

Ref: C177/07

16 November 2007



Deputy Deidre Mezbourian
Chairman
Education and Home Affairs Scrutiny Panel
Scrutiny Office, States Greffe
Morier House
St Helier JE1 1DD

Dear Deputy Mezbourian

User Pays Policing of Events

I am writing this letter in response to your letter to me dated 15 November 2007 concerning the proposal by the Minister for Home Affairs to introduce a 'user pays' charge for providing police services at commercial or profit-making events in Jersey. In your letter, you asked whether this proposal potentially could fall within the JCRA's remit under the Competition (Jersey) Law 2005 (the 'Law').

Upon reviewing the proposal as set forth in the proposition entitled *Policing Commercial and Profit-Making Events: New 'User Pays' Charges (P.94/2006)*, our preliminary view is that the programme, as currently proposed, may raise concerns under the Law, and specifically under the Law's prohibition of abuses of dominance set out in Article 16. This view is primarily based on the different treatment the proposal currently contemplates with respect to so-called 'traditional events' compared to 'commercial' or 'profit-making events.'

Analysis

Article 16(1) of the Law prohibits undertakings from abusing dominant positions in trade for any goods or services in Jersey or any part of Jersey. An assessment of activity under this Article requires the determination of: (1) whether the entity conducting the activity can be considered to be an 'undertaking' under the Law; (2) if so, whether that undertaking holds a dominant position in a relevant market in Jersey; and (3) whether the undertaking holding a dominant position is engaged in behaviour that can be considered as an abuse of that position. Under Article 60 of the Law, the JCRA must attempt to ensure that, so far as possible, questions arising under the Law in Jersey are dealt with in a manner that is consistent with the treatment of corresponding questions that have arisen under competition law within the European Union.

JERSEY COMPETITION REGULATORY AUTHORITY

2nd Floor Salisbury House 1-9 Union Street St. Helier Jersey JE2 3RF Channel Islands
Tel: +44 (0)1534 514990 Fax: +44 (0)1534 514991 E-mail: enquiries@jcra.je Web: www.jcra.je

1. *Is the States of Jersey Police Acting as an Undertaking?*

A threshold issue of the Law's applicability is whether the entity engaging in the conduct (here, the States of Jersey Police) is acting as an undertaking. Article 1 of the Law defines an undertaking as a person who is carrying on a business. Taking note of EC precedent under Article 60 of the Law, the European Court of Justice has stated that the concept of an undertaking 'encompasses every entity engaged in an economic activity regardless of the legal status of the entity[.]'¹ Economic activity, in turn, has been defined as '[a]ny activity consisting in offering goods or services on a given market[.]'²

There are potentially differing points of view on whether the States of Jersey Police would be seen as acting as an undertaking here. On the one hand, it could be argued that the maintenance of public order is a core public duty, irrespective of when and where it is performed, and not an economic activity. On the other hand, concerning some events, the Police are proposing to provide security services only for remuneration. Moreover, there may be the potential, at least, for the Police to be viewed as offering such services in competition with private firms that could provide security services.³ Considering these factors, it could be argued that the provision of security services for special events is an economic activity and hence subject to the Law. The fact that the proposed programme may be motivated by cost-recovery considerations, as indicated in P.94/2006, and not by profit motivations, is inconsequential to this analysis.⁴ Furthermore, the fact that the Police may continue to carry out numerous public service obligations does not mean that it cannot be viewed as an undertaking when providing security services for remuneration at special events.⁵

In summary, whether the Police would be viewed as acting as an undertaking in providing the services proposed in P.94/2006 is not a clear-cut issue. If the Police are not seen as acting as an undertaking, then the Law would not apply to the programme. However, because there appears to be an argument, perhaps strong, that the Police could be seen as acting as an undertaking here, we will proceed with further analysis of the proposal under the Law.

2. *Do the Police Hold a Dominant Position in a Relevant Market?*

For Article 16(1) to apply, the undertaking in question (here, the States of Jersey Police) must hold a dominant position in a relevant market. We will assume the relevant market here to be the provision of security services in Jersey for special events. Again, as indicated above in Footnote 3, we are uncertain if private firms

¹ *Höfner and Elser v. Macrotron GmbH*, Case C-41/190 at ¶ 21 (1991).

² *Glöckner and Sudwestpfalz*, Case C-475/99 at ¶ 19 (2001).

³ Although, whether private firms exist in Jersey that have the scale necessary to provide security services for special events is a factual matter that we have not specifically researched.

⁴ See Richard Whish, *COMPETITION LAW* at 81 (5th ed. 2003) ('The fact that an organization lacks a profit-motive or does not have an economic purpose does not disqualify it as an undertaking, provided always that it is carrying on some commercial or economic activity.').

⁵ See *ibid.* at 82 ('[A] particular entity might be acting as an undertaking when carrying out certain of its functions but not acting as an undertaking when carrying out others.').

currently exist in Jersey that can provide such services and, if so, how their scale and capacity to provide such services compares with the States of Jersey Police. Such matters would need to be resolved definitively, if this matter were ever to arise under the Law. For the purpose of this preliminary analysis, however, we will assume that the States of Jersey Police holds a dominant position in the provision of security services in Jersey for special events. The fact that P.94/2006 proposes to establish pricing and service levels for policing at special events without regard to competition or competitive pressure is itself evidence of a dominant position, for as stated in the JCRA's Guideline on Abuse of a Dominant Position (the 'Guideline'): 'The essence of dominance is the power to behave independently of competitive pressures.'

3. *Is there an Abuse of a Dominant Position?*

The mere holding of a dominant position does not infringe the Law. Article 16(1) of the Law only prohibits an undertaking from engaging in activity that can be considered as an *abuse* of its dominant position. Article 16(2) lists activities that might be considered as abusive when performed by a dominant undertaking. These activities include imposing unfair prices or trading conditions (so-called 'excessive pricing') and applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage (so-called 'discriminatory pricing'). Both of these concepts of abuse are analysed below with respect to the proposal for user pays policing for commercial or profit-making events in Jersey.

a. Excessive Pricing

The Guideline states that an abuse may arise from a dominant undertaking's imposition of an unfair price, with the relevant standard being the following:

*'A price charged by a dominant undertaking may be unfairly excessive if it has no reasonable relation to the economic value of the product supplied. The question is whether the difference between the costs actually incurred and the price actually charged is excessive and, if so, whether a price has been imposed that is either unfair in itself or when compared to other competing products.'*⁶

The prices the States of Jersey Police currently proposes to charge for the provision of security services at special events are set forth in P.94/2006. The 'Special Duty' hourly rates are 50% higher than the Normal hourly rates for each rank. The proposal states that '[t]he charges are based on a straightforward reimbursement of costs incurred. Employment of officers on a Bank Holiday will automatically incur a charge of double the normal hourly rate.'

There is no hard and fast rule of when prices can be considered to be excessive under the Law, and we currently lack sufficient information to determine if the rates

⁶ JCRA Guideline on Abuse of a Dominant Position pg 9.

provided in P.94/2006 could be viewed as excessive. Concerning this determination, however, we note the following:

- There should be cost justification for both the Normal and Special Duty rates.
- As a preliminary matter, we see no problem with more senior officers being charged out at higher rates compared to their more junior counterparts. This is standard practice across many trades and professions, and is a recognition of the greater level of experience (and thereby, presumably, the capacity to provide superior levels of service) offered by senior personnel compared to junior personnel.
- We also do not see a problem, *per se*, of charging a higher rate for work undertaken outside of normal working hours. Again, we understand that this is a normal business practice across many trades and professions, and concerning General Practitioners in Jersey the JCRA has stated that '[t]he additional expenses for a night home visit over an evening home visit appears reasonably cost justified based on additional compensation to the GP for providing services during late-night and early morning hours.'⁷ This view assumes, however, that in practice the Police do not determine the timing of events at which they provide security services for remuneration.
- It would be interesting to know whether the 'Special Duty' rates set out in P.94/2006 are the same as the Police's standard overtime or bank holiday rates. This appears to be implied in P.94/2006, but is not explicit. If the rates charged for special events correspond to the Police's normal overtime or bank holiday rates, this would support a view that the rates are not excessive. The suggestion may be the opposite, however, if the rates applicable to special events are higher than the normal overtime or bank holiday rates charged in other circumstances, unless the Police could show that a legitimate cost justification exists to support any such differential.
- It also would be interesting to compare both the Normal and Special Duty rates charged in Jersey, as well as the 50% mark-up applicable to the Special Duty rate, to the current practice in other similar jurisdictions. As noted above, a required element of excessive pricing is whether the prices in question can be considered as unfair in and of themselves, or when compared to the prices charged for corresponding services in other jurisdictions. We have not had the opportunity to compare the rates set out in P.94/2006 to police rates that may apply in other jurisdictions. To the extent that rates in Jersey correspond to those charged in other jurisdictions, this would suggest that the charges in question are not excessive. If the rates in Jersey are substantially higher than those charged in other similar jurisdictions, however, this may suggest otherwise. Potentially comparable jurisdictions would include Guernsey, the Isle of Man, and similar-sized police forces in the UK.

⁷ JCRA, *Decision C015/06 Concerning the General Practitioners Out-of-Hours Cooperative Notified under Article 9 of the Competition (Jersey) Law 2005*, at ¶ 40 (8 Aug. 2006).

b. Discriminatory Pricing

Another form of abuse is discriminatory pricing, when a dominant undertaking applies dissimilar conditions (including, but not limited to, different prices) to equivalent transactions with other trading parties, thereby placing the disfavoured party at a competitive disadvantage compared to the favoured party. The Guideline explains that discriminatory pricing may arise from:

*'the charging of different prices to different customers, or categories of customer, for the same product – where the differences in price do not reflect the quantity, quality or any other characteristics of the items supplied. The pricing structure would not be considered discriminatory, however, where there were objective and proportionate reasons for an undertaking charging different prices to different customers – for instance where there were different transport costs.'*⁸

As proposed in P.94/2006, the States of Jersey Police's user pays programme would appear to be inherently discriminatory. That is, charges will be levied for so-called commercial or profit-making events, in which 'a commercial organisation seeks to sell/advertise or otherwise promote or hold a particular product/merchandise/event for financial gain and where this event falls within core policing responsibilities, for example a music event which will involve the deployment of crowd control barriers, press pens and special access arrangements for vehicles and/or pedestrians.' No charges would be levied, however, for public, non-profit-making events, or for so-called traditional events – 'where an event is part of a long established Island tradition which by custom and practice has been policed free of charge, payment should not be sought, for example the Battle of Flowers.' Despite the different charging policies, P.94/2006 indicates that the services provided by the States of Jersey Police (i.e. security services) would be the same or very similar for each of the three categories of events.

The Guideline states that a dominant undertaking's discriminatory pricing practices may not necessarily be considered as abusive if they are based on an objective justification. An objective justification may support the different treatment for commercial/profit-making events compared to public, non-profit-making events, as set forth in P.94/2006. By providing security services at no charge for non-profit-making events, the States of Jersey Police may be seen as contributing to the social goals of such events by not placing extra costs on them. It is difficult to see how consumers would be harmed in such circumstances. We note, however, that P.94/2006 could be clearer on the standards on what qualifies as a 'public, non-profit-making event.' Must the event in question provide free admission to qualify? What if charitable booths exist at commercial or profit-making events? How does one actually define the term 'benefit financially' used in P.94/2006? The point is that while, in principle, providing no-cost security services at public interest events would not appear problematic under the Law, objective, transparent criteria should exist to delineate when an event is considered to be in the public interest. The determination should not rely solely on discretion.

⁸ JCRA Guideline on Abuse of a Dominant Position pg 10.

Furthermore, our initial review suggests that little objective justification appears to exist for the distinction P.94/2006 currently makes between commercial/profit-making events and traditional events. The Proposition contains little guidance on how the Police would go about determining when an event could be considered to be 'traditional'. For example, how long must an event be established and receive free police services to be considered as a 'traditional' event? We understand that, unlike non-profit-making events, traditional events such as the Battle of Flowers are undertaken, in part, for financial gain, evidenced from the fact that customers are charged admission to attend. In this respect, there would appear to be little objective criteria to distinguish such events from commercial or profit-making events (apart, perhaps, for the number of years they have been held).

A hypothetical example may suggest how this potential problem of discrimination could arise under the Law. As proposed under P.94/2006, the Battle of Flowers would continue to benefit from no-charge policing services. A private flower show in Jersey at which admission is charged, however, would presumably be viewed as a commercial or profit-making event, and thereby subject to the charges for policing set out in P.94/2006. There would appear to be no cost justification for the different treatment of the two events (indeed, if the Battle of Flowers were a larger event compared to the private flower show, this would imply that the policing costs of the former are greater than the later). Potentially, the private flower show would have to pass-on the charges it incurs for security services onto its customers in the form of higher ticket prices, while the Battle of Flowers would not, because it is not charged for such services. Such a situation would appear to place the private flower show at a competitive disadvantage compared to the Battle of Flowers, and thereby raise the possibility of discriminatory pricing under Article 16 of the Law (although ultimate liability under the Law would depend on the facts). In such circumstances, the sponsors of the disadvantaged flower show may have incentive to file a complaint with the JCRA, or seek redress directly in Royal Court through a civil action filed under Article 51.⁹

A similar potential ground for discrimination may arise from the handling of spontaneous incidents outside the control of the event organisers, as stated in the last page of P.94/2006. This states that if an unforeseen event arises, the Police will consult with the organisers as to the increased resources needed, however, the organisers would pay for the increased resources provided. Therefore, this could result in the costs of controlling the same type of unforeseen public disturbance being charged to the organisers of a private flower show (using the example set out above) but not to the organisers of the Battle of Flowers.

Conclusion

I would like to stress that this letter presents our preliminary views only, based on the facts set out in your letter and the materials attached thereto. As such, it does not constitute formal guidance or advice under Articles 43 or 57 of the Law. This letter

⁹ Please note that this hypothetical is provided for illustrative purposes only, and is not intended to be a criticism of the Battle of Flowers or any other current or prospective event in Jersey.

does not contain any confidential or commercially sensitive information, so the Panel should feel free to disclose the contents of this letter at its discretion.

Should the Panel require any further assistance concerning this matter, please contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C Webb', written in a cursive style.

Charles Webb
Executive Director