



PUBLIC VERSION

Case C1025J/14

Concerning the General Practitioners Out-of-Hours

**Cooperative Notified under Article 9 of the Competition (Jersey)
Law 2005**

Decision

Document No: CICRA 14/18

16 April 2014

Jersey Competition Regulatory Authority

2nd Floor Salisbury House, 1-9 Union Street, St Helier, Jersey, JE2 3RF

Tel 01534 514990, Fax 01534 514991 Web: www.cicra.je

INTRODUCTION

1. The JCRA granted an exemption in a decision dated 8 August 2006, to Jersey Doctors On Call (**JDOC**) under Article 9 of the *Competition (Jersey) Law 2005* (the **Law**) concerning the provision of after-hours medical care in Jersey which was later modified on 13 October 2006 (the **Original Decision**). In the Original Decision, the JCRA concluded that JDOC satisfied the exemption criteria set out in Article 9 of the Law for a term intended to cover JDOC's then-current trial period.¹
2. On 26 February 2007, JDOC applied for and received a further two year exemption. In March 2009, JDOC requested and was granted an exemption for five years (the **Current Decision**). JDOC submitted that a longer term exemption would enable it to deliver further improvements in its standard of care offered to patients JDOC's current exemption expires at 11.59pm on 23 April 2014.
3. On 25 February 2014, the JCRA received an application on behalf of JDOC to extend the exemption for a further five years (the **Application**). The JCRA registered a notice of its receipt of the Application on its website on 19 March 2014, inviting comments by 2 April 2014. No submissions were received during the consultation.
4. In response to JDOC's current request and in the absence of evidence or submissions to the contrary, the JCRA concludes that the justifications that existed for granting an exemption originally still remain, but is of the view that due to some uncertainty about possible changes in the delivery of primary care in Jersey, it is prudent and proportionate to grant an exemption for only one year.
5. This exemption, is subject to full compliance by both JDOC and its members with certain conditions, which are intended to protect the interests of competition and consumers. The term of this exemption is one year from the date of this Decision.

BACKGROUND

7. After-hours medical care or 'out-of-hours' medical care has been defined as care to patients being provided on weekday evenings and nights (i.e. 6.30 pm to 8 am) and during weekends, bank holidays and public holidays.²
8. Prior to JDOC's formation, after-hours medical care in Jersey was delivered by general practitioners (**GPs**), who generally provide services to patients through a practice in cooperation with other GPs i.e. a GP surgery. Individual practices would either provide after-hours care themselves, or offer such services to their patients in cooperation with other practices.

¹ The exemption was granted until 31 March 2007

² Report by the National Audit Office, *The Provision of Out-of-Hours Care in England*, Session 2005-2006 at para 1.1, page 9 (5 May 2006)

9. This system changed with JDOC's introduction in April 2006. JDOC is an association of GP practices formed with the goal of providing after-hours medical care collectively. The majority of GPs participate in JDOC but some surgeries continue to provide a limited out-of-hours service. According to the Application, one surgery provides cover overnight to its own patients and sets its own prices.
10. The first service that JDOC provides is an after-hours surgery located at the General Hospital in St Helier (**Co-op Surgery**). JDOC provides this service seven days a week from 6 pm – 11 pm, as well as on Saturday afternoons and Sunday and bank holidays during the day. The Co-op Surgery's attendance fee is currently £44.77³ for a twenty minute consultation; over the phone advice is provided free of charge.
11. The second service JDOC provides is 'house calls' – a GP visit to a patient's residence during the night, at weekends and on bank holidays and public holidays. This service is available between 6 pm to 8 am seven days a week, between 12 noon and 6pm on Saturday and between 8 am to 6 pm on Sunday. The price for such a service varies depending on the time of the visit. Two GP's are on-call: one to provide over-the-phone advice and care via the Co-op Surgery, and the other to make house calls.
12. According to the Application, JDOC continues to receive £[REDACTED] per annum from a joint Health and Social Security (**H&SS**) subsidy and assurances from HSS that they will continue to grant financial and logistical support to JDOC (the latter in the form of the use of a wing of the General Hospital, provision of receptionist support and use of a car and driver for out-of-hours house calls).
13. The five year term requested in the Application was to allow for significant investment in the IT infrastructure. Subject to some data protection issues that need clarification, it is intended that all JDOC GPs will be able to access remotely the patient records of the individuals using JDOC, providing much safer continuity of care; at the moment the GPs have to rely on patients providing their own medical/prescription history.

CURRENT REVIEW

14. Since its introduction in April 2006, in addition to each of the Decisions issued by the JCRA, JDOC has been the subject of several reports in Jersey, although admittedly they are quite dated now. These include:
 - the GP Co-Operative Out-of-Hours Service Management Board Performance Report 1 January 2008 – 31 December 2008, jointly

³ This is the fee paid by the patient - it was £42.02 at the time of drafting the 2009 Decision. For a home visit between 8am and 11pm a patient currently pays £91.26p and for a house call after 11pm and before 8am a patient pays £114.53 (NB- Social Security pay an additional sum for each service to JDOC ie a patient's GP care is subsidised, just as it is when a patient attends their own GP surgery)

completed by the Health, Social Security & Housing Scrutiny Panel and JDOC, which constituted the cooperative's annual performance review;

- the Report on the above produced by HSS and presented to the States of Jersey on 8 March 2007; and
- the 2008 Annual Report produced by HSS and JDOC and presented to the States of Jersey.

15. According to JDOC none of the reports listed above have been updated and so in its current assessment, the JCRA has considered the information provided in the Application, data provided by the Trading Standards Service (**TSS**) and the patient satisfaction survey conducted by JDOC (the **Survey**), at the JCRA's request, in advance of submitting the Application to help evidence criterion a) of Article 9(3) of the Law: the Agreement either improves the production or distribution of goods or services and criterion b): that consumers receive a fair share of the benefits.

ARTICLE 8 OF THE LAW

16. 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. 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.
17. In the Original Decision and subsequent Decisions, the JCRA has concluded that the JDOC arrangement is subject to Article 8(1) of the Law.⁴ This is based on the agreement by JDOC's members to charge common prices for the provision of after-hours home visits (the **Agreement**), whereas prior to the creation of JDOC different prices in Jersey existed for these services, at the discretion of the individual GP surgeries. Such an arrangement may be characterised as a price-fixing agreement under Article 8, and the European Court of First Instance has stated that such restrictions may only be compatible with competition law if they satisfy the criteria for exemption.⁵
18. JDOC's structure has remained the same (i.e. GP's participating in JDOC still agree to charge a common price for after-hours home visits), and so the conclusions reached in the Original Decision and subsequent Decisions remain

⁴ Original Decision, para 26 and the 2007 Decision, para 16. The Original Decision also established that the Law's definitions of 'undertakings' and an 'arrangement' also were satisfied. *See ibid.* para 19-20

⁵ *European Night Services v Commission*, Cases T-374/94 etc [1998] ECR II - 3141. The Original Decision also established that JDOC has an appreciable effect on competition in Jersey. Original Decision para 25

the same i.e. the Agreement infringes Article 8(1) of the Law and so it is necessary to assess whether it meets the four criterion for an exemption under Article 9 of the Law.

ARTICLE 9 OF THE LAW

19. 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 JCRA concluded in the Original Decision and in subsequent Decisions that JDOC satisfied these four criteria.⁶ The JCRA must therefore determine whether, based on the information that has been provided, JDOC still satisfies these criteria. The analysis is presented below.

A. Improvement in the Distribution of Goods or Services

20. The first criterion, Article 9(3)(a), requires that JDOC arrangement either improves the production or distribution of goods or services, or promote technical or economic progress in the production or distribution of goods or services. Simply stated, 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 new goods or service.

21. The Application submits that the services of JDOC were used 7379 times during 2013. The Survey received a rate of return of 41.6%, equalling 52 people, which is recognized as being a very small sample. Nevertheless, of the 52, an estimated 13 people received a home visit or advice over the telephone and so the survey has captured the views of service users of the different services provided by JDOC. 94% rated the service as ‘very satisfactory’⁷ compared to a 2013 NHS survey in which 67.5% described the out of hours service as ‘good’.

22. TSS have not received any Health Services related complaints in 2014 to date and of those in 2013 none were directly attributable to JDOC or its services.

23. In addition, in the Application, JDOC have listed the following as measures which assist in improving the service offered:

- JDOC has a management committee;
- Representatives of JDOC meet regularly with several lead practioners in the health service including the Chief Ambulance Officer and Lead Nurse Emergency care;

⁶ See Original Decision, para 27-68 and the 2007 Decision, para 18-40.

⁷ The highest criterion

- They are working toward being relocated closer to Accident and Emergency within the Hospital with a view to working as part of a multi-disciplinary ‘admission team’ to provide better co-ordination of care to patients;
 - Significant investment in the IT infrastructure that JDOC requires to fully deliver its agenda of governance, audit and improved care. Subject to some data protection issues that need clarification, it is intended that all JDOC GPs will be able to access remotely the patient records of the individual using JDOC, providing much safer continuity of care; at the moment the GPs have to rely on patients providing their own medical/prescription history. (It is likely that the implementation may be delayed without the certainty of a five year exemption); and
 - JDOC are seeking to implement a new rota system allowing automatic updates when rota changes are made, thus making instant viewing easy and provide an immediate messaging cascade should there be an urgent need to find shift cover. The Application notes a final decision has yet to be made, but if a decision is taken to proceed, it will require significant investment too and may be delayed as a result of a shorter term exemption.
24. Based on the evidence provided, the JCRA has no grounds to conclude that the efficiencies are not being realised, or that overall patient satisfaction with JDOC’s services has been anything less than very satisfactory. Thus, the JCRA concludes that the first exemption criterion remains satisfied.

B. Allow Consumers a Fair Share of the Benefits

25. The second criterion, Article 9(3)(b), requires that consumers receive a fair share of the benefits arising from the arrangement. Consumers must be, on balance, better off as a result of the agreement.
26. Since its inception in 2006 and every year since, JDOC’s services have been used over 7300 times per annum. The revenue generated from fees in 2013 was £[REDACTED] and overall costs have decreased to £3.63 per head of population.
27. In accordance with the relevant condition contained in the Original Decision, JDOC has notified the JCRA of three price increases,⁸ the last being in October 2013. The last request was made in light of JDOC prices being on the verge of being cheaper than GP practices and was raised to be in line with the cost of living index. JDOC GP’s have (currently) no access to a patient’s history/ records and JDOC did not want to find itself in a situation that its services were being used as a cheaper alternative to an individual’s own GP, who is in a much better

⁸ 2008 and 2011

position to provide continuity of care and has a professional relationship with the individual patient.

28. In the absence of evidence to the contrary, the JCRA currently has no grounds to deviate from the conclusion that JDOC's prices continue to be cost justified.
29. Thus, the JCRA concludes that JDOC continues to satisfy the second exemption criterion. However, to ensure that this remains so during the period of this exemption, the JCRA also concludes that the two conditions contained in the Current Decision remain necessary, namely:
 - The elimination of JDOC's ability to charge patients fees in addition to the base consultation fees. As stated in the Original Decision, such fees had not been cost justified to the JCRA (nor have they been since this time), and placing additional fees on consumers would materially affect the outcome of the JCRA's before and after expenditure analysis. Therefore, JDOC may not place additional fees on patients over and above the base consultation fee, unless and until such additional charges are cost justified to the JCRA's satisfaction.
 - A requirement that any increase to the base consultation fee be provided to the JCRA to determine if the increase is cost justified. This will provide the JCRA with an ability to ensure that JDOC's base consultation fees remain cost justified during the term of the exemption. This obligation is in addition to, and independent of, the annual review of JDOC's fee levels with HSS.

C. Contains No Indispensable Restrictions to Competition

30. 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.'⁹ The agreement should contain the least restrictive means of achieving its efficiencies.
31. The Original Decision concluded that the fixed fees for evening and night home visits were necessary to achieve JDOC's potential efficiencies.¹⁰ The Original Decision also discussed how JDOC agreed to amend its Governing Rules to facilitate a patient's ability to select the GP of their choice.¹¹ As JDOC's terms have not changed since this time, there are no grounds on which the JCRA can conclude that the third exemption criterion is no longer satisfied.

⁹ JCRA Guideline on Anti-competitive Arrangements at 13.

¹⁰ See Original Decision para 47-53

¹¹ See *Ibid* para 54-58

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

32. This criterion requires an assessment of the market effects that result from the Agreement.
33. In the Original Decision, the JCRA established that the proper relevant product market in which to analyse the effect of the Agreement was the provision of after-hours medical care.¹² In addition, the proper relevant geographic market was Jersey.¹³
34. As part of assessing the application in 2007, the JCRA undertook further analysis and noted that although the vast majority of GPs providing out-of-hours were members of JDOC, the fourth criterion remain satisfied for the reasons below namely that
- One surgery continues to provide care until 8pm Monday-Thursday and 7pm Friday, charging a lower fee than JDOC;
 - GPs remain at liberty to leave JDOC if they wish, although no one has to date;
 - JDOC has not sought to increase the services it provides i.e. into daytime care for example; and
 - A&E remains open to patients for after hours care and is attended by a significant number with non urgent and primary care ailments.
35. The JCRA has therefore concluded that the fourth exemption criterion is satisfied.¹⁴ The Application submits that because conditions in the relevant market have not changed, there are no grounds on which the JCRA can conclude that the fourth exemption criterion is no longer satisfied. To ensure this remains so during the term of this exemption, however, the existing conditions (below) continue to be necessary:
- JDOC must notify the JCRA prior to accepting any new members into the cooperative. This condition allows the JCRA an opportunity to assess the effects on competition of any additional members 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.¹⁵ It also provides protection to JDOC from potentially making its exemption under the Law invalid during the exemption period by making

¹² See *ibid.* 62

¹³ See *ibid.* 63

¹⁴ See 2007 Decision, para 40

¹⁵ See Part 4, Competition (Jersey) Law 2005; *see also* JCRA Guideline on Mergers and Acquisitions

additional arrangements with new members absent of approval under Article 9.

- In addition, the JCRA must continue to 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. The potential concern in this regard is diminished by the fact that night services represent only a very small portion of a GP’s total business.¹⁶ To help ensure no ‘spill over’ effects occur, however, this exemption is conditional on the GP’s 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.
- Finally, the ability of the JCRA to review JDOC’s proposed increases in price before they are implemented provides a safeguard that JDOC’s prices will remain cost justified.

DECISION

36. The JCRA concludes that the Agreement is subject to Article 8(1) of the Law.
37. The JCRA also concludes that JDOC satisfies the criteria for exemption, subject to certain conditions under Article 9(6). Specifically, these conditions are intended to facilitate the JCRA’s ability to ensure that all fees charged by JDOC, and all increases to these fees, are cost justified (to ensure that the second and fourth exemption criteria are 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 provided by JDOC (also to ensure that the fourth exemption criterion is satisfied).
38. By this Decision, the JCRA hereby grants an exemption to JDOC under Article 9, subject to compliance by JDOC and its members 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 increase taking effect. Any such submission shall explain in detail how the proposed increase is cost justified, and provide sufficient data to the JCRA to examine this justification.

¹⁶ See Original Decision para 67 (noting that the provision of after-hours medical care amounted to only around 2 – 5% of an average GP practice’s total annual income).

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. JDOC shall notify the JCRA at least twenty one calendar days in advance of accepting any new members. Should, any time after receiving such a notice, the JCRA instruct JDOC not to proceed with the addition, in whole or in part, JDOC shall not proceed with it except in accordance with the JCRA's prior written consent.
 5. 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.
 6. 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.
39. In accordance with Article 9(7) of the Law, the effective date of this exemption is 16 April 2014. This exemption shall terminate at 11:59 pm on 15 April 2015, unless otherwise terminated prior to this time under any of the circumstances set forth in Articles 9(9) – 9(13) of the Law. By the beginning of Q1 2015, it is envisaged that any proposed changes to the primary care service will be more developed and so the JCRA feels it is prudent at this time to issue a one-year exemption, but recognizes that it may delay some decisions that JDOC are seeking to make as it relates to investment. Subject to more clarity about plans being made as they relate to the delivery of primary care in Jersey, if towards the end of the current exemption period, JDOC satisfies the four criteria, it may, at its discretion, apply for an extension to the term of this exemption.
40. Compliance with the conditions set forth in Paragraph 38 is binding on both JDOC and all GPs participating in JDOC, as well as on any of their assignees or successors.

16 April 2014

By Order of the JCRA Board