



Jersey Competition Regulatory Authority ('JCRA')

Decision C 015/06

**Concerning the General Practitioners Out-of-Hours
Cooperative Notified under Article 9 of the Competition
(Jersey) Law 2005**

Table of Contents

I.	INTRODUCTION AND EXECUTIVE SUMMARY	1
II.	OVERVIEW OF AFTER-HOURS MEDICAL CARE.....	2
III.	THE NOTIFIED AGREEMENT AND SERVICES PROVIDED.....	2
IV.	ANALYSIS UNDER ARTICLE 8 OF THE LAW	5
A.	Undertakings.....	5
B.	Arrangement	6
C.	Object or Effect of Hindering Competition	6
D.	Appreciable Effect	7
V.	ANALYSIS UNDER ARTICLE 9 OF THE LAW	7
A.	Improvement in the Distribution of Goods or Services	8
B.	Allow Consumers a Fair Share of the Benefits.....	9
C.	Contains No Indispensable Restrictions to Competition	14
1.	The Necessity for Fixed Fees.....	14
2.	Other Potential Restrictions Contained in the JDOC Agreements	16
D.	No Elimination of Competition in respect of a Substantial Part of the Goods or Services in Question	17
VI.	DECISION	20
	ANNEX.....	23

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On 1 March 2006, JCRA received an application for an exemption under Article 9 of the Competition (Jersey) Law 2005 (the 'Law') concerning a proposed cooperative among general medical practitioners in Jersey, called Jersey Doctors on Call or 'JDOC', to provide after-hours medical services. The cooperative was proposed jointly by the participating general practitioners and Jersey's Health and Social Services Department ('HSS').
2. On 14 March 2006 the JCRA published details of the application in the Jersey Gazette, asking for interested parties to submit comments on the application to the JCRA by 31 March 2006. The JCRA received four representations in response to this consultation, which were considered as part of the JCRA's determination of this matter.
3. On 5 April 2006, HSS informed the JCRA that it had decided to introduce JDOC, with effect from 3 April 2006, on a trial basis and subject to a performance review after six months. The programme remained subject, however, to the JCRA's analysis under the Law and to a separate review being undertaken by the Social Affairs Scrutiny Panel.
4. The JCRA has conducted a detailed analysis of the potential effects of JDOC on competition. This investigation has involved the cooperation of JDOC and its members, HSS, consumers and third parties.
5. As a result of this investigation, the JCRA concludes that although JDOC is subject to Article 8 of the Law, it satisfies the exemption criteria under Article 9 of the Law, subject to full compliance by both JDOC and its members with certain conditions.
6. The exemption's term is through 31 March 2007. This term is intended to cover JDOC's current trial period and allow for JDOC to apply for a longer-term exemption, should the programme be extended after HSS's performance review.

If HSS decides not to extend its support for JDOC, the term would allow for the programme to be wound up in the timeframe envisaged by the parties.

II. OVERVIEW OF AFTER-HOURS MEDICAL CARE

7. This application involves the way in which after-hours medical care is delivered in Jersey. ‘After-hours’ or ‘out-of-hours’ medical care has been defined as care to patients being provided on weekday evenings and nights (i.e., 6:00 pm to 8:00 am) and during weekends and bank holidays.¹
8. After-hours medical care in Jersey traditionally has been provided by general practitioners (‘GPs’), who generally provide services to patients through a practice in cooperation with other GPs. Individual practices would either provide after-hours care themselves, or offer such services to their patients in cooperation with other practices.
9. Now, under JDOC, several of Jersey’s GP practices have come together to provide after-hours medical care collectively. According to materials submitted to the JCRA, the following practices have GPs participating in JDOC: Clifden House Surgery, Como Villa Surgery, St Peter’s Surgery, Ivy House Surgery, Crahamel House, Indigo House, Lister House, White Lodge Medical Centre, La Route de Fort Surgery, 41 David Place, The Laurels, Health Plus, and Les Saisons Surgery. We understand that the total number of full-time equivalent (‘FTE’) GPs participating in JDOC is approximately fifty-seven.

III. THE NOTIFIED AGREEMENT AND SERVICES PROVIDED

10. JDOC has been established as an association under Jersey law.² It is subject to a Service Level Agreement with HSS (hereinafter, the ‘HSS SLA’), which covers JDOC’s use of facilities within the General Hospital and provides for the

¹ See Health Committee, House of Commons, *GP Out-of-Hours Services, Fifth Report of Session 2003-04* at 3 n.2 (19 July 2004).

² See Loi (1862) sur les teneures en fidéicommiss et l’incorporation d’associations.

- maintenance of quality standards by JDOC and the monitoring of these standards by HSS, among other provisions.³
11. The parties submitted several documents to the JCRA during the course of the investigation. A list of these documents is set out in Annex A. Collectively, these documents make up the agreement among the GPs to participate in JDOC. JDOC's stated main aim is to create an improved out-of-hours GP service in Jersey.⁴ This is done by providing essentially two services.
 12. The first service is an after-hours surgery located in ground floor of the Gwyneth Huelin Wing of the General Hospital in St Helier (the 'GP Surgery'). The GP Surgery provides GP services at the times set forth in Table 1, for a base fee of currently £40 for a twenty minute consultation.
 13. The second service involves after-hours 'house calls' – a GP visit to a patient's residence during nights and weekends. This service is available from 6:00 pm to 8:00 am seven days a week. As detailed in Table 1, the price for such service varies depending on the time of the visit, with a lower fee (currently, £80.16) being charged for 'evening' home visits (i.e., from 6 pm – 11 pm) compared to a higher fee (currently, £100.72) for 'night' home visits (i.e., from 11 pm – 8 am).⁵
 14. Table 1 summarizes JDOC's schedule of services and prices. Additionally, JDOC's schedule of services offered on bank holidays corresponds to its Sunday schedule.

³ See *Service Agreement between the Minister for Health and Social Services, and Jersey Doctors on Call (MD-HSS-2006-0024)*.

⁴ *Proposed General Practitioners Out of Hours Service, Joint Working Party*, pg. 2 (16 Jan. 2006).

⁵ These prices are set forth in Schedule 2 of the HSS SLA.

Table 1: JDOC Service Schedule		
Day	Service Available	Base Price
Monday	GP Surgery, 6 pm – 11 pm GP Home Visit, 6 pm – 11 pm GP Home Visit, 11 pm – 8 am	£40.00 £80.16 £100.72
Tuesday	GP Surgery, 6 pm – 11 pm GP Home Visit, 6 pm – 11 pm GP Home Visit, 11 pm – 8 am	£40.00 £80.16 £100.72
Wednesday	GP Surgery, 6 pm – 11 pm GP Home Visit, 6 pm – 11 pm GP Home Visit, 11 pm – 8 am	£40.00 £80.16 £100.72
Thursday	GP Surgery, 6 pm – 11 pm GP Home Visit, 6 pm – 11 pm GP Home Visit, 11 pm – 8 am	£40.00 £80.16 £100.72
Friday	GP Surgery, 6 pm – 11 pm GP Home Visit, 6 pm – 11 pm GP Home Visit, 11 pm – 8 am	£40.00 £80.16 £100.72
Saturday	GP Surgery, 12 pm – 11 pm GP Home Visit, 12 pm – 11 pm GP Home Visit, 11 pm – 8 am	£40.00 £80.16 £100.72
Sunday	GP Surgery, 8 am – 11 pm GP Home Visit, 8 am – 6 pm GP Home Visit, 11 pm – 8 am	£40.00 £80.16 £100.72

15. These services are provided on a rotational basis, or ‘rota’, comprised of the GPs participating in JDOC. Under the rota, two GPs are on-call: one to cover phone advice and the GP Surgery, and the other to make house calls. Based on the current number of GP FTEs participating in the cooperative, each GP is responsible for covering twenty rota sessions per year.

16. In addition, the GP may charge patients additional fees for services such as injections, blood tests, referral letters, ECGs, and issuing prescriptions.⁶ JDOC also offers over-the-phone advice to patients after-hours at no charge.

IV. ANALYSIS UNDER ARTICLE 8 OF THE LAW

17. Article 8(1) of the Law states that an undertaking must not make an arrangement with one or more other undertakings that has the objective or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey. Article 8(2)(a) states that this prohibition applies, in particular, to an arrangement that directly or indirectly fixes purchasing or selling prices or any other trading conditions.
18. The first question is whether JDOC meets the criteria of Article 8 and hence is prohibited, unless subject to an exemption under Article 9. If Article 8 does not apply, there is no need for an exemption. Article 60 of the Law requires that, so far as possible, the JCRA interprets these provisions consistently with the treatment of corresponding questions arising under competition law in the European Union.

A. Undertakings

19. An undertaking is a person or group of persons carrying on a business and includes an association, whether or not incorporated, that consists of or includes such persons. The concept of an undertaking ‘encompasses every entity engaged in an economic activity regardless of the legal status of the entity[.]’⁷ As both the GPs individually and JDOC are engaged in an economic activity – the provision of after-hours medical services to patients for remuneration – they are undertakings under the Law.

⁶ *Proposed General Practitioners Out of Hours Service, Joint Working Party*, pg. 9 (16 Jan. 2006).

⁷ *Höfner and Elser v. Macrotron GmbH*, Case C-41/190 ¶ 21 (1991).

B. Arrangement

20. An arrangement under the Law means ‘any type of arrangement, agreement, and understanding, and in respect of an arrangement made by undertakings includes a decision by an association of undertakings and a concerted practice involving undertakings.’⁸ Through JDOC, the GPs are agreeing among themselves on the joint provision of certain services, at least some of which previously were provided independently. JDOC therefore qualifies as an arrangement.

C. Object or Effect of Hindering Competition

21. Fundamental components of JDOC are the joint provision of out-of-hours services by the participating GPs, and the agreement on common prices for those services. As noted above, Article 8 applies, in particular, to arrangements that have the object or effect of directly or indirectly fixing the selling prices of goods or services sold in Jersey. As the JCRA states in its Guideline on Anti-competitive Arrangements (the ‘Guideline’), ‘arrangements which explicitly and directly fix prices or the resale prices of any product or service are likely to infringe the prohibition.’⁹

22. The GPs participating in JDOC have established prices for both visits to the GP Surgery (£40) and home visits (£80.16 or £100.72, depending on the time of visit). Establishing a common price for visits to the GP Surgery may not restrict competition, as we understand that many of the practices participating in JDOC did not, and practically could not, offer such a service prior to joining.¹⁰

23. On the other hand, however, a large majority of the practices participating in JDOC did provide after-hours home visits prior to joining the cooperative. These services were either provided independently by the practice, or through ‘mini’

⁸ Art. 1, Competition (Jersey) Law 2005.

⁹ JCRA Guideline, *Anti-competitive Arrangements*, pg. 7.

¹⁰ We understand that only large practices comprised of many GPs have had the capability of offering a limited out-of-hours surgery independently. For example, [REDACTED] states that the three surgeries it operates in Jersey are all open until 8 pm, Monday through Thursday, and from 9 am to 12 pm on Saturday. *See Jersey Evening Post*, pg. 16 (28 Jan. 2006). We also understand, however, that [REDACTED] currently is the single largest GP practice in Jersey. Operating a surgery for such hours, combined with concurrently providing a home visiting service, may not be possible for smaller practices.

cooperatives comprised of different practices. Prices for these services prior to JDOC ranged from £55 - £100 for evening visits and £71 - £110 for night visits. By agreeing to participate in JDOC, members have agreed to charge a common price for these services.

24. Such an agreement may be characterized as a price-fixing agreement under Article 8. In *European Night Services*, The European Court of First Instance characterized price-fixing agreements as ‘obvious restrictions of competition’, and stated that such restrictions may only be compatible with competition law if they satisfy the criteria for exemption.¹¹ As one commentator states: ‘parties, for example, to a price-fixing agreement, cannot argue that the fixing of prices does not restrict competition: the law has decided, as a matter of policy, that it does[.]’¹²

D. Appreciable Effect

25. To be subject to Article 8, JDOC must have an appreciable effect on competition. As the Guideline states, a safe harbour exists for arrangements that affect less than 25% of a given market.¹³ This threshold is well surpassed here, as based on data provided by the GPs, JDOC accounts for approximately 71% of total GP FTEs in Jersey. Moreover, the Guideline states that, regardless of market share, agreements to fix prices will automatically be viewed as having an appreciable effect on competition.
26. The JCRA thus concludes that JDOC is subject to the prohibition in Article 8(1), unless it qualifies for an exemption under Article 9.

V. ANALYSIS UNDER ARTICLE 9 OF THE LAW

27. To qualify for an exemption under Article 9, the JCRA must be satisfied that JDOC meets all four of the exemption criteria listed in Article 9(3). The application of these criteria is discussed below.

¹¹ *European Night Services v. Commission*, Cases T-374/94 etc ¶ 136 (1998).

¹² Richard Whish, *COMPETITION LAW* at 111 (5th ed. 2003).

¹³ JCRA Guideline, *Anti-competitive Arrangements* at pg. 6.

A. Improvement in the Distribution of Goods or Services

28. The first criterion, Article 9(3)(a), requires that JDOC either improve the production or distribution of goods or services, or promote technical or economic progress in the production or distribution of goods or services. Stated simply, JDOC must be likely to produce either quantitative or qualitative efficiencies. Efficiencies may create additional value for consumers by lowering costs, improving the quality of a good or service provided, or by creating a new good or service.
29. In its submissions before the JCRA and in public statements, the participating GPs have stated that JDOC is intended to produce the following efficiencies:
- To improve patient access to out of hours service;
 - To improve quality of after-hours service;
 - To maximize the use of resources to the benefit of patients and GPs;
 - To improve the liaison and coordination of GPs with other patient/medical service providers; and
 - To ensure that no increased costs to the patient arise from the introduction of the proposed service.¹⁴
30. The JCRA recognizes that these factors have the potential to improve the provision of after-hours medical service in Jersey. As noted above, the GP Surgery within the General Hospital is a new service that was largely unavailable to consumers in Jersey prior to the cooperative.¹⁵ By participating in a rota comprised of a greater number of individual GPs, JDOC has the capability to reduce the number of nights each GP is responsible for providing after-hours

¹⁴ See, e.g., *Proposed General Practitioners Out of Hours Service, Joint Working Party*, pg. 2 (16 Jan. 2006).

¹⁵ See *supra* ¶ 22 and note 10.

service, and thereby reduce the risk of fatigue to GPs.¹⁶ Furthermore, the HSS SLA provides for the adoption of clinical governance and best practice standards that previously were not required in Jersey, and the ability of HSS to monitor JDOC's service and performance levels.¹⁷

31. The JCRA therefore accepts that the potential for such efficiencies arising from JDOC satisfies the first exemption criterion. The JCRA will endeavour to monitor the activity of JDOC and patients' reaction to it during the period of this exemption to verify whether these potential efficiencies are being realized. Furthermore, we understand that at the end of JDOC's current trial period, HSS will be conducting its own cost-benefit analysis of the programme to determine whether or not to continue its support on a longer-term basis, which would further inform the JCRA's assessment of JDOC's efficiencies.

B. Allow Consumers a Fair Share of the Benefits

32. The second criterion, Article 9(3)(b), requires that consumers receive a fair share of the benefits arising from the arrangement. 'If an improvement . . . is seen as benefiting only the . . . parties to the agreement, the condition would not be satisfied.'¹⁸ Consumers must be, on balance, better-off as a result of the agreement than they were previously.
33. The JCRA thus examined whether JDOC's current fees of £40 for a visit to the GP Surgery and either £80.16 or £100.72 for home visits (depending on the time of visit), allow for consumers to receive a fair share of the potential benefits identified above.¹⁹

¹⁶ As one GP has stated: 'I do agree that the idea of only working five nights a year instead of the present 28 is very appealing to the GP and may make it easier to attract new doctors to the Island.' *Jersey Evening Post*, pg. 14 (1 Feb. 2006).

¹⁷ See HSS SLA §§ 5-7. The HSS SLA defines 'clinical governance' as 'a framework through which [JDOC] endeavours continuously to improve the quality of its service and safeguard high standards of care by creating an environment in which clinical excellence can flourish.' *Ibid.* § 1.1.

¹⁸ JCRA Guideline, *Anti-competitive Arrangements*, pg. 12.

¹⁹ See *supra* ¶ 29.

34. The JCRA concludes that the £40 fee for a visit to the GP Surgery satisfies this criterion. As detailed above, the after-hours GP Surgery is a new service that was largely unavailable to most consumers in Jersey prior to JDOC's introduction.²⁰ Moreover, its cost of £40 for a twenty minute consultation is significantly lower than the cost for most alternative forms of after-hours medical care (such as home visits) that were available in Jersey prior to JDOC. The GPs has told us that consumers may also benefit from qualitative factors arising from receiving after-hours medical services in a hospital environment, such as better lighting and more available resources.
35. More difficult questions arise, however, with respect to JDOC's fees for after-hours evening and night home visits. As originally consulted on by HSS, these fees were set at £70 for evening visits and £95 for night visits.²¹ When JDOC took effect, these fees were increased by approximately 14% and 6%, respectively, to £80.16 and £100.72.
36. The new fee levels represent increases in the prices charged for after-hours home visits for a majority of practices participating in JDOC, and at times these increases are significant. For one practice, for example, the £80.16 price for evening visits represents an increase of over 45% on the price it charged for evening visits immediately prior to joining JDOC. Similarly, the night visit fee of £100.72 represents an increase of nearly 42% for another practice's pre-existing fee for a similar service.
37. The GPs stated that although prices for after-hours home visits have increased for some participating practices, consumers benefit from substantial improvements in quality and service arising from JDOC.²² Moreover, the GPs argued that if viewed holistically (that is, when the low-cost option of a £40 visit to the GP Surgery is combined with the more expensive options for home visits), JDOC results in a net price decrease in Jersey.

²⁰ See *supra* ¶ 22 and note 10.

²¹ See *Jersey Evening Post*, pg. 35 (27 Jan. 2006).

²² See *supra* ¶ 29.

38. To test this last proposition, the JCRA conducted a ‘before-and-after’ expenditure analysis for after-hours medical care. This analysis was based on JDOC’s actual activity data for its first two months in operation (April and May 2006) and the assumption that this level of activity corresponds to that which existed prior to JDOC’s introduction.²³ The results of this analysis are set out below.

Table 2: Before and After Expenditure Analysis²⁴			
<u>Before JDOC²⁵</u>		<u>After JDOC</u>	
Number of Patients	678	Number of Patients	678
<i>No after-hours GP Surgery</i>		37.3% of 678 <i>multiplied by</i> £40 (i.e., proportion of total visiting the GP Surgery)	£10,116
91.7% of 678 <i>multiplied by</i> £76.86 (i.e., the proportion of total receiving an evening home visit)	£47,787	54.4% of 678 <i>multiplied by</i> £80.16 (i.e., the proportion of total receiving an evening home visit)	£29,566
8.3% of 678 <i>multiplied by</i> £92.64 (i.e., the proportion of total receiving a night home visit)	£5,213	8.3% of 678 <i>multiplied by</i> £100.72 (i.e., the proportion of total receiving a night home visit)	£5,668
Total Monthly Cost for Service	£53,000	Total Monthly Cost for Service	£45,350

39. This analysis suggests that, viewed holistically, consumers in Jersey saved over £7,600 in after-hours GP medical care during JDOC’s initial two months of

²³ An assumption that appears reasonable based on information provided to the JCRA from HSS, which estimated that the historic annual average split between evening and night home GP visits in Jersey corresponds to the split that actually has occurred since JDOC’s introduction.

²⁴ Based on activity data provided by JDOC for April and May 2006. Numbers rounded for simplicity. Data exclude free phone consultations and also do not account for the approximately 20% of patients in Jersey that are Health Insurance Exempt (‘HIE’) and do not pay out-of-pocket expenses for medical care. Because the percentage of HIE patients remains constant both before and after JDOC’s introduction, accounting for HIE patients would result in a uniform reduction to both the before and after totals, and therefore would not change the conclusions drawn from this analysis.

²⁵ Prices used are weighted average fees for evening and night home visits charged by practices participating in JDOC prior its introduction.

operation. These savings result from the significant minority (37.3%) of patients utilizing the £40 after-hours GP Surgery instead of requiring a GP home visit.²⁶ The GPs expect the savings to consumers arising from the GP Surgery to increase as the programme becomes more established and widely known in Jersey, stating that the proportion of patients opting to visit the Surgery as opposed to needing a home visit could rise to as much as 50%.²⁷

40. Furthermore, based on data provided by JDOC, the JCRA concludes that the current fee levels are reasonably justified by costs. European competition law precedent counsels that to the extent fixed fees are necessary to achieve the benefits of a joint venture (analyzed in detail below), the level of such fees must be cost justified.²⁸ Specifically concerning JDOC's fees:

- A reasonable cost justification exists for the current £40.00 fee for a visit to the GP Surgery based on consumables, overhead expenses, insurance, and the GP's compensation. As detailed above, the fee for this service is significantly lower than the fees that were predominantly available for after-hours medical care before JDOC's introduction.²⁹
- The additional expense for an evening home visit over a visit to the GP Surgery appears reasonably cost justified based on the added expenses necessary for transportation to the patient's residence and the extra time usually needed for the GP to complete a home visit.³⁰

²⁶ It is possible that the lower-priced option of the GP Surgery has created additional demand for after-hours medical care in general. That is, having a lower-priced option may have encouraged more patients to seek after-hours medical care than otherwise would have prior to JDOC's introduction. Given that demand for after-hours medical care, however, would appear to be price inelastic (in that one would not expect a large increase in demand for this service based on a decrease in price), we conclude that the effect of 'new' patients being generated by the GP Surgery, as opposed to patients that would have needed after-hours service in any event, likely is low.

²⁷ See *Social Affairs Scrutiny Panel, Questions in Relation to the GP Co-op* ¶12.4 (25 May 2006).

²⁸ See *Visa Int'l – Multilateral Interchange Fee*, Case No Comp29/373, O.J. L 318/17 ¶¶ 79 - 95 (22 Nov. 2002).

²⁹ See *supra* ¶¶ 22 - 23.

³⁰ JDOC informed us that while the stated time for a consultation at the GP Surgery is twenty minutes, a reasonable time estimate for a home visit is one hour. We understand that the additional time is needed for transportation and set-up in the patient's residence.

- The additional expenses for a night home visit over an evening home visit appears reasonably cost justified based additional compensation to the GP for providing services during late-night and early morning hours.
41. While the JCRA remains concerned about the percentage increase JDOC's fees for evening and night home visits represents for some of the participating practices, our analysis concludes that JDOC's fees in general appear to result in a net cost decrease to consumers in Jersey, arising from the presence of the relatively low-cost GP Surgery. Furthermore, the current levels of JDOC's fees appear to be reasonably cost justified. Finally, patients may receive qualitative benefits from JDOC's adoption of clinical governance standards and other international best practices, as required by the HSS SLA.³¹
 42. No cost justification has been given to the JCRA, however, for charging patients additional fees over and above the current base consultation fees of £40.00, £80.16 and £100.72. As detailed above, the agreement gives JDOC the discretion to charge patients additional fees for referral letters, blood tests, ECGs, etc.³² The extent of consumer gain evidenced in Table 2 depends in large part on JDOC's current fees, and the scope of this gain is reduced if JDOC charges patients additional fees over and above the current base fees that GPs previously did not charge. Thus, the exemption granted to JDOC is conditioned upon the elimination of the ability to place additional charges in patients over and above the base consultation fee, unless and until such additional charges can be cost-justified to the JCRA's satisfaction.
 43. Similar logic applies with respect to future increases to the base consultation fees. Specifically, to ensure that these fees remain reasonably cost justified, the JCRA is including mandatory notification and approval conditions to this exemption. That is, prior to JDOC increasing its fees, it must provide the JCRA with an

³¹ See *European Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty*, O.J. C 101/08 ¶ 86 (2004) (if prices increase as a result of the agreement, consumers must be fully compensated through increases in quality or other benefits).

³² See *supra* ¶ 16.

opportunity to review the proposed increase and determine that it is cost justified. This obligation will be in addition to, and independent of, the annual review of JDOC's fee levels with HSS, as provided for under Section 9 of the HSS SLA.

44. Based on compliance by JDOC and its members with the conditions set forth in the Decision, the JCRA concludes that the second exemption criterion is satisfied.

C. Contains No Indispensable Restrictions to Competition

45. The third criterion, Article 9(3)(c), asks whether JDOC contains 'restrictions beyond those necessary for the attainment of the benefits that the parties demonstrate is likely to flow from the agreement.'³³ The agreement should contain the least restrictive means of achieving its efficiencies.

46. As detailed below, our examination of this criterion focused on the necessity for fixed fees and other potential restrictions contained in the JDOC agreements.

1. The Necessity for Fixed Fees

47. A focus of our examination was whether the fixing of prices for evening and home visits was the least restrictive means for the GPs to achieve the efficiencies potentially arising from JDOC. Our analysis concludes that no less restrictive means are available to gain these potential efficiencies.

48. As detailed above, under JDOC's rota one GP is responsible for performing house calls on any given evening or night.³⁴ This GP will provide services to any patient requiring a house call during the evening/night he or she is on call. The patients served may be from that GP's own practice, or from another participating practice.

49. Because JDOC does not have its own patient billing system (and, we were told, has no plans to acquire one because of the costs involved), patients are billed by their own practice for the services provided through JDOC, even if the GP

³³ JCRA Guideline, *Anti-competitive Arrangements*, pg. 13.

³⁴ See *supra* ¶ 15.

- providing these services is from another practice. For example, if a patient of Practice A receives a home visit from a GP from Practice B (who happens to be the on-call GP covering home visits the night the service is required), that patient will be billed subsequently by Practice A for the service provided – even though the GP from Practice B actually provided the service. Thereafter, JDOC has a reconciliation procedure to ensure that Practice A (which received the income) compensates Practice B (which provided the service).³⁵
50. In the absence of JDOC's set fees for evening and night visits, the GPs have stated that the procedure described above would have a potential inflationary effect. That is, if Practice B (which provided the service) charged £100 for the home visit, while Practice A charged only £70, Practice B would seek full compensation from Practice A for the service it provided to the patient (i.e., £100). This, in turn, would create a strong incentive for Practice A to increase its own price to the patient from £70 to £100, to receive full compensation for the amount paid to Practice B.
51. The GPs stated that fixing the fees for evening and night home visits removes this incentive to increase prices. They further stated that under the HSS SLA, JDOC's prices are subject to annual review and approval of HSS,³⁶ thereby providing oversight on JDOC's ability to increase prices.
52. Although price fixing agreements among competitors normally are classified as cartels and not subject to an exemption, European Commission precedent states that 'it is not the case that an agreement concerning prices is always to be classified as a cartel and thus inherently non-exemptible.'³⁷ In particular, when the fixed prices are found to be necessary for the operation of a cooperative joint venture under which efficiencies are generated and consumers receive a fair share

³⁵ Specifically, under the HSS SLA, HSS agrees to maintain an accounts reconciliation clerk 'to ensure that the income from patients is directed to the specific GP/GP practice as appropriate[.]' HSS SLA § 4.3.4.

³⁶ See *ibid.* § 9.

³⁷ *Visa Int'l – Multilateral Interchange Fee*, Case No Comp29/373, O.J. L 318/17 ¶ 79 (22 Nov. 2002).

of these benefits, the Commission has found the indispensability criterion satisfied.³⁸

53. Because of the potential for inflationary effects, discussed above, in absence of set fees for evening and night visits, and in light of JDOC's potential for efficiencies and consumer benefits, the JCRA concludes that the establishment of evening and night home visit fees is indispensable to the operation of the joint venture.

2. Other Potential Restrictions Contained in the JDOC Agreements

54. The JCRA also examined whether JDOC imposes any non-price obligations on the participating GPs that restrict competition and are not indispensable to the achievement of the joint venture's potential efficiencies.
55. A particular area of concern we identified was with Paragraph 8 of JDOC's Governing Rules. As originally drafted, this paragraph stated:

*Whilst working for the Association, no member may express any views to patients, relatives or others, which may undermine the confidence in, or prejudice the reputation of, another Member. Nor will it be acceptable for any Member to request, encourage or coerce any patient to de register with another practice. Members must guard against being compromised in this way and must not allow other doctors' patients whom they have visited whilst working for the Association to switch their registration to their own practice, at least for a period of three months following the visit.*³⁹

56. While the JCRA accepts that a restriction against 'patient poaching' likely is necessary to provide incentives for a majority of GPs to participate in the joint venture, we were concerned that the last sentence of this provision unnecessarily restricted a patient's ability to select the GP of his or her choice. That is, while a GP may not be permitted to disparage the services of another GP or coerce a patient into changing practices, the patient must remain completely autonomous to select the GP of their choice based on the quality of services they receive.⁴⁰

³⁸ *Ibid.* ¶ 99.

³⁹ *Rules Governing Membership of Jersey Doctors on Call* ¶ 8.

⁴⁰ Throughout the investigation, the GPs informed us that a patient's ultimate choice of a GP is based on the quality of service provided, at least to the same extent as the prices charged.

The agreement among the participating GPs not to accept a patient for at least three months following a consultation with that patient through JDOC unnecessarily restricted this freedom of patient choice.

57. The JCRA thus concluded that the last sentence of Paragraph 8 placed an overbroad restriction on patient choice and that this restriction was not indispensable to the achievement of JDOC's potential efficiencies. In response to this concern, JDOC's Management Committee agreed to delete the last sentence from Paragraph 8 of its Governing Rules, and it has provided suitable evidence to the JCRA that this change has occurred (in the form of amended Governing Rules and communication of this change to all members). Thus, the JCRA's concerns arising from Paragraph 8 as originally drafted have been satisfied through JDOC's voluntary cooperation, and remedial action by the JCRA is not necessary.
58. While no other provisions of JDOC's agreements appeared to explicitly contain unnecessary restrictions on competition, the JCRA will continue to monitor JDOC's operation to ensure that no other rule restricts competition in practice. If problems subsequently arise that were not initially evident, the JCRA retains the discretion under Articles 9(9) and 9(10) of the Law to modify, vary, or cancel the exemption if necessary.
59. The JCRA therefore concludes that the third exemption criterion is satisfied.

D. No Elimination of Competition in respect of a Substantial Part of the Goods or Services in Question

60. This criterion 'depends on the degree of competition existing prior to the agreement and on the impact of the restrictive agreement on competition, i.e. the reduction in competition that the agreement brings about.'⁴¹ It calls for an assessment of the potential market effects that will result from JDOC.
61. This assessment requires the definition of relevant product and geographic markets. No relevant precedents under European competition law concerning

⁴¹ European Commission Notice on Guidelines on the Application of Article 81(3) of the Treaty, O.J. C 101/08 ¶ 107 (2004).

after-hours medical services were apparent to the JCRA in its consideration of this issue. The provision of after-hours medical care has been examined in the United Kingdom and other jurisdictions; however, none of the sources we have reviewed defined relevant markets.⁴²

62. As a result of our investigation, the JCRA concludes that the provision of after-hours medical care is the relevant product market in which to analyze this matter. This conclusion is based on the following observations:

- As noted above, the provision of after-hours medical care would appear to be price inelastic.⁴³ Therefore, an increase of 5-10% in the price for after-hours medical care would not be expected to reduce demand for such services to the extent that the price increase would be unsustainable.⁴⁴
- Prices for after-hours care in Jersey traditionally have been higher than similar services provided during normal daytime hours. For example, according to average GP fee data disseminated by the States of Jersey last summer, the price for a nighttime home visit could be as much as 64% higher than the price of a daytime home visit.⁴⁵ An ability to ‘price discriminate’ among customers – charging some higher prices than others for similar services – also can indicate the existence of a distinct relevant product market.⁴⁶

⁴² See, e.g., National Audit Office, *The Provision of Out-of-Hours Care in England* (5 May 2006); Health Committee, House of Commons, *GP Out-of-Hours Services, Fifth Report of Session 2003-04* (19 July 2004); Australian Competition & Consumer Commission, *Application for Authorization lodged by the Royal Australian College of General Practitioners* ¶¶ 2.26, 5.14 (19 Dec. 2002).

⁴³ See *supra* note 26.

⁴⁴ See JCRA Guideline, *Market Definition*, pg. 5 (explaining that the internationally accepted approach to product market definition ‘is to assume the relevant market is the smallest space within which a hypothetical, profit-maximising, sole supplier of a good or service, not constrained by the threat of entry, would be able to impose a small yet significant and non-transitory increase in price assuming all other terms of sale remain constant (this is known as the ‘SSNIP test’). The JCRA generally considers a SSNIP to involve a five to ten percent increase in price that is sustained for one year.’).

⁴⁵ See General Medical Practitioners’ Fees (displaying average GP fees in Jersey as of 1 July 2005).

⁴⁶ See JCRA Guideline, *Market Definition*, pg. 7; see also *European Commission Notice on the definition of the relevant product market for the purposes of Community competition law*, O.J. C 372 ¶ 42 (9 Dec. 1997) (‘A distinct group of customers for the relevant product may constitute a narrower, distinct market when such a group could be subject to price discrimination.’).

- Barriers to entry into the provision of after-hours medical care would appear to be high, based at least on the facilities and professional qualifications needed to provide such services. Thus, the ability of supply side substitution to act as a disciplinary effect in the short-term would appear to be minimum, at best.⁴⁷
63. The JCRA also concludes that the relevant geographic market in this matter is limited to Jersey. It is very unlikely that a patient requiring after-hours medical care would seek such care off the Island, both from the standpoint of the extra costs involved and the time required for moving from Jersey to another jurisdiction.
64. Based, therefore, on a relevant market defined as the provision of after-hours medical care in Jersey, the JCRA concludes that JDOC would not give the participating GPs the ability to eliminate competition in respect of a substantial part of the goods or services in question. While JDOC accounts for roughly 71% of the GPs in Jersey, other major sources of supply for after-hours medical care remain. Jersey's largest single GP practice, [REDACTED], has elected to not join JDOC. [REDACTED] provides a range of after-hours services, either from one of its three surgeries located in Jersey, or via home visits.⁴⁸ Thus, [REDACTED] should continue to provide an alternative to patients for after-hours medical care. In addition to [REDACTED], other GP practices in Jersey also have chosen to remain outside of JDOC, which should provide further alternatives to patients for after-hours medical care.⁴⁹
65. Moreover, we understand that the Accident and Emergency ('A&E') services in the General Hospital remain open to patients for after-hours care, and that a significant proportion of after-hours visits to A&E are for non-emergency, primary care visits.

⁴⁷ See JCRA Guideline, *Market Definition*, pg. 8 (explaining the concept of supply side substitution).

⁴⁸ See *Jersey Evening Post*, pgs. 16-17 (28 Jan. 2006).

⁴⁹ In addition to [REDACTED], at least two other GP practices remain outside JDOC.

66. The JCRA therefore concludes that a significant amount of competition remains in the relevant market after the formation of JDOC. To ensure this remains so, however, as a condition to this exemption the JCRA will require JDOC to receive the JCRA's prior approval written prior before accepting any new members into the cooperative. This condition should allow the JCRA an opportunity to assess the effects on competition of any additional practices joining JDOC, analogous to the analysis it conducts of whether a proposed merger or acquisition would substantially lessen competition in Jersey or any part of Jersey.⁵⁰
67. In addition, the JCRA must ensure that JDOC does not create 'spill over' effects that could substantially reduce competition in other markets in which GPs compete. One such potential area of concern could be day services provided by the GPs, and whether cooperation in night services has the risk of substantially reducing competition in day services. Our potential concern in this regard is diminished by the fact that the provision of after-hours medical care represents a very small proportion of total annual income derived by GP practices – amounting to only 2-5%. Thus, cooperation in night services affects only a very small portion of a GP's business. To help ensure no spillover effects occur, however, this exemption is conditioned on the GPs' compliance with conditions intended to segregate after-hours service from daytime service and to provide the JCRA with the ability to monitor JDOC's activities.
68. Subject, therefore, to compliance by JDOC and its members with the conditions set forth in the Decision, the JCRA concludes that the fourth and final exemption criterion is satisfied.

VI. DECISION

69. The JCRA concludes that JDOC is subject to Article 8(1) of the Law.
70. The JCRA also concludes that JDOC satisfies the criteria for exemption, subject to certain conditions under Article 9(6). Specifically, these conditions are

⁵⁰ See Part 4, Competition (Jersey) Law 2005.

intended to facilitate the JCRA's ability monitor JDOC's activity and patients' views (to ensure that the first exemption criterion is satisfied); to ensure that all fees charged by JDOC, and increases to these fees, are cost justified (to ensure that the second exemption criterion is satisfied); to make JDOC's acceptance of any new members subject to the JCRA's assessment under the Law (to ensure that the fourth exemption criterion is satisfied); and to segregate members' daytime activities from the after-hours activities subject to JDOC (also to ensure that the fourth exemption criterion is satisfied).

71. By this Decision, the JCRA hereby grants an exemption to JDOC under Article 9, subject to compliance by JDOC and its member with the following conditions:
 1. JDOC shall demonstrate to the JCRA's satisfaction that any future increase in one or more of its fees is cost justified. JDOC therefore shall submit for the JCRA's review full details of any proposed increase in fees at least twenty one calendar days prior to such increases taking effect. Any such submission shall explain in detail how the proposed increases are cost justified, and provide sufficient data to the JCRA to examine this justification.
 2. Should, any time after receiving a notice set forth in the first condition, the JCRA instruct JDOC not to proceed with the proposed increase, in whole or in part, JDOC shall not implement the increase to the extent it has been objected to by the JCRA, except in accordance with the JCRA's prior written consent.
 3. JDOC shall not charge patients additional fees over and above those charged for consultations, unless and until such additional fees have been cost justified to the JCRA's satisfaction, such satisfaction to be expressed by the JCRA in writing to JDOC.
 4. Within twenty one calendar days of the end of each calendar year quarter, JDOC shall submit to the JCRA copies of any questionnaires, surveys,

comments, complaints, or complements (or similar documents) it has received from patients during the previous quarter. In addition, JDOC shall cooperate with the JCRA to implement any patient satisfaction surveys the JCRA wishes to undertake on its own behalf and at its own expense.

5. JDOC shall not accept any new members except in accordance with the JCRA's prior written approval.
 6. With the exception of the fees expressly subject to JDOC, each participating practice shall continue to set its own fees independently within its sole discretion.
 7. JDOC and/or its members shall provide such information and documents as the JCRA may reasonably require, subject to any legally recognizable privilege and upon written request with reasonable notice, for the purpose of determining, monitoring or securing compliance with this Decision.
72. This exemption shall take effect on the date specified below and continue until 11:59 pm on 31 March 2007. JDOC may, at its discretion, apply for an extension to the term of this exemption prior to this expiration date.
73. Compliance with the conditions set forth in Paragraph 71 is binding on both JDOC and all GPs participating in JDOC, as well as on any of their assignees or successors.

8 August 2006

By Order of the JCRA Board

ANNEX

Documents submitted for the JCRA's consideration:

HSS, Proposed General Practitioner's Out of Hours Service, Business Case (5 Oct. 2005)

Island Doctors on Call Disciplinary Procedure

Island Doctors on Call Grievance Procedure

JDOC Clinical Governance Framework

JDOC Complaints Procedure

JDOC Contract for Services

Out of Hours GP Co-op Facility

Proposed General Practitioners Out of Hours Service, Joint Working Party (16 Jan. 2006)

Rules governing Membership of Jersey Doctors on Call (A General Practitioners Co-operative)

Service Agreement between the Minister for Health and Social Services, and Jersey Doctors on Call (MD-HSS-2006-0024).

The Constitution of Jersey Doctors on Call (16 Dec. 2005)

Quality Standards Framework JDOC