



Competition Law consultation Paper 4: Other Amendments

Consultation Paper:

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Introduction

1. The fourth – final – consultation paper sets out a number of, further, miscellaneous amendments the Government is proposing to make to the Competition (Jersey) Law 2005 (the **Competition Law**).

Article 10 – Requirement on the JCRA to publish a draft of its advice before advising the Minister on a Block Exemption Order

2. Under Article 10 of the Competition Law, the Minister may, after consulting the Jersey Competition Regulatory Authority (the **JCRA**), by Order exempt from Article 8(1) a class of arrangements to which that Article would otherwise apply (so-called ‘block exemptions’). Paragraph (3) goes on to provide that before advising the Minister, the JCRA must publish a draft of the advice it intends to give and consider any representations made to it. The JCRA must also publish the advice it gives to the Minister.
3. In comparison, under Article 11 of the Competition Law, the Minister may, after consulting the JCRA, exempt from the scope of Article 8(1) certain small undertakings, as prescribed by Order. In terms of the procedure that must be followed, Article 11(6) merely provides that when the Minister consults the JCRA, the Authority must publish the advice it gives to the Minister.
4. Therefore, unlike Article 10(3), Article 11 does not require the JCRA to publish its draft advice and consider representations (i.e. conduct its own consultation). It is proposed to align Articles 10 and 11 of the Competition Law with regard to the process to be followed by the JCRA when consulted by the Minister. In particular, it is proposed to remove the obligation on the JCRA to publish a draft of its advice and consider representations (i.e. the requirements currently set out in Article 10(3) of the Law). The amendment will however not prevent stakeholders from submitting their views, as a consultation will form part of the legislative process should a block exemption be proposed.¹

Article 12 – Exemption by Minister on grounds of public policy

5. Article 8(1) of the Competition Law prohibits anti-competitive arrangements that have the object or effect of hindering to an appreciable extent competition in Jersey. Under Article 12 of the Competition Law, the

¹ See e.g. MD-C-2019-0135 for a previous consultation on a proposed Block Exemption Order.

Minister may exempt an arrangement from the Article 8(1) prohibition if he or she is satisfied that there are exceptional and compelling reasons of public policy that make it desirable to do so. The wording of Article 12(1) suggests that the power to make exemptions under Article 12(1) can only be used on an individual, case-by-case, basis.

6. The Covid-19 pandemic has shown that, in exceptional circumstances, there may be a need to issue an exemption on public policy grounds covering an entire class of arrangements. The UK authorities, for example, introduced the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020, which exempted certain types of agreements from the prohibition on anti-competitive agreements in the Competition Act 1998. Under this Order, (amongst other things) grocery retailers were allowed (to a certain extent) to work together to meet food-supply challenges posed by the Covid-19 pandemic. This Order applied to agreements of a particular description (i.e. a class), as opposed to individual agreements.
7. An 'umbrella exemption' such as the Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020, can likely not be made under Article 12 of the Competition Law. Instead, it appears that the Minister must make an individual exemption on public policy grounds for each arrangement that would otherwise have been in breach of Article 8(1). This is a time-consuming process, especially in times of crises when urgent action by the competent authorities may be required. The Government therefore proposes to extend the scope of Article 12 of the Competition Law so that the Minister may exempt "an arrangement or a class of arrangements" from the Article 8(1) prohibition.

Article 28 – Power to obtain information stored on a computer

8. As part of an investigation under the Competition Law, the JCRA may wish to review information that is stored on a computer. Article 28 of the Competition Law provides the framework that regulates the JCRA's power to obtain information stored on a computer during an investigation.
9. Article 28(1) provides that during a Competition Law investigation under Article 26(1), the JCRA may serve a written notice on a person who has control of a computer that the Authority has reasonable cause to suspect is used to store information relating to a person mentioned in Article 26(1). According to Article 28(2), the notice may require the person:
 - (a) to provide the Authority with access to the computer;
 - (b) to provide the Authority with any assistance it may require to do so; and
 - (c) to produce to the Authority in a form in which it may be taken away information relating to the business of the person mentioned in Article 20(1) that is stored on the computer or may be accessed by virtue of the computer.
10. Firstly, it is not explicitly clear from Article 28(2)(c) that this provision applies only to information that is relevant to the investigation. In comparison, Article 28(4)(c) appears to be more limited and only applies to 'relevant information'. Whilst it is not likely that the JCRA would request information that is not relevant to the investigation, the Government wishes to make explicitly clear that this provision does not extend the JCRA's power under Article 28 to obtain information stored on a computer beyond information which is relevant to the investigation.

11. Secondly, Article 28(2)(c) (only) empowers the JCRA to require a person to produce “information relating to the business of the person mentioned in Article 20(1) [emphasis added] that is stored on the computer or may be accessed by virtue of the computer”. This may hinder JCRA investigations into possible breaches of Article 8(1) or Article 16(1) as these provisions are not mentioned in Article 28(2)(c). To address this potential issue, the Government proposes to widen the scope of Article 28(2)(c) to ensure that Articles 8(1) and 16(1) are also included.

Article 39 – Financial penalties

12. Article 39(7) of the Competition Law provides that the JCRA shall pay to the Treasurer of the States any money received by it in payment of a financial penalty. It is proposed to add to this provision that the money received shall be transferred into the Court and Case Costs Smoothing Reserve of the States of Jersey which provides the mechanism to fund peaks and troughs in Court and Case Costs. This would help fulfil a recommendation made by Oxera and others that the JCRA should have greater certainty of funding against the risk that one of its decisions is appealed.

Article 40 – Interim measures

13. Article 40 of the Competition Law enables the JCRA, in certain circumstances mentioned in paragraph (1), to order interim measures to prevent serious, irreparable damage to a particular person or class of persons or to protect the public interest.

14. Article 40(5) currently provides that an interim measure may (if the circumstances permit) be replaced by a direction under Article 36, 37 or 38 (as appropriate), forcing a business to undertake certain action (e.g. cease certain conduct). However, there is currently no explicit mechanism enabling the JCRA to vary or revoke an interim measure during an investigation, for example, where merging parties that are subject to an interim measure make a submission to the JCRA that there is no longer a risk of pre-emptive action.

15. The Government therefore proposes to include explicit provision in Article 40(5) of the Competition Law that interim measures will have effect, subject to subsequent variation, release or revocation by the JCRA, while Article 40(1) applies, but may be replaced if the circumstances permit by a direction under Article 36, 37 or 38 (as appropriate).

16. In addition, as outlined in Consultation Paper 3, the Government proposes to introduce a new commitment procedure in the Competition Law. Under the new procedure, a business under investigation may offer commitments at any time during the investigation, until a decision on infringement is made. Once commitments have been accepted, the JCRA may, in principle, not continue its investigation or take an infringement decision. As a commitment decision makes commitments offered by a business binding on it and prevents the JCRA from taking further action, Article 40(5) should also provide that an interim measure may be replaced by commitments accepted by the JCRA.

Article 51 – Civil action

17. There is a well-established principle in developed economies that breaches of competition law give rise to claims for private damages.

18. Legislative policy at the UK and EU level strongly supports private enforcement of competition law. This is e.g. shown by the UK Consumer Rights Act 2015, which was introduced to promote and encourage civil

claims, and the EU Damages Directive. In the UK, the Competition and Markets Authority has emphasised the importance of private enforcement as private litigants may sometimes be better placed to enforce breaches of competition law. In Jersey, the Competition Law also enables private litigants to bring a case before the court. Article 51(1) states that a person has a duty not to breach Article 8(1), 16(1) or 20(1), or a direction. Paragraph (2) goes on to provide that a breach of that duty is actionable by an aggrieved person.²

19. The EU Damages Directive establishes that an infringement of competition law found by a final decision of a national competition authority is irrefutably established for the purposes of an action for damages brought within the same Member State. The Government takes the view that it would be appropriate to include similar provision in Article 51 of the Competition Law. There is a right of appeal against a final decision of the JCRA under Article 53 of the Competition Law. Once such appeal process is exhausted, it would be fair, efficient and in the interests of ensuring deterrence under an effective competition law regime that private actions for damages may be brought under Article 51 of the Competition Law which rely upon a final decision of the JCRA and that such a decision can be relied upon by a claimant in order to establish liability before the court.

Question

1. Do you support the other (minor and technical) amendments proposed in consultation paper 4?

² For the purposes of Article 51 of the Competition Law an “aggrieved person” means a person who has suffered or is likely to suffer economic loss or damage as a result of an actual or apprehended breach or Article 8(1), 16(1) or 20(1), or of a direction.