

**Ref:** BA/WB

09 December 2005

Mr Bevan Anthony  
Executive Director  
Economic Development  
26/28 Bath Street  
St Helier JE2 4ST

Dear Mr Anthony

**Public Policy Exemption under Article 12**

In your letter to me dated 25 November 2005, you requested the JCRA to provide its views on the application made by Jersey Dairy for a public policy exemption to Article 8(1) of the Competition (Jersey) Law 2005 (the Law), as provided for under Article 12. In a letter to Deputy Voisin dated 28 October 2005, Jersey Dairy requested that the Economic Development Committee (EDC) grant such an exemption for the requirement that registered milk producers sell all of their milk to the Jersey Milk Marketing Board (JMMB).<sup>1</sup>

The JCRA's response to your request is as follows:

1. We first would like to summarize our understanding of the scope of Jersey Dairy's request. In its letter, Jersey Dairy requests the EDC to grant an exemption under Article 12. This Article gives the EDC the power to provide an exemption for arrangements from the application of Article 8(1) if there are 'exceptional and compelling reasons of public policy' for the EDC to do so. It would not exempt such activities from potential scrutiny under other articles contained in the Law. Furthermore, as noted above, Jersey Dairy's exemption request appears limited to the requirement that registered milk producers sell all of their milk to the JMMB. If granted, therefore, it would not limit the potential applicability of Article 8(1), or other provisions of the Law, to other arrangements that Jersey Dairy may impose or in which it may be a participant.
2. In our research we have not found a jurisdiction that has adopted a public policy exemption to the application of competition law to the decisions of a milk marketing organization. The EDC's power under Article 12 appears to have been drawn from that of the British Secretary of State under the U.K.'s Competition Act 1998, pursuant to which an exemption may also be granted

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<sup>1</sup> We understand that the responsibilities of the EDC are now being assumed by the Minister for Economic Development (the Minister). If this is the case, references in this advice to the EDC are equally applicable to the Minister.

based on ‘exceptional and compelling reasons of public policy.’<sup>2</sup> We have not found evidence of the Secretary ever using this power in the U.K. One author suggests that a possibly proper area of applicability for this exemption would be the defence industry.<sup>3</sup>

3. To grant an exemption under Article 12, the EDC must be satisfied that ‘exceptional and compelling reasons of public policy’ exist that make the exemption desirable.<sup>4</sup> The same language in the UK’s Competition Act 1998 ‘clearly imposes a heavy burden on the Secretary of State to demonstrate that he should be able to exercise the power.’<sup>5</sup> It appears to the JCRA that such an exemption is intended for exceptional circumstances where the application of the Law would impede the achievement of important objectives of public policy.
4. In our opinion, Jersey Dairy’s letter does not appear to define clearly the public policy goals an exemption would further. If we are to assume that (i) contributing to the aim of economic growth and diversification, and (ii) protecting Jersey’s natural environment are the goals that Jersey Dairy seeks to further through the requirement that registered milk producers sell all of their milk to the JMMB, the letter does not explain how the application of Article 8(1) to this practice would hinder the achievement of these objectives, or how granting a public policy exemption would further their achievement. Such alleged economic benefits are typically analyzed in an Article 9 type exemption request, as opposed to a request for exemption based on public policy.<sup>6</sup>
5. The EDC may therefore consider it more appropriate to make this decision after the JCRA has had the opportunity to determine definitively if the practice in question would appreciably hinder competition under Article 8(1) and, if so, whether it would qualify for an individual exemption under Article 9(3). If the activity satisfies the criteria for an individual exemption under Article 9(3), the EDC’s grant of a public policy exemption under Article 12 would not be necessary. Indeed the EDC’s power under Article 12 would be irrelevant since the practice would be compatible with Article 8(1) in any event.
6. Even if, after an investigation, the JCRA determines that the practice does infringe Article 8(1) and an individual exemption is not applicable, we believe that the individual exemption analysis we would undertake under Article 9(3) might inform the EDC’s determination of whether exceptional and compelling reasons of public policy make an exemption under Article 12 desirable. Article 9(3) would require us to examine whether the practice (i) improves the

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<sup>2</sup> Competition Act 1998, Sch 3(7)(1). This is exactly the same language as appears in Article 12 of Jersey’s Competition Law.

<sup>3</sup> Whish, Richard, *COMPETITION LAW* at pg 330 (5<sup>th</sup> ed 2003) (‘It might be that the power would be invoked, for example, in relation to the defence industry.’).

<sup>4</sup> Competition (Jersey) Law 2005, Art. 12(2).

<sup>5</sup> Whish, *supra* note 3 at pg 330.

<sup>6</sup> See, for example, the European Commission’s decision in the *Sicasov*, O.J. L 4/27 (14 Dec. 1998), in which French breeders of plant varieties applied for and received an individual exemption for the use of standard licensing agreements for the production and sale of seeds, based on an analysis of the practice’s economic effects.

production or distribution of milk in Jersey, or otherwise promotes technical or economic progress; (ii) contains any unnecessary restrictions; (iii) affords Jersey Dairy the ability to eliminate competition in respect of a substantial part of the goods or services in question; and (iv) allows Jersey consumers to enjoy a fair share of any resulting benefits. The Law requires the JCRA to undertake public consultation as part of this process. If, based on the evidence presented to us, the JCRA concludes that an individual exemption is not appropriate, we believe that the EDC might wish to see the JCRA's analysis of the practice's adverse economic impact before taking a view on whether a public policy exemption would be desirable.

7. Accordingly, whether or not the practice is ultimately found to be compatible with Article 8(1), we believe that the EDC may feel it is premature to consider an Article 12 exemption at this point.
8. We therefore advise that the EDC does not make a determination under Article 12 until Jersey Dairy has filed an application under Article 9 for the requirement that registered milk producers sell all of their milk to the JMMB, and the JCRA has had the opportunity to conduct the analysis described above. Currently, we do not have sufficient information to conduct this analysis, but that information could be provided if Jersey Dairy applied to the JCRA for an exemption. Assuming the EDC agrees with this advice, it would be in Jersey Dairy's interests, we believe, to make this submission to the JCRA as soon as possible, and in any event well before the end of the transitional period applicable to pre-existing arrangements, defined in Article 62 of the Law to be 1 May 2006.

We would be happy to address any further questions the EDC may have on this advice, or concerning this matter generally.

Yours sincerely

**William Brown**  
Executive Director