letter, email, or phone, either directly or through their advisers. Informal approaches may be made on a no-names basis. Information provided to the JCRA in such circumstances is subject to the protections from disclosure detailed in Articles 44 and 45 of the Law.

The Law does not require the JCRA to respond to an informal approach, and the decision on whether or not to respond – as well as the timing, form and content of any response provided – are all within the JCRA's sole discretion. Unlike guidance or exemptions, any response provided to an informal approach is not binding on the JCRA. Depending on the circumstances, the JCRA may request that a party making an informal approach seek guidance under Article 43, or an exemption under Article 9, for the conduct or potential conduct described.

5. KEY DIFFERENCES BETWEEN GUIDANCE AND EXEMPTIONS

	Guidance	Exemption
Coverage	Any <i>planned</i> course of action that may breach of Articles 8(1) and/or 16(1)	Planned or existing arrangements that may breach Article 8(1). No exemption possible from Article 16(1).
Confidentiality	Applications for guidance and the guidance provided remain confidential, unless the applicant consents to full or partial disclosure.	Law requires that JCRA publish details of exemption applications and notices of exemptions granted.
Legal Certainty	Provides parties guidance on potential applicability of Articles 8(1) and/or 16(1); however, no bar to action if JCRA receives a complaint. Also no bar to third party civil actions under the Law.	If granted, arrangement exempt from the application of Article 8(1). Exemption may be withdrawn by JCRA in particular circumstances.
Fee	£200 - £1,000 depending on complexity	No fee
Time	Guidance normally available within a significantly shorter time than an exemption	Considerably longer time scale than Guidance, as more complete investigation generally will be required.
Consequences of Negative Decision	Guidance that a proposed course of action could infringe the Law remains confidential between the JCRA and applicant, absent the applicant's consent to disclosure.	Refusal to grant exemption normally published and likely grounds for an Article 8(1) violation (which also would be published).