



Jersey Competition Regulatory Authority ('JCRA')

Decision C015/06.3

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

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. On 13 March 2009 the JCRA received an application on behalf of 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 an exemption in a decision dated 8 August 2006, which was later modified on 13 October 2006 (the 'Original Decision'). In the Original Decision, the JCRA concluded that JDOC satisfied the exemption criteria set out in Article 9. 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. On 26 February 2007 JDOC applied to the JCRA for a further two year exemption. The JCRA granted a further exemption to JDOC in a decision dated 23 April 2007 (the '2007 Decision'). In that decision, the JCRA concluded that JDOC continued to satisfy the criteria for an exemption. However, the term of the exemption was only to last until 23 April 2009.
4. JDOC has requested that the exemption granted to it under the Law be extended further. 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 stability and 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 April 2009 the JCRA published details of this request in the Jersey Gazette, asking for interested parties to submit comments on the application by 17 April 2009. No comments were received in response to this consultation.
6. JDOC's exemption expires on 23 April 2009. 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 exemptions, 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 five 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. 6:30 pm to 8 am) and during weekends, bank holidays and public 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 and bank holidays during the day. The GP Surgery’s base fee is currently £42.02 for a twenty minute consultation. It also provides phone advice free of charge.

¹ Report by the National Audit Office, *The Provision of Out-of-Hours Care in England*, Session 2005-2006 at para 1.1, page 9 (5 May 2006).

11. The second service JDOC provides is ‘house calls’ – a GP visit to a patient’s residence during nights and weekends and on bank holidays and public holidays. This service is available from 6 pm to 8 am seven days a week, and during 12 noon to 6pm 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, £83.77) charged for ‘evening’ home visits (i.e. from 6 pm – 11 pm) compared to a higher fee (currently, £105.13) 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 GP’s 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 of major analyses in Jersey. These include:
 - the Original Decision;
 - the 2007 Decision;
 - the GP Co-Operative Out-of-Hours Service (‘GPCOOP’) Management Board Performance Report 1 January 2008 – 31 December 2008, jointly completed by Health, Social Security & Housing Scrutiny Panel (‘HSS’) and JDOC, which constituted the cooperative’s annual performance review (hereinafter referred to as, the ‘Performance Review’);
 - the Report on GPCOOP produced by HSS and presented to the States of Jersey on 8 March 2007 (hereinafter referred to as, the ‘Scrutiny Report’); and
 - the 2008 Annual Report produced by HSS and JDOC and presented to the States of Jersey (hereinafter referred to as the ‘2008 Annual Report’).

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

14. The JCRA has considered these documents during its current examination.

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 and the 2007 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, whereas prior to JDOC different prices in Jersey existed for these services. Such an arrangement may be characterised 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. GP's participating in JDOC still agree to charge a common price for after-hours home visits), the conclusions reached in the Original Decision and the 2007 Decision under Article 8(1) of the Law remain the same for this current Decision, hence the need for an extension of the exemption under Article 9 of the Law.

³ Original Decision, para 26 and the 2007 Decision, para 16. The Original Decision also established that the Law's definitions of 'undertakings' and an 'arrangement' also were satisfied. *See ibid.* para 19-20.

⁴ *European Night Services v Commission*, Cases T-374/94 etc [1998] ECR II - 3141. 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 and the 2007 Decision that JDOC satisfied these four criteria,⁵ thus providing grounds for the JCRA to issue the respective exemptions to JDOC. In this current Decision, the JCRA must determine whether, based on the information that has been made available to it since the 2007 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 arrangement either improves the production or distribution of goods or services, or promote technical or economic progress in the production or distribution of goods or services. Simply stated, 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 new goods or service.

19. The Original Decision and the 2007 Decision list several potential efficiencies that JDOC intended to arise from the cooperative, and the JCRA recognised that these had the potential to improve the provision of after-hours medical service in Jersey.⁶ The JCRA expected that JDOC's Performance Review would further inform the assessment of JDOC's efficiencies.

20. The Performance Review notes that during the period of January to December 2008, JDOC's reported patient approval rate was very high. Specifically, 100% of patients that completed patient questionnaires during this time rated the care they received from JDOC as very satisfactory.⁷ According to the Performance

⁵ See Original Decision, para 27-68 and the 2007 Decision, para 18-40.

⁶ Original Decision, para 27-68 and the 2007 Decision, para 19-24.

⁷ Performance Review at 5

Review, this compares to a ‘very satisfied’ care rating in England’s National Health Service of just 41%.⁸

21. In addition, JDOC have listed the following as significant areas of improvement that have been implemented, maintained and enhanced:

- Patients in Jersey continue to have access to 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 (including the introduction of a VoIP telephone system), thereby improving the ability to contact a doctor out of hours;
- JDOC has included an automatic defibrillator in the vehicle used for out-of-hours house calls;
- JDOC has maintained a formalised complaints procedure;
- JDOC has maintained a system of communicating the needs of vulnerable patients to colleagues; and
- JDOC has introduced formal governance and improved accountability processes.

22. Based on the evidence provided, the JCRA has no grounds to conclude that the efficiencies originally put forward by JDOC are not being realised, or that overall patient satisfaction with JDOC’s services has been anything less than very satisfactory. Thus, the JCRA concludes that the first exemption criterion remains satisfied.

⁸ *Ibid.*

B. Allow Consumers a Fair Share of the Benefits

23. 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.
24. In the 2007 Decision, the JCRA examined whether the fees set by JDOC allowed this criterion to be satisfied.⁹ Following the analysis from the Original Decision, the 2007 Decision focussed on JDOC's patient activity data and, specifically, the percentage of patients utilising the GP Surgery (a low-cost service that was not available to patients prior to the advent of JDOC) compared to those requiring relatively higher-cost home visits. The 2007 Decision concluded that the percentage of patients using the GP Surgery increased since the Original Decision, and according to JDOC's current application this overall trend has continued and is expected to continue. According to JDOC, currently around 46% of patients utilise the GP Surgery, and this has resulted in the fees generated falling by approximately 18%.¹⁰
25. In the 2007 Decision the JCRA concluded that JDOC's prices were cost justified.¹¹ In December 2007, JDOC proposed to increase its fees by approximately 4%, on the basis of significant increases to overhead costs. In accordance with the relevant condition contained in the 2007 Decision, JDOC notified the JCRA in advance of this price increase, to which the JCRA did not object. As JDOC's prices have not changed since December 2007, the JCRA currently has no grounds to deviate from the conclusion that JDOC's prices continue to be cost justified.
26. Thus, the JCRA concludes that JDOC continues to satisfy the second exemption criterion. However, to ensure that this remains so during the period of this exemption, the JCRA also concludes that the two conditions contained in the 2007 Decision remain necessary, namely:

⁹ See 2007 Decision para 26-30.

¹⁰ Page 2 of the JDOC Application.

¹¹ See 2007 Decision para 29.

- 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 (nor have they been since this time), 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 an 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

27. 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.’¹² The agreement should contain the least restrictive means of achieving its efficiencies.
28. The Original Decision concluded that the fixed fees for evening and night home visits were necessary to achieve JDOC’s potential efficiencies.¹³ 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.¹⁴ As 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.

¹² JCRA Guideline on Anti-competitive Arrangements at 13.

¹³ See Original Decision para 47-53

¹⁴ See *Ibid* para 54-58

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

29. This criterion requires an assessment of the market effects that result from JDOC.
30. 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.¹⁵ In addition, the proper relevant geographic market was the Island of Jersey.¹⁶
31. In the 2007 Decision, the JCRA concluded that the fourth exemption criterion was satisfied.¹⁷ Because conditions in the relevant market have not appreciably changed since this time, there are no grounds on which the JCRA can conclude that the fourth exemption criterion is no longer satisfied. To ensure this remains so during the term of this exemption, however, the existing conditions (below) continue to be necessary:
- 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.¹⁸ 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 of approval under Article 9.
 - In addition, the JCRA must continue to 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.

¹⁵ See *ibid.* 62

¹⁶ See *ibid.* 63

¹⁷ See 2007 Decision, para 40

¹⁸ See Part 4, Competition (Jersey) Law 2005; *see also* JCRA Guideline on Mergers and Acquisitions.

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.¹⁹ To help ensure no 'spill over' effects occur, however, this exemption is conditional on the GP's 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

32. The JCRA concludes that JDOC is subject to Article 8(1) of the Law.
33. 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).
34. By this Decision, the JCRA hereby grants an exemption to JDOC under Article 9, subject to compliance by JDOC and its members 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

¹⁹ See Original Decision para 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).

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.
35. In accordance with Article 9(7) of the Law, the effective date of this exemption is 24 April 2009. This exemption shall terminate at 11:59 pm on 23 April 2014,

unless otherwise terminated prior to this time under any of the circumstances set forth in Articles 9(9) – 9(13) of the Law. The JCRA is satisfied that this five-year term provides JDOC with the stability and security mentioned in Paragraph 4, while providing the JCRA with a regular review period to determine if JDOC still satisfies the exemption criteria and, if so, whether the conditions listed in Paragraph 34 remain appropriate. JDOC may, at its discretion, apply for an extension to the term of this exemption.

36. Compliance with the conditions set forth in Paragraph 34 is binding on both JDOC and all GPs participating in JDOC, as well as on any of their assignees or successors.

20 April 2009

By Order of the JCRA Board