

WB/hcm

9 August 2005

The President and Members
Economic Development Committee
C/o Mr W Gallichan
Cyril Le Marquand House
The Parade
St Helier

Dear President and Members

Block Exemptions under the Competition (Jersey) Law 2005

Introduction

On 25 November 2004, the Economic Development Committee (EDC) requested the JCRA, under Article 6(4) of the Competition Regulatory Authority (Jersey) Law 2001 (the CRA Law), to advise it on the content and form of any Order which it might be appropriate for the EDC to issue under Article 10(1) of the Competition (Jersey) Law 2005 (the Law), assuming it received Royal Assent. (Royal Assent was subsequently given on 9 February 2005). Article 10(1) provides that the EDC may issue 'block exemption' Orders (the concept of block exemptions is explained below). The JCRA accepted this request.

While Article 10(1) itself requires the EDC to consult the JCRA before issuing any block exemption Order, Article 10(1) does not come into force until 1 November 2005. Relying on this provision would mean, therefore, that there would be a delay between the entry into force of Part 2 – scheduled for 1 November – and the issue of any appropriate block exemption Order. A request for advice under Article 6(4) of the 2001 Law means that any appropriate Order can be drafted and take effect on the same day as Part 2 taking effect.

The Nature of Block Exemptions

Article 9 provides that the JCRA may exempt from the prohibition of anti-competitive agreements under Article 8(1) an agreement which the JCRA is satisfied meets certain criteria laid down in Article 9(3), namely it:

- a. is likely to improve the production or distribution of goods or services, or to promote technical or economic progress in the production or distribution of goods or services;
- b. will allow consumers of those goods or services a fair share of any resulting benefit;
- c. does not impose on the undertakings concerned terms that are not indispensable to the attainment of the objectives mentioned in subparagraphs (a) and (b) and ;
- d. does not afford the undertakings concerned the ability to eliminate competition in respect of a substantial part of the goods or service in question.

The criteria laid down in Article 9(3) reflect the equivalent criteria for exemption under EC competition law. Also like EC competition law, the Law provides for two processes for exemption. The first is an individual exemption, which requires the parties to apply for exemption, and the JCRA to consider whether the agreement meets the criteria for exemption, on a case-by-case basis. The second is where the agreement fulfils the conditions laid down in block exemptions.

A block exemption is an exemption by category of agreement. For example, in EC competition law, block exemptions exist for certain types of vertical (supply and purchase) agreements, technology transfer agreements and research and development agreements.

The idea behind block exemptions is that an agreement fulfilling the terms of the relevant block exemption is presumed to satisfy the exemption criteria in Article 9(3) so that there is no need for the parties to apply for an individual exemption. The JCRA (like the Commission under EC competition law) can withdraw the benefits of the exemption if it emerges that the agreement does not in fact satisfy the criteria in a particular case i.e. effectively rebutting the presumption to which compliance with the block exemption gives rise.

Purpose of Block Exemptions

The concept of block exemption was devised by the European Competition authorities as a means of allowing the Commission to focus on the most serious competition cases while giving parties to notified agreements greater legal certainty. The Commission had received a large number of individual notifications, with decisions on notified agreements often taking two or three years or even longer to achieve. Moreover, many of these agreements, once they were reviewed, turned out to be innocuous from a competition law standpoint. The Commission was able, from its experience of individual agreements, to define a set of conditions under which certain categories of agreement were presumed to be exempted. By embodying these conditions in secondary legislation, parties could

frame their agreements to comply with the law and thus avoid the need to apply for an individual exemption.

Are Block Exemptions under the Competition (Jersey) Law Appropriate?

Under Article 60 of the Law, the JCRA, and the Royal Court, have a duty to attempt to ensure that, so far as possible, questions relating to competition are dealt with consistently with the treatment of corresponding questions under Community law. The JCRA's view is that this does not mean the JCRA must adopt block exemptions, or if it does, that it must ensure that block exemptions are in similar terms to the EC block exemptions. The duty in Article 60 is to attempt to ensure, and the duty is further qualified by the term 'as far as possible'.

In the JCRA's view, this means that if there are factors in the Jersey context which mean that block exemptions are inappropriate, or may even serve to defeat the objectives of the Law, the JCRA may decide not to advise the EDC to introduce block exemptions.

The JCRA's view is that there are a number of factors specific to Jersey which mean that it is not appropriate to introduce block exemptions before Part 2 of the Law takes effect on 1 November (although it may be appropriate to do so at a later stage, in the light of the JCRA's experience of individual applications for exemption). These are as follows:

1. As indicated above, the main policy objective for introducing block exemptions at the EC level was the fact that the Commission did not have the resources to deal with the large number of individual exemption applications it received within a commercially acceptable timeframe. The JCRA is not in a position to forecast with any degree of certainty at this stage the number of individual applications it will receive, and therefore whether the same policy rationale for block exemptions would apply in Jersey.
2. Given the particular features of the Jersey market compared with most other EU countries, such as the reliance on air and sea transport services for imports and exports, and the high barriers to entry and concentration levels in certain markets, it would appear unwise to assume in advance that the conditions of a block exemption at the EU level would be universally applicable in a Jersey context. For example, the block exemption for vertical agreements states that the block exemption does not apply where there is an exclusive supply obligation, if the purchaser's market share is 30% or more. Given that, for example, distribution rights in Jersey are more likely to be granted on a Jersey-wide or even Channel Island-wide basis, a market share level of 30% may mean that few distribution agreements would qualify under a block exemption with a market share ceiling set at this level. (The JCRA does not express any view at this stage on whether a market share ceiling would be appropriate in Jersey, and if so at what level).

3. A 'Jersey – specific' block exemption Order could only be drafted in the light of experience gained in dealing with individual notifications. In drafting the EC block exemptions, the Commission similarly relied on its experience of individual notifications¹. The increased legal certainty which block exemptions are supposed to give would be illusory if block exemptions are not drafted with the benefit of prior experience in a particular geographical market. The ability of the Commission to withdraw the benefits of the block exemption is clearly intended only to apply in exceptional cases, otherwise the legal certainty deriving from compliance with terms of a block exemption would be defeated. However, if the block exemption conditions were not drafted carefully with reference to local market conditions, this would increase the risk that presumptions about the acceptability of certain clauses in a Jersey context later prove to be unfounded. This would leave the JCRA with little alternative but to withdraw the exemption in a more frequent number of cases.

Article 6(4) of the CRA Law does not require the JCRA to consult publicly before delivering its advice to the EDC. Nevertheless, the EDC and the JCRA agreed that it would be appropriate to do so in this case.

The JCRA issued a Consultation Paper on 5 July 2005 containing the views set out above on a provisional basis and inviting comments from third parties. Two responses were received: from the Jersey Chamber of Commerce and the Jersey Motor Trades Federation (JMTF) (see Annex I and Annex II respectively). While the Chamber of Commerce strongly supported the introduction of Block Exemptions, Chamber did not provide persuasive arguments against the reasons for the JCRA's view, as listed above. In particular, the JCRA remains firmly of the view that it would not be prudent to presume in advance the acceptability of certain types of agreement in the Jersey context, and that block exemptions should only be considered after the JCRA has gained experience of dealing with agreements notified to it for individual exemption. The JMTF did not oppose the JCRA's position.

Conclusion

In the light of the above considerations the JCRA advises the EDC not to issue any Block Exemption Orders under Article 10 before Part 2 of the Law takes effect on 1 November, but to request the JCRA's further advice on this matter after a period of approximately 6 months from that date.

¹ See for example recital 2 of Commission Regulation 2790/99/EC on vertical agreements and concerted practices.

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

Yours sincerely

William Brown
Executive Director

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