

Ref: WB/WG

05 October 2005

The President and Members
Economic Development Committee
c/o Mr W Gallichan
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Dear President and Members

Small Undertakings Exemption under the Competition (Jersey) Law 2005

Introduction

On 30 August 2005, the Economic Development Committee (EDC) requested the JCRA, under Article 6(4) of the Competition Regulatory Authority (Jersey) Law 2001 (the CRA Law), advise it on the content and form of any order which it might be appropriate for the EDC to issue under Article 11(1) of the Competition (Jersey) Law 2005 (the Law). Article 11(1) provides that the EDC may exempt from the scope of Article 8(1) of the Law arrangements involving one or more small undertakings. In its letter to the EDC dated 7 September 2005, the JCRA accepted this request.

While Article 11(1) requires the EDC to consult the JCRA before issuing any small undertakings exemption order, it does not come into force until 1 November 2005. Relying solely on this provision would mean, therefore, that there would be a delay between the effective date of Part 2, scheduled for 1 November, and the issue of any appropriate small undertakings exemption. A request for advice under Article 6(4) of the CRA Law means that, should the EDC determine that a small undertakings exemption is needed, an appropriate order can be drafted and take effect concurrent with, or soon after, the effective date of Part 2.

Potential Scope of a Small Undertakings Exemption under the Law

Article 11(1) empowers the EDC to issue an order exempting small undertakings from the scope of Article 8(1). The Law itself does not define what constitutes a 'small' undertaking,¹ but Article 11(2) states that the EDC may by order prescribe a definition based on factors such as turnover, earnings, market share, or number of employees. As set forth in Article 11, the order may impose conditions or obligations on the exemption and provide for the manner in which the JCRA may withdraw the exemption.

¹ Article 1 of the Law defines an 'undertaking' as a person carrying on a business and includes an association, whether or not incorporated, that consists of or includes such persons.

An order under Article 11(1) may exempt small undertakings only from the application of Article 8(1), which prohibits anti-competitive arrangements. Thus, it cannot exempt small undertakings from the application of Article 16(1) (abuse of dominance) or Article 20(1) (requiring JCRA approval for certain mergers or acquisitions). Moreover, Article 11(4) provides that any order issued by the EDC exempting arrangements between small undertakings from the scope of Article 8(1) shall not have effect if the object or effect of the arrangement is to: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; or (c) share markets or sources of supply.

Potential Benefits and Costs of a Small Undertakings Exemption

A small undertakings exemption has the potential to reduce the compliance burden of small businesses by providing a degree of legal certainty that the Law will not prohibit their arrangements. An exemption also may benefit the JCRA by potentially enabling it to avoid examining numerous arrangements with little to no significance from a competition law point of view and focus on more problematic cases.

However, in Jersey a small undertakings exemption may have the cost of potentially insulating activities that otherwise may be subject to liability under the Law. Many undertakings in Jersey may be ‘small’ in terms of turnover, employees, or other indicators, yet still have large market shares. An agreement between undertakings which are ‘small’ in those terms nevertheless could produce substantial adverse effects on competition. While the JCRA could withdraw the benefit of the exemption for arrangements found to hinder competition to an appreciable extent, such a withdrawal would not have retroactive effect. An exemption may also limit the damages recoverable by aggrieved persons in civil actions under Article 51.

The risk of a small undertakings exemption producing these adverse effects could be reduced if the size of the undertakings was defined in terms of market share rather than turnover or employees – generally businesses with small market shares do not have the ability to restrict competition to an appreciable extent. Calculating markets and market shares, however, can be a complex process, and thus an exemption based on market share thresholds may not significantly reduce the Law’s compliance burden on small businesses. Moreover, it is doubtful whether a market share threshold would give small undertakings any greater protection than the Law already provides. Article 8(1) only applies to agreements which have an ‘appreciable’ effect on competition, and in general this only will be the case where the parties have a combined market share of 25% or more (except for serious restrictions such as price-fixing, market sharing, etc., which under the Law would be excluded from any small undertakings exemption in any event).²

Various other jurisdictions have enacted ‘small agreements’ or ‘de minimis’ exemptions to their competition laws. Some of these exemptions are summarized in Annex A. There exist, however, some notable exceptions, particularly (and significantly, in the context of Jersey) in the case of smaller jurisdictions. Neither

² See JCRA Guidelines on Anti-Competitive Arrangements.

Ireland nor Jamaica have enacted a small undertakings exemption. Malta's competition law contains an exemption for arrangements that have a minimal impact on competition, but leaves the determination of what impact is 'minimal' to a case-by-case basis, which effectively would be the position of the JCRA in Jersey even if the EDC chooses to not adopt a small undertakings exemption order.

The JCRA's Public Consultation

On 8 September 2005 the JCRA published a consultation paper concerning a potential small undertakings exemption under the Law. Article 6(4) of the CRA Law does not require the JCRA to consult publicly before delivering its advice to the EDC; nevertheless, we thought (and the EDC agreed) that consultation would be appropriate in this case. We specifically asked for views on the following:

- 1) In Jersey, do the potential advantages of a small undertakings exemption outweigh the potential disadvantages?
- 2) If the answer to the first question is 'yes,' how should 'small' undertakings be defined (e.g., by reference to turnover, market share, employees, or another criterion)?

The JCRA received six responses. The topic also was subject to comments reported in the *Jersey Evening Post*. In response to the first question, most commentators supported the adoption of a small undertakings exemption. In response to the second question, the commentators that favoured an exemption expressed widely divergent views on the criteria that the EDC should use to define a small undertaking.

The Jersey Consumer Council supports the adoption of a small undertakings exemption, citing the potential for a reduced compliance burden on small businesses. The Council supports an exemption based on the aggregate turnover of the parties involved, and not their aggregate market share, but was not in a position to recommend an appropriate turnover threshold. See Annex B.

While Jersey Harbours supports a small undertakings exemption, it also noted a risk that *'the very word "exemption" will send out the wrong signal in that it could be misunderstood and imply immunity for small business from the principles of the Law.'* If the EDC were to adopt a small undertakings exemption, Jersey Harbours states that a threshold based on the number of employees would be more easily verifiable for businesses than one based on turnover. See Annex C.

The law firm of Mourant du Feu & Jeune declined to give a view on whether Jersey should have a small undertakings exemption. It noted, however, that the potential benefits an exemption may provide in terms of reduced compliance and regulatory burdens could be negated if the threshold was based on turnover, because turnover is not a matter of public record in Jersey. See Annex D.

Jersey Business Venture ('JBV') recommends that the EDC adopt a *'proactive and generous approach'* to allow small businesses *'to continue without any further legislative burdens.'* The JBV also noted the potential benefit to the JCRA of

concentrating on monopolies and larger businesses. The JBV did not suggest how to define a small undertaking. See Annex E.

The Jersey Chamber of Commerce considers that the introduction of a small undertakings exemption is vital, citing reduced compliance burdens for both small businesses and the JCRA as potential benefits. According to the Chamber, the risks Jersey consumers may face from a small undertakings exemption are reduced by market forces and the Law's mandate that an exemption would not cover either abuses of dominance or objectionable activity such as price fixing. In light of the difficulties small businesses may face in defining markets and calculating market shares, the Chamber would not define the exemption based on market share. An undertaking could qualify for the Chamber's suggested exemption by satisfying two of the three following thresholds: (1) net assets of less than £1 million, (ii) turnover of less than £1 million, or (3) less than ten employees. See Annex F.

Jersey Finance Limited ('JFL') favours a small undertakings exemption and broadly concurs with the Chamber's proposed approach. JFL suggests that further consideration may be required to determine if the Chamber's recommended thresholds would be appropriate in all instances. It notes that Article 11(3) of the Law allows a small undertakings exemption order to have different provisions for different types of undertakings or different economic activities, thus making a unified approach potentially unnecessary. See Annex G.

Finally, the 12 September 2005 edition of the *Jersey Evening Post* reported the views of Senator Stuart Syvret in opposition to a small undertakings exemption. As quoted in this report, Senator Syvret states that '*to exempt small businesses would be socially unjust and go against the spirit of the law*' because a vast majority of businesses in Jersey are small and hence an exemption could cover their activities. See Annex H.

The Appropriateness of a Small Undertakings Exemption in Jersey

As expressed in the JCRA's consultation paper and reaffirmed by the comments received, a small undertakings exemption would have potential benefits and costs in Jersey. The adoption of an exemption may benefit some businesses by reducing their compliance burden with the Law, however, the interests of consumers may be compromised through potentially insulating anti-competitive conduct. With no exemption consumers would be protected through the widest possible application of the Law, but this could increase the costs the Law places on some businesses. Experience from jurisdictions such as Ireland, Malta and Jamaica – where no exemptions for small businesses exist – may suggest that, in a smaller island economy, the consumer interest should take precedence.

Should the EDC conclude that a small undertaking exemption is appropriate, it must still determine the relevant threshold. Jersey law in general does not provide any particularly relevant guidance.³ As shown in Annex A, practice under various European competition laws is diverse. Some countries, such as Austria and Germany,

³ The JCRA understands that permits under the Shops (Sunday Trading) (Jersey) Law 1960 are granted to establishments with retail sales areas less than prescribed limits in terms of square footage. The JCRA believes that such a measure would be inappropriate in the context of competition law, because retail sales area would not necessarily capture an undertaking's competitive significance.

define exemptions based on the undertakings' aggregate market share. Others, such as the United Kingdom, use a threshold based on the undertakings' combined annual turnover. Still others, such as the European Commission, Denmark and the Netherlands, have thresholds combining turnover, market share and other factors.

Most commentators agreed that a market share based threshold is not appropriate in Jersey and favour an objectively based measure that businesses could define more easily, such as turnover or number of employees. We observed in our consultation paper that practice in other jurisdictions would suggest an aggregate turnover-based threshold of approximately £30,000 to nearly £300,000.⁴ The Chamber suggests a substantially higher turnover threshold, £1 million, combined with at least one other factor. Other commentators suggest that turnover is not the right criterion to use in Jersey because it is not as easily verifiable compared to other indicators, such as the number of employees.

A threshold based solely on factors such as the number of employees, however, may not reflect a firm's competitive significance. Although turnover is not reported publicly in Jersey, most businesses likely would have a good estimate of their own annual turnover, and thus able to determine whether their arrangements with other businesses qualify for the exemption. An exemption order based on turnover could define in precise terms how firms calculate turnover, such as is done in the UK. Moreover, as the Chamber suggests, turnover does not have to be the sole factor on which the exemption is based, but can be combined with other factors.

Defining the exemption based on objective criteria and not market share, however, may increase the risk in Jersey that an exemption may cover otherwise anti-competitive activity. As Senator Syvret suggests, businesses that appear objectively 'small' in Jersey based on employees or turnover still could have large market shares. Thus, while small businesses may benefit from the adoption of objective criteria, the risk to consumers arising from the exemption is increased. Finally, experience from other jurisdictions suggests that objective criteria and market share do not have to be mutually exclusive; they both could be used to define what constitutes a small undertaking (although, as noted above, the need to determine markets and calculate market shares likely increases compliance burdens).

Conclusion

If the EDC decides that a small undertakings exemption is appropriate, we suggest that it consult further with the JCRA on the actual terms of the order. For example, the order would have to make clear that the exemption applies only to undertakings that are not owned or controlled by other, larger undertakings, whether in Jersey or abroad. Moreover, if a small undertakings exemption is adopted, the JCRA would recommend that it be given the power to withdraw the exemption where a particular agreement was found to have hindered competition to an appreciable extent. This ability to withdraw an exemption in particular circumstances would be consistent with practice in the UK and other jurisdictions.

⁴ For the avoidance of doubt, this figure is the aggregate level of annual turnover for all undertakings participating in the arrangement.

Another option for the EDC is to decide to not introduce a small undertakings exemption at this stage, but allow businesses and the JCRA a period (of say, six months) to gain experience in the practical application of the Law in a Jersey context before deciding on whether an exemption is appropriate and, if so, what the appropriate threshold(s) should be. This approach would be consistent with that taken in the case of block exemptions.

I would be happy to answer any queries the EDC may have on the above advice.

Yours sincerely

William Brown
Executive Director

Enclosures