



Consultation Paper

**Block Exemptions and
Small Undertakings Exemption**

Under the

Competition (Jersey) Law 2005

12 September 2006

I. Introduction

The Jersey Competition Regulatory Authority ('JCRA') is consulting on whether it would be appropriate at this time for the Minister for Economic Development (the 'Minister') to issue Block Exemptions and/or a Small Undertakings Exemption under Articles 10 and 11 of the Competition (Jersey) Law 2005 (the 'Law'). The purpose of this consultation is to assist the JCRA in formulating its advice on these matters, which the Minister has requested.

II. Overview of Block Exemptions and Small Undertakings Exemptions under the Law

Articles 10 and 11 of the Law give the Minister discretion, after consulting with the JCRA, to grant by Order certain exemptions to the Law's prohibition on anti-competitive agreements, Article 8(1). Article 10 provides for possible exemptions covering classes of arrangements (such as distribution or licensing agreements), commonly known as block exemptions. Article 11 provides for a possible exemption covering small undertakings, which may be defined by reference to factors such as turnover, earnings, employees, or market share or similar measures.

An Order issued under Articles 10 or 11 would only exempt conduct from the application of Article 8(1) of the Law, meaning that the Law's prohibition on abuses of dominance and requirements with respect to mergers and acquisitions would not be affected. In addition, an Order made under Article 11 with respect to small undertakings has no effect if the arrangement's object or effect is to fix prices, limit production, share markets, or engage in analogous conduct.

III. Background

In response to prior requests received from the Economic Development Committee ('EDC'), in late 2005 the JCRA consulted on possible block and small undertakings exemptions.¹ The JCRA conducted these consultations in anticipation of the Law coming into full force on 1 November 2005.

1. Block Exemption July 2005 Consultation

The consultation paper dated 5 July 2005 gave the JCRA's provisional view that the EDC's introduction of block exemptions was not appropriate at that time. This view was based in part on the fact that the JCRA had not, at that time, had significant experience in assessing commercial arrangements under the Law to be able to define a set of criteria pursuant to which classes of agreement would be automatically exempt under block exemptions. We also noted that the standards for block exemptions adopted for application within the whole of the European Union may not be appropriate in an economy the size of Jersey.

Two responses were received to this consultation. While one of these responses strongly supported the adoption of one or more block exemptions, it did not, in the

¹ Copies of these consultation papers, and the JCRA's subsequent advice to the EDC on both matters, are available on our website, www.jcra.je.

JCRA's view, present persuasive arguments that the EDC should issue such exemptions before the Law took full effect.

2. Small Undertakings September 2005 Consultation

The JCRA's consultation paper dated 8 September 2005 reviewed the potential advantages and disadvantages of adopting a small undertakings exemption in Jersey. It also reviewed the practice with respect to small undertakings exemptions under competition laws in other jurisdictions, and noted that other small island jurisdictions did not have small undertakings exemptions. Our consultation paper also discussed the difficulty in defining what would qualify as a 'small' undertaking under an exemption, and the lack of guidance under Jersey law on this issue.

Comments received in response to this consultation varied widely. While most supported the adoption of a small undertakings exemption, noting potential benefits arising from reduced compliance burdens, others thought that exempting small undertakings may be inappropriate in a Jersey context, in which a vast majority of businesses are small. Among the supporters of a small undertakings exemption, there were widely divergent views on the appropriate criteria necessary to define a small undertaking.

3. Advice to the EDC on Block and Small Undertakings Exemptions

After its consultation on block exemptions, the JCRA advised the EDC that it was not appropriate to issue any such Order prior to the Law taking full effect, although the EDC may want to revisit the matter at a later time. With respect to small undertakings, we suggested that an option the EDC may want to consider is not to issue an Order prior to the Law coming into force, but to allow a period for businesses and the JCRA to gain experience with the practical application of the Law in a Jersey context before deciding on whether an exemption is appropriate and, if so, what the appropriate exemption criteria should be.

Subsequently, the EDC decided to not issue exemptions prior to 1 November 2005, but to reconsider both matters at a later date.

IV. Current Considerations

The current question for consideration is, in light of the experience gained thus far under the Law, is the adoption by the Minister of block and/or small undertakings exemptions now appropriate? Our preliminary views on both block and small undertakings exemptions are discussed below.

1. Block Exemptions

Article 10(3) of the Law requires that, when advising the Minister on whether or not to issue an Order granting block exemptions, the JCRA must publish a draft of the advice it intends to give, and consider any representations made to it before providing the advice to the Minister. To comply with this requirement, a copy of our draft advice on block exemptions is annexed to this consultation paper. It should be stressed that the conclusions contained in this draft are preliminary only, and subject

to further consideration based on the representations made in response to this consultation.

- ***Interested parties are requested to comment on the attached draft advice concerning block exemptions, and the JCRA's preliminary conclusions that the Minister's adoption of one or more block exemptions is not appropriate at this time.***

2. Small Undertakings Exemption

During our initial consultation, some commentators stated that a small undertakings exemption was necessary to reduce the compliance burden the Law would place on small businesses. While concerns about compliance burdens have been raised in general, since the Law has come into full force the JCRA has not been presented with specific information on the costs of, or any difficulties with, compliance, particularly with respect to compliance with Article 8(1) (which is the only section of the Law potentially subject to a small undertakings exemption).

Nevertheless, the JCRA is sensitive to potential compliance burdens and the need to reduce these burdens as much as possible without sacrificing the Law's fundamental goal of promoting competition in the supply of goods and services in Jersey. To this end, our primary objectives currently include seeking to ensure understanding by businesses and consumers of the Law and providing sufficient transparency into the JCRA's own powers and processes.²

- ***The JCRA would welcome information regarding the compliance burden that Article 8(1) places on small businesses, and any associated costs or difficulties. Discussion of specific examples would be most helpful.***³

While our initial consultation paper identified reduced compliance burdens as a potential benefit of a small undertakings exemption, it also discussed the potential cost arising from such an exemption of possibly insulating activities that otherwise may be subject to liability under the Law. This cost could be particularly relevant in a Jersey context, where businesses which may be small in terms of turnover or employees may also have large market shares.

An additional consideration in this analysis is the scope of the benefit gained from a small undertakings exemption, and the extent to which this actually would reduce compliance burdens. As stated above, under the Law such an exemption may only exempt small undertakings from the application of Article 8(1). This means that, even with a small undertakings exemption, small businesses still would need to ensure that their activities complied with the requirements of Article 16(1) concerning abuses of dominance, and that their potential mergers or acquisitions complied with the requirements of Article 20(1), if reportable to the JCRA under the thresholds set forth in the Competition (Mergers and Acquisitions) (Jersey) Order 2005. Even with

² See JCRA, *Aims and Objectives January to December 2006* at 6-7.

³ If necessary, the JCRA can keep potentially sensitive information, such as the identity of parties or the specific costs involved, confidential.

respect to arrangements under Article 8(1), an exemption would not apply to those that had an element of price fixing, market or customer sharing, or similar provisions.

An example to illustrate this is the JCRA's recent exemption decision concerning the arrangement among different general practitioners in Jersey for the joint provision of after-hours medical care.⁴ Even if some or even all of the undertakings subject to that arrangement may have qualified as 'small' under the terms of an Order, because their agreement included a provision which fixed prices, by operation of the Law a small undertakings exemption could not apply,⁵ and therefore the arrangement would still have needed an individual exemption under the Law.

Similarly, because a small undertakings exemption does not apply to Article 20(1), the merger filings we have approved that may have involved 'small' businesses (such as PDJ/Boustouler) still would have been required, even with the existence of an exemption under Article 11.⁶

Having a small undertakings exemption in place possibly could even have the harmful effect of providing small businesses a false sense of security, by giving the impression that their activities are completely exempt from the Law, when in fact a majority of the Law's requirements still apply.

- ***In light of the limited scope of a small undertakings exemption under the Law, do interested parties think potential benefits gained from reductions in compliance burdens outweigh the costs that may arise in Jersey from such an exemption? Whether the answer is 'yes' or 'no' please provide reasons.***

In responding to this question, interested parties may want to consider the JCRA's past and ongoing efforts to reduce compliance burdens under the Law:

- As observed in our prior consultation paper, for Article 8(1) to apply the arrangement in question must have an 'appreciable' effect on competition, and the JCRA's Guidelines state that this normally will not be the case when the combined market share of the parties subject to the arrangement does not exceed 25% (unless the arrangement involves activities such as price fixing, market sharing, etc., which also would be excluded from a small undertakings exemption).⁷
- The JCRA currently has published ten guidelines explaining various aspects of the Law, the types of conduct it prohibits, and the JCRA's own processes and procedures. The JCRA soon expects to review these guidelines and revise them in light of actual experience gained under the Law in Jersey, and will be publicly consulting as part of this process.
- Concurrently with revising our current guidelines, the JCRA is also planning to consult on two additional guidelines. One of these will cover

⁴ See JCRA Decision C015/06, *General Practitioners Out-of-Hours Cooperative* (8 Aug. 2006).

⁵ See Art. 11(4)(a), Competition (Jersey) Law 2005.

⁶ See JCRA Decision M003/06, *Proposed Acquisition of Mike Boustouler Limited by Petroleum Distributors (Jersey) Limited* (22 May 2006).

⁷ See JCRA Guideline, *Anti-Competitive Arrangements* at 6.

vertical arrangements and discuss the Law's application to common forms of distribution agreements and agency relationships. The other will recommend best practices with respect to competition law compliance programmes.

- The JCRA also remains available to provide guidance on the Law's potential application to proposed courses of conduct. The JCRA may provide such guidance informally or, if requested, formally under the procedures set forth in Article 43 of the Law.⁸ While the Law allows for the JCRA charge a fee to cover the expenses of providing formal guidance, the JCRA also retains the discretion to waive this fee in appropriate circumstances.

The JCRA's intention is that such activities will further the understanding of the Law and reduce the associated burdens of compliance.

- *While not directly relevant to our advice to the Minister, the JCRA would welcome suggestions on other steps it could take to explain the Law and reduce compliance burdens. Are there any other areas in which guidance is needed?*

Even if the adoption of a small undertakings exemption were considered appropriate in principle, the question remains as to how a small undertaking should be defined. Our prior consultation paper gave a preliminary view that if a small undertakings exemption was adopted in Jersey, turnover would be the most appropriate parameter on which to define a small undertaking. This paper also stated that practice in other jurisdictions that have adopted a turnover-based small undertakings exemption suggests that the appropriate threshold, based on the size of Jersey's economy, would range from approximately £30,000 to nearly £300,000.

- *If a small undertakings exemption were considered appropriate for Jersey, how should a 'small' undertaking be defined (e.g., by turnover, employees or another criterion) and what quantitative threshold would be suitable (e.g., level of turnover, number of employees, etc.)?*

V. Comments

The JCRA welcomes comments on these topics and, in particular, on the questions raised herein. Comments must be submitted in writing by **5 pm on 20 October 2006** to:

Exemption Consultation Response
 Jersey Competition Regulatory Authority
 6th Floor, Union House
 Union Street
 St Helier
 Jersey JE2 3RF

⁸ See Art. 43, Competition (Jersey) Law 2005 and JCRA Guideline, *Applications for Guidance and Exemption* at 3-5.

Comments may also be sent via email by this deadline to enquiries@jcra.je. Emailed responses should be identified by 'Exemption Consultation Response' in the subject line.

The JCRA may publish responses to this Consultation Paper on its website, so any confidential material should be clearly marked as such (including, but not limited to, the information discussed above in footnote 3).

12 September 2006

ANNEX: DRAFT ADVICE TO THE MINISTER

This is the second time the JCRA's advice has been sought with respect to block exemptions, from either the Minister or its predecessor, the Economic Development Committee ('EDC'). You may recall that our letter dated 9 August 2005 to the President and Members of the EDC reviewed the nature and purpose of block exemptions. We advised that the EDC should not issue any Block Exemption Orders at that time. This recommendation was based largely on the fact that the Competition (Jersey) Law 2005 (the 'Law') had not yet come into full force, meaning that the volume of individual exemption applications the JCRA could expect to receive, and the appropriate criteria for block exemptions in Jersey, both were unclear at that time. The JCRA recommended that the EDC reconsider the matter once a sufficient period had passed with the Law in full effect.

Although the Law is now fully in force, we do not think that circumstances have changed significantly to warrant the issuance of block exemptions at this time. Specifically, the reasons we provided to the EDC for not issuing a block exemption in August 2005 appear to apply equally today.

As you know, the concept of block exemptions in the Law is derived from the equivalent concept under EC competition law. It is therefore relevant to look at the policy justification for block exemptions. We noted in our advice to the EDC that one of the main policy objectives for introducing block exemptions in Europe was to ease the administrative burden of the European Commission, which found it increasingly difficult to adequately handle the large number of individual exemption applications it continued to receive. Since the Law has come into full force in Jersey, the JCRA has not found thus far that it has been inundated with requests for individual exemption, or that it has inadequate resources to handle the requests it receives. In fact, to date the JCRA has received only one request for an individual exemption under the Law, which we granted, concerning a cooperative for the provision of after-hours medical care. While we understand that other parties currently may be considering seeking individual exemptions from the JCRA, we would not expect these requests, should they be received, to overly tax our current resources.

In our previous advice we noted the need for any block exemptions in Jersey to be tailored to local market conditions, rather than being based purely on the terms of the EC block exemptions. For example, we noted in our prior advice that block exemption standards applicable for the EU, such as the 30% market share cap concerning exclusive supply agreements, may not reflect the economic realities of many markets in Jersey. Having not been required to deal with a significant number of individual exemption applications, the JCRA currently is in no better position than it was nine months ago to recommend the appropriate standards for block exemptions in Jersey. The adoption of block exemptions containing standards that have not been developed in light of sufficient past experience in this particular market may reduce the level of legal certainty any such Order could provide, in that the JCRA may have to withdraw the benefit of a block exemption if the standards under which it was granted later prove to be unfounded in a Jersey context.

The JCRA's recommended course of action would be to not adopt block exemption standards at this time, which later may prove to be inappropriate, but to let the appropriate standards for Jersey develop over time through detailed analyses the

ANNEX: DRAFT ADVICE TO THE MINISTER

JCRA would conduct in its consideration of likely future requests for individual exemption. Consistent with our current primary objectives, we would strive to handle such matters in a manner that reduces compliance burdens while still faithfully fulfilling our duties under the Law.

Finally, in the absence of block exemptions, the JCRA continues to provide both formal and informal guidance in an attempt to reduce potential compliance burdens with the Law. We have given such advice both in general terms through seminars and publications, as well as on an individual basis with respect to particular parties or arrangements. In many cases our advice has been that the arrangement in question does not have the object or effect of appreciably hindering competition in Jersey or any part thereof, meaning that an exemption under the Law (either individual or block) is not necessary. In continuation of these efforts, we intend to soon publish new guidelines on the Law's application to common vertical arrangements, such as distribution agreements, which in the EU would be potentially subject to a block exemption.

In the light of the above considerations the JCRA advises that no Block Exemption Orders be issued at this time, but that you reconsider the matter at a later date after the JCRA has had an opportunity to handle more requests for individual exemption under the Law.