



Jersey Competition Regulatory Authority ('JCRA')

Decision C 015/06.2

**Concerning the General Practitioners Out-of-Hours
Cooperative Notified under Article 9 of the Competition
(Jersey) Law 2005**

Table of Contents

I.	INTRODUCTION AND EXECUTIVE SUMMARY.....	1
II.	BACKGROUND	2
IV.	ANALYSIS UNDER ARTICLE 8 OF THE LAW	4
V.	ANALYSIS UNDER ARTICLE 9 OF THE LAW	5
A.	Improvement in the Distribution of Goods or Services	5
B.	Allow Consumers a Fair Share of the Benefits.....	7
C.	Contains No Indispensable Restrictions to Competition	9
D.	No Elimination of Competition in respect of a Substantial Part of the Goods or Services in Question	10
VI.	DECISION.....	12

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On 26 February 2007 JCRA received a request sent on behalf Jersey Doctors on Call ('JDOC') to extend an exemption granted under Article 9 of the Competition (Jersey) Law 2005 (the 'Law') concerning the provision of after-hours medical care in Jersey.
2. The JCRA granted this exemption in a decision dated 8 August 2006, which was later modified on 13 October 2006. In this decision, the JCRA concluded that JDOC satisfied the Law's exemption criteria; however, the term of that exemption was only to last until 31 March 2007, which was intended to cover JDOC's then-current trial period. In the event the cooperative was extended beyond the trial period, JDOC could apply to the JCRA for a longer-term exemption.
3. JDOC has subsequently informed the JCRA that Jersey's Health and Social Services Department ('HSS') is continuing its support for the cooperative beyond the trial period. JDOC also has informed us that it will be recommending to the Minister of Health & Social Services that support for the cooperative be continued for a longer term.
4. Thus, JDOC has requested that the JCRA's initial exemption under the Law be extended. In its request, JDOC stated that the cooperative has been well received in Jersey and that a longer-term exemption will give the cooperative the security needed to make further investments in its services. According to JDOC, this will enable it to deliver further improvements in its standard of care offered to patients.
5. On 3 March 2007 the JCRA published details of this request in the Jersey Gazette, asking for interested parties to submit comments on the application by 19 March 2007. No comments were received in response to this consultation.
6. JDOC's original exemption expired on 31 March 2007. In response to JDOC's current request and in the absence of evidence or submissions to the contrary, the JCRA concludes that the justifications that existed for granting this exemption

still remain. Accordingly, in this Decision, the JCRA grants a new exemption to JDOC under Article 9 of the Law. Like the previous exemption, this new exemption is subject to full compliance by both JDOC and its members with certain conditions, which are intended to protect the interests of competition and consumers. The term of this exemption is two years from the date of this decision, subject to potential renewal upon a further application from JDOC.

II. BACKGROUND

7. This matter concerns the way in which after-hours medical care is delivered in Jersey. ‘After-hours’ or ‘out-of-hours’ medical care has been defined as care to patients being provided on weekday evenings and nights (i.e., 6 pm to 8 am) and during weekends and bank holidays.¹
8. Prior to JDOC’s formation, after-hours medical care in Jersey was delivered by general practitioners (‘GPs’), who generally provide services to patients through a practice in cooperation with other GPs. Individual practices would either provide after-hours care themselves, or offer such services to their patients in cooperation with other practices.
9. This system changed with JDOC’s introduction in April 2006. Through JDOC, GP practices formed an association under Jersey law with the goal of providing after-hours medical care collectively.
10. The first service JDOC provides is an after-hours surgery located in ground floor of the Gwyneth Huelin Wing of the General Hospital in St Helier (the ‘GP Surgery’). JDOC provides this service seven days a week from 6 pm – 11 pm, as well as on Saturday afternoons and Sunday during the day. The GP Surgery’s base fee is currently £40 for a twenty minute consultation. It also provides phone advice free of charge.

¹ See Health Committee, House of Commons, *GP Out-of-Hours Services, Fifth Report of Session 2003-04* at 3 n.2 (19 July 2004).

11. The second service JDOC provides are 'house calls' – a GP visit to a patient's residence during nights and weekends and on bank holidays. This service is available from 6 pm to 8 am seven days a week, and during 12 noon to 6 pm on Saturday and from 8 am to 6 pm on Sunday. The price for such service varies depending on the time of the visit, with a lower fee (currently, £80.16) charged for 'evening' home visits (i.e., from 6 pm – 11 pm) compared to a higher fee (currently, £100.72) for 'night' home visits (i.e., from 11 pm – 8 am).²
12. JDOC provides these services on a rotational basis, or 'rota', comprised of the GPs participating in JDOC. Under the rota, two GPs are on-call: one to cover phone advice and the GP Surgery, and the other to make house calls.

III. BASIS OF CURRENT REVIEW

13. Since its introduction in April 2006, JDOC has been subject to three major analyses in Jersey. These are:
 - The JCRA's Decision dated 8 August 2006, which granted an exemption to JDOC to cover its trial period (as referred to hereinafter, the 'Original Decision');
 - The GPCOOP Management Board Performance Report 03 April 2006 – 03 October 2006, jointly completed by HSS and JDOC, which constituted the cooperative's six month performance review (as referred to hereinafter, the 'Performance Review'); and
 - The Report on the GP Co-Operative Out-of-Hours Service produced by the Education and Home Affairs Scrutiny Panel and presented to the States of Jersey on 8 March 2007 (as referred to hereinafter, the 'Scrutiny Report').
14. The JCRA has considered these documents during its current examination. In addition, JDOC has provided the JCRA with copies of the patient satisfaction

² Saturday and Sunday daytime home visits also are charged currently at £80.16.

questionnaires completed up to January 2007, and data that records JDOC's total patient activity from April 2006 to January 2007, as well as other information in response to JCRA requests.

IV. ANALYSIS UNDER ARTICLE 8 OF THE LAW

15. Article 8(1) of the Law states that an undertaking must not make an arrangement with one or more other undertakings that has the objective or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey. Article 8(2)(a) states that this prohibition applies, in particular, to an arrangement that directly or indirectly fixes purchasing or selling prices or any other trading conditions. Article 60 of the Law requires that, so far as possible, the JCRA interprets these provisions consistently with the treatment of corresponding questions arising under competition law in the European Union.
16. In the Original Decision, the JCRA concluded that the JDOC arrangement was subject to Article 8(1) of the Law.³ This was based on the agreement by JDOC's members to charge common prices for the provision of after-hours home visits (£80.16 or £100.72, depending on the time of visit), whereas prior to JDOC different prices in Jersey existed for these services. Such an arrangement may be characterized as a price-fixing agreement under Article 8, and the European Court of First Instance has stated that such restrictions may only be compatible with competition law if they satisfy the criteria for exemption.⁴ Because JDOC's structure has remained the same (i.e., GPs participating in JDOC still agree to charge a common price for after-hours home visits), this conclusion reached in the Original Decision under Article 8(1) remains the same for this current Decision, hence the need for an exemption under Article 9.

³ Original Decision ¶ 26. The Original Decision also established that the Law's definitions of 'undertakings' and an 'arrangement' also were satisfied. *See ibid.* ¶¶ 19-20.

⁴ *European Night Services v. Commission*, Cases T-374/94 etc ¶ 136 (1998). The Original Decision also established that JDOC has an appreciable effect on competition in Jersey. Original Decision ¶ 25.

V. ANALYSIS UNDER ARTICLE 9 OF THE LAW

17. To qualify for an exemption under Article 9, the JCRA must be satisfied that JDOC meets all four of the exemption criteria listed in Article 9(3). The JCRA concluded in the Original Decision that JDOC satisfied these four criteria,⁵ thus providing grounds for the JCRA to issue the initial exemption to JDOC. In this current Decision, the JCRA must determine whether, based on the information that has been made available to it since the Original Decision, JDOC still satisfies these criteria. This analysis is presented below.

A. Improvement in the Distribution of Goods or Services

18. The first criterion, Article 9(3)(a), requires that JDOC either improve the production or distribution of goods or services, or promote technical or economic progress in the production or distribution of goods or services. Stated simply, JDOC must be likely to produce either quantitative or qualitative efficiencies. Efficiencies may create additional value for consumers by lowering costs, improving the quality of a good or service provided, or by creating a new good or service.

19. The Original Decision listed several potential efficiencies that JDOC intended to arise from the cooperative, and the JCRA recognized that these had the potential to improve the provision of after-hours medical service in Jersey.⁶ As stated in the Original Decision, during the cooperative's trial period the JCRA endeavoured to monitor JDOC's activity and patients' reaction to it to verify whether these potential efficiencies were being realized. Furthermore, the JCRA expected that JDOC's six month performance review would further inform the assessment of JDOC's efficiencies.

20. The Performance Review noted that during the period of April to September 2006, JDOC's reported patient approval rating was very high. Specifically, 97% of patients that completed patient questionnaires during this time rated the care

⁵ See Original Decision ¶¶ 27-68.

⁶ See *ibid.* ¶¶ 29-30.

they received from JDOC as very satisfactory.⁷ According to the Performance Review, this compares to a 'very satisfied' care rating in England's National Health Service of just 42%.⁸ Additional patient questionnaires JDOC provided to the JCRA subsequent to the Performance Review's time-period show that patients continue to be very satisfied with JDOC's service.

21. The Scrutiny Report also noted JDOC's high level of patient satisfaction and welcomed the ease with which patients can access its services.⁹
22. In addition, in response to the JCRA's inquiries, JDOC and HSS have listed the following as significant areas of improvement that are being implemented:
 - Patients for the first time in Jersey are able to access medicines after 9 pm and over significant bank holidays such as Christmas Day when all the Island's pharmacies are otherwise closed;
 - JDOC has created a single point of access, thereby improving the ability to contact a doctor out of hours;
 - JDOC has introduced a formalised complaints procedure;
 - JDOC has introduced a system of communicating the needs of vulnerable patients to colleagues; and
 - JDOC has begun to introduce formal governance and improved accountability processes.¹⁰
23. Based on the evidence provided, the JCRA has no grounds to conclude that the expected efficiencies originally put forward by JDOC are not in the process of being realized, or that overall patient satisfaction with JDOC's services has been

⁷ Performance Review at 4.

⁸ *Ibid.*

⁹ Scrutiny Report at 26 and 29.

¹⁰ Letter from Barbara Ward to the JCRA dated 2 April 2007.

anything less than very satisfactory. Thus, the JCRA concludes that the first exemption criterion remains satisfied.

24. JDOC has told the JCRA that it was never its intention to achieve all of its stated efficiency goals within its initial year of operation, and it will continue to strive to achieve them. JDOC also has stated that a new exemption from the JCRA would give the cooperative the security needed to make further investments in its infrastructure and further improve its services. An exemption period of two years has been recommended to the JCRA as the minimum period necessary to sufficiently allow progress on these goals to be achieved. This term also will provide a further opportunity for both JDOC and the JCRA to re-assess progress toward these goals at a later date.

B. Allow Consumers a Fair Share of the Benefits

25. The second criterion, Article 9(3)(b), requires that consumers receive a fair share of the benefits arising from the arrangement. Consumers must be, on balance, better off as a result of the agreement.
26. In the Original Decision, the JCRA examined whether the fees set by JDOC allowed this criterion to be satisfied.¹¹ Specifically, whereas the JCRA had no doubt that the £40 fee for a visit to the GP Surgery satisfies this criterion,¹² more difficult questions arose from JDOC's fees for after-hours home evening and night visits. In many instances, these fees were above the fees that participating practices charged for equivalent services prior to joining JDOC.
27. The GPs argued that if viewed holistically (that is, when the low-cost option of a £40 visit to the GP Surgery is combined with the more expensive options for home visits), JDOC results in a net price decrease in Jersey. To test this argument, the JCRA conducted a 'before and after' expenditure analysis for after-hours medical care. This analysis was based on JDOC's actual activity data for

¹¹ Original Decision ¶¶ 32-44.

¹² Because the GP Surgery was a new service that was largely unavailable to consumers in Jersey prior to JDOC's introduction, and because its cost to the patient was significantly below the costs of home visits prior to JDOC.

- its first two months in operation (April and May 2006) and the assumption that this level of activity corresponds to that which existed prior to JDOC's introduction. This analysis suggested that, viewed holistically, consumers in Jersey saved over £7,600 in after-hours GP medical care during JDOC's initial two months of operation.¹³ These savings result from a significant minority (37.3%) of patients utilizing the £40 after-hours GP Surgery instead of requiring a GP home visit.
28. For the current analysis, the JCRA once again examined JDOC's activity data, but this time over a longer time period (April 2006 to January 2007). The results of this analysis are consistent with that contained in the Original Decision. That is, a significant minority of patients are treated at the GP Surgery and thus benefit from a lower price of after-hours care (£40) that previously was unavailable in Jersey before JDOC's introduction.¹⁴ In fact, the percentage of patients utilizing the GP Surgery has increased since the Original Decision and now stands at around 40-45%. At the same time, the percentage of patients requiring a home visit during the GP Surgery's hours of operation has decreased,¹⁵ which indicates that patients are substituting more expensive home visits with less costly visits to the GP Surgery. JDOC has informed the JCRA that it expects the trend of more patients using the GP Surgery to continue.
29. In the Original Decision the JCRA also concluded that JDOC's prices were cost justified.¹⁶ Because JDOC's prices have not changed since this time, the JCRA currently has no grounds to deviate from this conclusion.
30. Thus, the JCRA concludes that JDOC still satisfies the second exemption criterion. However, to ensure this remains so during the period of this exemption,

¹³ See Original Decision ¶ 38-39.

¹⁴ In addition to receiving a lower price for after-hours care, these patients may get further benefits from receiving their care in a hospital environment, such as better lighting and more available resources. See *ibid.* ¶ 34.

¹⁵ From around 56% of JDOC's total activity in April 2006 to approximately 48% in January 2007. The remainder of JDOC's patient activity (approximately 9%) is made up of patients requiring late night home visits, after the GP Surgery's hours of operation.

¹⁶ See Original Decision ¶ 40.

the JCRA also concludes that two of the conditions contained in the Original Decision still are necessary, namely:

- The elimination of JDOC’s ability to charge patients fees in addition to the base consultation fees. As stated in the Original Decision, such fees had not been cost justified to the JCRA, and placing additional fees on consumers would materially affect the outcome of the JCRA’s before and after expenditure analysis. Therefore, JDOC may not place additional fees on patients over and above the base consultation fee, unless and until such additional charges are cost justified to the JCRA’s satisfaction.
- A requirement that any increase to the base consultation fee be provided to the JCRA to determine if the increase is cost justified. This will provide the JCRA with the ability to ensure that JDOC’s base consultation fees remain cost justified during the exemption’s term. This obligation is in addition to, and independent of, the annual review of JDOC’s fee levels with HSS.

C. Contains No Indispensable Restrictions to Competition

31. The third criterion, Article 9(3)(c), asks whether JDOC contains ‘restrictions beyond those necessary for the attainment of the benefits that the parties demonstrate is likely to flow from the agreement.’¹⁷ The agreement should contain the least restrictive means of achieving its efficiencies.

32. The Original Decision concluded that the fixed fees for evening and night home visits were necessary to achieve JDOC’s potential efficiencies.¹⁸ The Original Decision also discussed how JDOC agreed to amend its Governing Rules to facilitate a patient’s ability to select the GP of their choice.¹⁹ Because JDOC’s terms have not changed since this time, there are no grounds on which the JCRA can conclude that the third exemption criterion is no longer satisfied.

¹⁷ JCRA Guideline on Anti-competitive Arrangements at 13.

¹⁸ See Original Decision ¶¶ 47-53.

¹⁹ See *ibid.* ¶¶ 54-58.

D. No Elimination of Competition in respect of a Substantial Part of the Goods or Services in Question

33. This criterion requires an assessment of the market effects that result from JDOC.
34. In the Original Decision, the JCRA established that the proper relevant product market in which to analyze JDOC was the provision of after-hours medical care.²⁰ In addition, the proper relevant geographic market was the Island of Jersey.²¹
35. Unlike the other criteria, circumstances under the fourth criterion have changed substantially since the Original Decision. At the time of the Original Decision, JDOC accounted for approximately 71% of all GPs in Jersey, with the remainder remaining outside of the cooperative.²² Since this time, a vast majority of Jersey's remaining GPs have joined JDOC, and the JCRA subsequently approved these additions through the modification to JDOC's exemption.²³ Currently, virtually all of Jersey's GPs that provide after-hours medical care are members of JDOC. However, adequate grounds exist to conclude that the fourth exemption criterion still is satisfied.
36. First, although virtually all of Jersey's GP practices now participate in JDOC, at least some continue to provide a limited amount of after-hours care outside of the cooperative. The surgery hours of one practice, for example, extend to 8 pm Monday through Thursday and until 7 pm on Friday; and this practice charges a base consultation fee lower than that charged by JDOC's GP Surgery. Therefore, at least for some portion of what is considered to be after-hours medical care, an alternative surgery continues to exist.
37. Second, as stated in the Original Decision, the evidence presented to the JCRA indicates strongly that the quality of medical care provided is as important, and

²⁰ See *ibid.* ¶ 62.

²¹ See *ibid.* ¶ 63.

²² See *ibid.* ¶ 64.

²³ See JCRA, *Approval of Additions to Jersey Doctors on Call* (13 Oct. 2006).

- likely more important, to patients than the price for the care provided.²⁴ This evidence is consistent with recent analysis elsewhere which indicates that with respect to medical care, consumers value attributes such as quality, service and location as much (if not more than) price.²⁵ While GPs in JDOC may charge a common price for their collective provision of after-hours care, it does not eliminate the ability of GPs to otherwise compete in these important non-price attributes. Indeed, JDOC's cooperative nature may have the effect of actually increasing this type of competition among GPs. Because under JDOC's rota system the on-call GP provides services to patients regardless of that patient's current practice affiliation, and because under the Original Decision 'the patient must remain completely autonomous to select the GP of their choice based on the quality of services they receive,'²⁶ GPs have the incentive to provide the highest possible quality of service through the cooperative.
38. Third, once they have joined the cooperative, GPs remain at liberty to leave the cooperative, should they think it is in their and their patients' benefit to do so.
39. Fourth and finally, as stated in the Original Decision, the JCRA understands that the Accident and Emergency ('A&E') services in the General Hospital remain open to patients for after-hours care, and that a significant proportion of after-hours visits to A&E are for non-emergency, primary care visits.²⁷ The Scrutiny Report concluded that the introduction of the GP Surgery had little effect on the services provided by A&E.²⁸
40. The JCRA thus concludes that the fourth exemption criterion remains satisfied. To ensure this remains so during the term of this exemption, however, certain conditions are necessary, namely:

²⁴ See Original Decision ¶ 56 note 40 ('Throughout the investigation, the GPs informed us that a patient's ultimate choice of a GP is based on the quality of service provided, at least to the same extent as the prices charged.').

²⁵ See, e.g., Neil W. Averitt and Robert H. Lande, *Using the 'Consumer Choice' Approach to Antitrust Law*, ANTITRUST LAW JOURNAL at 198 (Issue 1, 2007).

²⁶ Original Decision ¶ 56.

²⁷ *Ibid.* ¶ 65.

²⁸ Scrutiny Report at 42-44.

- JDOC must notify the JCRA prior to accepting any new members into the cooperative. This condition allows the JCRA an opportunity to assess the effects on competition of any additional members joining JDOC, analogous to the analysis it conducts of whether a proposed merger or acquisition would substantially lessen competition in Jersey or any part of Jersey.²⁹ It also provides protection to JDOC from potentially making its exemption under the Law invalid during the exemption period by making additional arrangements with new members absent approval under Article 9.
- In addition, the JCRA must ensure that JDOC does not create ‘spill over’ effects that could substantially reduce competition in other markets in which GPs compete. One such potential area of concern could be day services provided by the GPs, and whether cooperation in night services has the risk of substantially reducing competition in day services. The potential concern in this regard is diminished by the fact that night services represent only a very small portion of a GP’s total business.³⁰ To help ensure no spillover effects occur, however, this exemption is conditioned on the GPs’ compliance with conditions intended to segregate after-hours service from daytime service and to provide the JCRA with the ability to monitor JDOC’s activities.
- Finally, although price competition may not be as important as other non-price factors in the provision of medical care, the ability of the JCRA to review JDOC’s proposed increases in price before they are implemented provides a safeguard that JDOC’s prices will remain cost justified.

VI. DECISION

41. The JCRA concludes that JDOC is subject to Article 8(1) of the Law.

²⁹ See Part 4, Competition (Jersey) Law 2005; *see also* JCRA Guideline on Mergers and Acquisitions.

³⁰ See Original Decision ¶ 67 (noting that the provision of after-hours medical care amounted to only around 2-5% of an average GP practice’s total annual income).

42. The JCRA also concludes that JDOC satisfies the criteria for exemption, subject to certain conditions under Article 9(6). Specifically, these conditions are intended to facilitate the JCRA's ability to ensure that all fees charged by JDOC, and increases to these fees, are cost justified (to ensure that the second and fourth exemption criteria are satisfied); to make JDOC's acceptance of any new members subject to the JCRA's assessment under the Law (to ensure that the fourth exemption criterion is satisfied); and to segregate members' daytime activities from the after-hours activities subject to JDOC (also to ensure that the fourth exemption criterion is satisfied).
43. By this Decision, the JCRA hereby grants an exemption to JDOC under Article 9, subject to compliance by JDOC and its member with the following conditions:
 1. JDOC shall demonstrate to the JCRA's satisfaction that any future increase in one or more of its fees is cost justified. JDOC therefore shall submit for the JCRA's review full details of any proposed increase in fees at least twenty one calendar days prior to such increase taking effect. Any such submission shall explain in detail how the proposed increase is cost justified, and provide sufficient data to the JCRA to examine this justification.
 2. Should, any time after receiving a notice set forth in the first condition, the JCRA instruct JDOC not to proceed with the proposed increase, in whole or in part, JDOC shall not implement the increase to the extent it has been objected to by the JCRA, except in accordance with the JCRA's prior written consent.
 3. JDOC shall not charge patients additional fees over and above those charged for consultations, unless and until such additional fees have been cost justified to the JCRA's satisfaction, such satisfaction to be expressed by the JCRA in writing to JDOC.

4. JDOC shall notify the JCRA at least twenty one calendar days in advance of accepting any new members. Should, any time after receiving such a notice, the JCRA instruct JDOC not to proceed with the addition, in whole or in part, JDOC shall not proceed with it except in accordance with the JCRA's prior written consent.
 5. With the exception of the fees expressly subject to JDOC, each participating practice shall continue to set its own fees independently within its sole discretion.
 6. JDOC and/or its members shall provide such information and documents as the JCRA may reasonably require, subject to any legally recognizable privilege and upon written request with reasonable notice, for the purpose of determining, monitoring or securing compliance with this Decision.
44. In accordance with Article 9(7) of the Law, the effective date of this exemption is 1 April 2007. This exemption shall terminate at 11:59 pm on 23 April 2009, unless otherwise terminated prior to this time under any of the circumstances set forth in Articles 9(9)-9(13) of the Law. JDOC may, at its discretion, apply for an extension to the term of this exemption.
45. Compliance with the conditions set forth in Paragraph 43 is binding on both JDOC and all GPs participating in JDOC, as well as on any of their assignees or successors.

23 April 2007

By Order of the JCRA Board