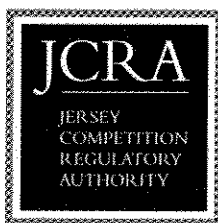


Ref: C006/05

09 June 2006



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

Dear Mr Anthony

Exemption Application under Article 18 of the Competition (Jersey) Law 2005

In your letter of 25 May 2006, you requested the JCRA to provide its views on the application made by the Jersey Milk Marketing Board ('JMMB') for a public policy exemption under Article 18 of the Competition (Jersey) Law 2005 (the 'Law'). The JCRA previously has provided its advice concerning JMMB's Article 12 application in a letter dated 9 December 2005. The JCRA's advice with respect to JMMB's Article 18 application is set out below.

1. Similar to our response to the Article 12 application, we would first like to summarize our understanding of the scope of JMMB's exemption request under Article 18. JMMB's 21 March letter to the Minister for Economic Development (the 'Minister') states that it 'seeks to extend our application under Article 12 . . . to include Article 18.' Thus, as JMMB's Article 18 request is simply an extension of its earlier Article 12 request, the scope of the former appears to be no wider than that of the latter. In our 9 December letter, we observed that the exemption request appears limited to the requirement that registered milk producers sell all of their milk to JMMB.¹ If granted, therefore, an exemption would not limit the potential applicability of Articles 8(1) and 16(1) of the Law to other areas in which JMMB is active, such as the sale of liquid milk and other dairy products to retailers and other customers.
2. As stated in our 9 December letter, the Minister's discretion to grant exemptions under the Law based on 'exceptional and compelling reasons of public policy' is analogous to authority provided to the U.K. Secretary of State (the 'Secretary') under the U.K.'s Competition Act 1998 (the 'Act'). We observed that such an exemption appears intended for exceptional circumstances where the application of competition law principles would impede the achievement of important public policy objectives, such as national defence. This observation is consistent with the Secretary's subsequent action in granting the first and only public policy exemption under the Act in the U.K., which exempts agreements in relation to the maintenance and repair of

¹ This requirement is contained in a prescriptive resolution originally adopted by JMMB's board on 1 January 1955 under the provisions of Part 4 of the Milk Marketing (Approval) (Jersey) Act, 1954.

surface warships from the application of Chapter I of the Act (the U.K. equivalent of Article 8(1)).²

3. International practice suggests that to the extent activities are exempted from the application of competition law, such exemptions do not apply to abuses of dominance. The U.K. exemption concerning warship maintenance applies only to Chapter I of the Act, but does not provide an exemption for potential abuses of dominance under Chapter II (even though the Act provides the Secretary with the discretion to do so).³ Furthermore, under European competition law, '[t]here is no derogation from the application of Article 82 to the agricultural sector.'⁴
4. As further observed in our 9 December letter, JMMB has failed to define clearly the exceptional and compelling reasons of public policy supporting an exemption, or how the application of the Law would hinder the objectives it wishes to achieve. Specifically, many of the goals JMMB lists in both of its letters, such as contributing to economic growth and diversification, achieving scale economies, avoiding extra costs that may arise from increased competition, and ensuring a fair share of benefits are passed on to consumers, appear relevant to an economic analysis under the Law. Under Part 2 of the Law the JCRA may conduct such an analysis under Articles 8 and 9. Such an analysis also would be instructive to the ultimate determination of whether enforcement of the prescriptive resolution by JMMB may be an abuse of dominance under Article 16.
5. We therefore concluded in our 9 December letter that the Minister's consideration of JMMB's public policy exemption request may be premature at this point, and that the Minister may consider it more appropriate to make this decision after the JCRA has had the opportunity to determine definitively whether the practice in question would infringe the Law. If we ultimately were to determine that the practice does not infringe the Law, a public policy exemption would be unnecessary. If our enquiries conclude that there is an infringement of the Law, we would notify JMMB of our conclusion and the grounds for it, and with JMMB's consent we also could inform the Minister. The Minister thus would have the opportunity to consider whether exceptional and compelling reasons of public policy exist, in light of our competition analysis, prior to our conclusion of a final decision. This advice given with respect to JMMB's application under Article 12 is equally applicable to its expanded application to the Minister under Article 18.

² The Competition Act 1998 (Public Policy Exclusion) Order 2006 SI 2006/605.

³ See Competition Act 1998, Sch. 3, ¶¶ 7(4) and 7(5).

⁴ Richard Whish, *COMPETITION LAW* 921 (5th ed. 2003). Article 60 of the Law requires that, so far as possible, the JCRA and the Royal Court are to ensure that competition law matters arising in Jersey are treated consistently with the treatment of corresponding questions arising under competition law in the European Union.

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

Yours sincerely

A handwritten signature in cursive script, appearing to read "William Brown", with a long horizontal flourish extending to the right.

William Brown
Executive Director