



**Consultation Paper**

**Small Undertakings Exemption**

**Under the**

**Competition (Jersey) Law 2005**

## **I. 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. The JCRA accepted this request.

While Article 11(1) itself requires the EDC to consult the JCRA before issuing any small undertakings exemption Order, Article 11(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 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 any appropriate Order can be drafted and take effect concurrent with, or soon after, the effective date of Part 2.

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 have agreed that it would be appropriate to do so in this case. The purpose of this paper is therefore to seek the comments of all interested parties on the provisional views set out in this paper.

## **II. 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,<sup>1</sup> 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. The Order may impose conditions or obligations on the exemption and provide for the manner in which the JCRA may cancel the exemption.

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

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<sup>1</sup> 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.

- (c) share markets or sources of supply.

### **III. The Appropriateness of a Small Undertakings Exemption in Jersey**

#### **A. Potential Benefits and Costs of a Small Undertakings Exemption**

A small undertakings exemption has the potential to reduce the compliance burden the Law places on small businesses. It does this by providing a degree of legal certainty that the Law will not prohibit arrangements between or among small undertakings. 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 could nevertheless 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 (as the Law would permit) rather than turnover or employees – generally businesses with small market shares do not have the ability to restrict competition to an appreciable extent. However, it is doubtful whether this 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).<sup>2</sup>

#### **B. Practice in Other European Jurisdictions**

Various other jurisdictions in Europe have enacted ‘small agreements’ or ‘de minimis’ exemptions to provisions of their competition laws analogous to Article 8(1) in Jersey. Some of these exemptions are summarized in Appendix 1. There exist, however, some notable exceptions, particularly (and significantly, in the context of Jersey) in the case of smaller jurisdictions. Ireland does not have a small undertakings exemption to its competition law.<sup>3</sup> Malta’s competition law contains an exemption for arrangements that have a minimal impact on competition, but leaves the determination of what impact is

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<sup>2</sup> See JCRA Guidelines on Anti-Competitive Arrangements.

<sup>3</sup> Similarly, beyond Europe, Jamaica does not have a small undertakings exemption to its competition law.

‘minimal’ to a case-by-case basis,<sup>4</sup> which effectively would be the position in Jersey even if no small undertakings exemption was adopted, as explained above.

#### **IV. Potential Thresholds of a Small Undertakings Exemption**

If a small undertakings exemption is appropriate for Jersey, the EDC’s Order still would need to define what constitutes a small undertaking. Jersey law in general does not appear to provide any particularly relevant guidance.<sup>5</sup> As shown in Appendix 1, practice under various European competition laws is diverse. Some countries, such as Austria and Germany, 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 Denmark and the Netherlands, have thresholds combining turnover, market share, and other factors.

The European Commission has two relevant practices. It has a *de minimis* exemption defined in a Commission Notice, with thresholds set by the undertakings’ aggregate market share.<sup>6</sup> The Commission also has acknowledged that agreements between small and medium sized undertakings – defined in terms of employees, annual turnover, and annual balance sheet total – rarely are capable of appreciably affecting trade between Member States.<sup>7</sup>

The JCRA is of the provisional view that, should the EDC enact a small undertakings exemption, defining the thresholds in terms of turnover would provide the most certainty to undertakings seeking to comply with the Law. Turnover-based thresholds would avoid the need for undertakings to go through the process attempting to define markets and market shares, thereby potentially reducing compliance costs. As noted above, however, turnover-based thresholds in a Jersey context could have the risk of exempting arrangements between undertakings that may have low combined turnovers but high combined market shares. Therefore, if a small undertakings exemption based on turnover was 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 a turnover-based exemption in particular circumstances would be consistent with practice in the UK and other jurisdictions.

Should a turnover threshold be recommended, the question remains as to the appropriate level. The relevant exemption in the UK applies to ‘all agreements between undertakings

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<sup>4</sup> Competition Act, Art. 6(2).

<sup>5</sup> 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.

<sup>6</sup> *Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis)*, 2001 O.J. (C 368).

<sup>7</sup> *Ibid.* See also *Commission Recommendation of 3 April 1996 concerning the definition of small and medium-sized enterprises*, 1996 O.J. (L107).

the combined applicable turnover of which . . . does not exceed £20 million.’<sup>8</sup> Smaller European economies, such as the Netherlands and Sweden, have lower turnover limits, although these are combined with other factors. Denmark has a combined aggregate turnover limit of approximately €20 million.

Thresholds at these limits most likely would be inappropriate for a comparatively small economy like Jersey. They may be instructive, however, when viewed as a percentage of each country’s Gross Domestic Product (GDP). The aggregate turnover thresholds noted above approximately range from .001% to .014% of national GDP. Applying such ratios in Jersey would suggest combined aggregate turnover limits among small undertakings ranging from approximately £30,000 to nearly £300,000.

## V. Comments

The JCRA welcomes comments on this topic. In particular, the JCRA would welcome responses to the following questions, in light of the above discussion:

- 1) Do you believe that the potential advantages of a small undertakings exemption outweigh the potential disadvantages? Whether the answer is ‘yes’ or ‘no’ please provide reasons.
- 2) If the answer to the first question is ‘yes,’ how do you believe ‘small’ undertakings should be defined (e.g., by turnover, employees or another criterion) and please specify the quantitative threshold you believe is appropriate (e.g., level of turnover, number of employees, etc.). Again, please provide reasons for your views.

Comments must be submitted in writing by **5 pm on 3 October 2005** to:

Jersey Competition Regulatory Authority  
6<sup>th</sup> Floor, Union House  
Union Street  
St Helier  
Jersey JE2 3RF  
For the attention of Janet Whiteside, Case Officer

The JCRA may publish responses to this Consultation Paper on its website, so any confidential material should be clearly marked as such.

8 September 2005

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<sup>8</sup> *The Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000*, (2000) SI 2000/262. This exemption may be withdrawn if a particular agreement is likely to infringe the U.K. Competition Act’s prohibition against anti-competitive agreements.

## Appendix 1

### Summary of Other European Small Agreement or De Minimis Exemption Thresholds

<b>Jurisdiction</b>	<b>Threshold</b>
Austria	Exemption for 'minor cartels' holding less than a 5% national or 25% regional market share.
Czech Republic	Exemption where parties to an agreement have an aggregate market share not exceeding 10% (for agreements between competitors) or 15% (for agreements between companies at different levels of the supply chain).
Denmark	Agreements exempt if (i) the parties' aggregate annual turnover and market share are less than approximately €135 million and 10%, respectively; or (ii) the parties' combined aggregate annual turnover is less than approximately €20 million, regardless of market share.
Estonia	Exemption where parties to an agreement have an aggregate market share not exceeding 10% (for agreements between competitors) or 15% (for agreements between companies at different levels of the supply chain).
European Union	<p>Small and medium-sized undertakings defined as those with fewer than 250 employees and have either an annual turnover not exceeding €40 million or an annual balance sheet total not exceeding €27 million. Agreements between small and medium-sized undertakings are rarely capable of affecting trade between Member States.</p> <p><i>or</i></p> <p>De minimis exemption for agreements under Article 81(1) when: (i) for agreements between actual or potential competitors, the aggregate market share held by the parties does not exceed 10% in any of the relevant markets affected by the agreement; or (ii) for agreements between non-competitors, the market share held by each of the parties to the agreement does not exceed 15% in any of the relevant markets affected by the agreement; or (iii) where a network of small agreements exists that have a cumulative effect in a relevant market, the cumulative foreclosure effect of the agreements is less than 30% or, where a cumulative foreclosure effect exists, agreements between individual firms will not contribute to this effect when the individual parties have market shares not exceeding 5%.</p>
Germany	Competition authority will not intervene against agreements between small and medium-sized undertakings if: (i) the agreement is designed to promote efficiency, (ii) only a limited number of small and medium-sized undertakings participate, and (iii) the participants' aggregate market share does not exceed 5%.
Hungary	Exemption for agreements between undertakings with less than a 10% aggregate market share.

## Appendix 1

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Iceland	Exemption where parties to an agreement have an aggregate market share not exceeding 5% (for agreements between competitors) or 10% (for agreements between companies at different levels of the supply chain). Five percent threshold applies where agreements are difficult to classify.
Malta	Concerted practices between undertakings not subject to prohibition where impact in relevant market is minimal. In determining whether impact is minimal, 'consideration shall be given to all relevant circumstances including the aggregate share of all the undertakings concerned of the relevant market.'
Netherlands	Exemption for agreements where (i) no more than 8 undertakings are involved and (ii) the involved undertakings' combined aggregate turnover for the previous year does not exceed €4.54 million.
Poland	Exemption where parties to an agreement have an aggregate market share not exceeding 5% (for agreements between competitors) or 10% (for agreements between companies at different levels of the supply chain).
Slovakia	Exemption for agreements between undertakings with aggregate market share not exceeding 10%.
Slovenia	Exemption where parties to an agreement have an aggregate market share not exceeding 5% (for agreements between competitors) or 10% (for agreements between companies at different levels of the supply chain).
Sweden	No appreciable effect on competition for agreements where each undertaking has an annual turnover of less than approximately €3.2 million and the parties have an aggregate market share not exceeding 15%.
United Kingdom	Exemption for agreements between undertakings with a combined applicable turnover for the previous year not exceeding £20 million.

\*For ease of comparison, the turnover thresholds of Denmark and Sweden have been converted to Euros using current exchange rates.