

COMPETITION LAW: PROGRESS REPORT

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by the Industries Committee**



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Introduction

As part of the States' Anti-Inflation Strategy, the States charged the Industries Committee in September 2000 to develop policies for the creation of a more competitive commercial environment in Jersey. Subsequently, the Committee was invited to bring forward legislation proposals by the end of 2001.

The Industries Committee presented a Report to the States in January 2002 outlining how the Committee would progress the work through its Competition Policy Sub-Committee, the reaction to which was substantially supportive.

Law Drafting Instructions have been produced, and the target for producing a draft Law for consultation with all key parties is the end of September this year, hopefully leading to lodging the draft Law "au Greffe" before the end of 2002.

The purpose of this Report is to explain the overall background to the Law and the approach being proposed by the Industries Committee.

Overall background and approach

What is Competition law?

Competition law is the body of rules designed to ensure fairness and freedom in the marketplace by -

- (a) generally prohibiting anti-competitive arrangements;
- (b) prohibiting the abuse of dominance; and
- (c) controlling some sale of businesses agreements on the basis of competition.

Why is a Law needed?

International experience demonstrates that the enactment and enforcement of competition law helps create and promote conditions for healthy competition and promote consumer welfare by increasing efficiency, while leading to better services, higher profits and lower prices.

What effect is the Law to have?

Experience and evidence gathered throughout the world indicates that competition law, when correctly enacted and enforced, brings about an increase in the general levels of efficiency and competitiveness in the economy as well as several other effects and consequences including -

- (a) a reduction in prices for businesses and consumers alike because the forces of competition usually tend to reduce prices - this will help to reduce inflation;
- (b) an increase in service levels for businesses and consumers alike because suppliers are stimulated to compete on the basis of the service offered;
- (c) an increase in innovation within an economy because of the stimulus of competition;
- (d) an increase in productive efficiency within the economy because only those goods and services for which there is a demand will be purchased (this eliminates inefficiency or wasteful production);
- (e) an increase in allocative efficiency within the economy because resources will be allocated to only those goods and services for which there is a demand;
- (f) a greater awareness within the economy generally of competition and the virtues of competition - this awareness helps both businesses and consumers alike;
- (g) a heightened preparation for businesses within the jurisdiction on how to deal with competition law internationally - "the home becomes a training ground for international competition" - this is all the more important given the fact that almost any jurisdiction where businesses would trade around the world has

competition laws;

- (h) a competition regime can give a competitive advantage to a jurisdiction (such as Jersey) over other jurisdictions which do not have such a law.

Work is being carried out by economic advisers to provide an estimate of the quantitative benefits to Jersey of a Competition Law.

How is the Law to achieve that effect?

In order to achieve the effects outlined above, the Law would -

- (a) apply to the behaviour of persons engaged in economic activities (such persons are known in competition law as “undertakings”) thus the definition of “undertaking” should be carefully defined so that the Law embraces only commercial or trading-related activities and does not cover other activities. It will include a public sector organisation operating within the definition of “Undertaking”;
- (b) generally prohibit anti-competitive arrangements between undertakings;
- (c) ordinarily prohibit the abuse of dominance by any undertaking having a dominant position - the Law does not prohibit the existence of dominance but rather the *abuse* of dominance;
- (d) control “sale of business agreements” on the basis of competition law - it is worth noting that the Law should not allow for the control of such arrangements on the basis of any other criterion;
- (e) facilitate the Authority, i.e. the JCRA, to engage in the advocacy of competition law - it is very important that the Law enables the Authority to explain the virtues and rules of competition to both business and consumers alike. This is important because an economy where there is a widespread understanding of competition law tends to be a more efficient one because there is a greater awareness of the desirability of complying with competition law. It also facilitates the enforcement of competition law because no-one (whether a business person, a judge or a jury member) can deny that they do not know about competition law;
- (f) enable aggrieved persons to take legal actions to sue for damage caused to them by reason of anti-competitive arrangements or abuse of dominance - this element of private enforcement reduces the costs and workload on the Authority but also tends to encourage private vigilance as well as public vigilance - the remedies open to aggrieved persons should be any combination of damages, possibly exemplary damages, injunctions and declarations;
- (g) provide that the Authority shall have the power to adopt “notices” so as to provide certainty and clarification on what the Law means - this is important because any competition law is a framework law which is augmented and supplemented from time to time by notices; and
- (h) promote awareness and knowledge of competition law - this is different from advocacy because it involves the imparting of information (i.e. education) rather than the advocacy of a cause.

How will the Law affect existing law and practice?

The proposed Law is the first substantive competition law to be enacted in Jersey, although specific laws to liberalise telecommunications and postal services in Jersey have been progressed ahead of the overall Competition Law. There would be no need to amend any existing substantive competition law. This makes the drafting of this Law much easier.

The proposed Law is about competition and while there is an obvious link with consumer welfare, this Law has nothing to do with “consumer protection” in the conventional sense of that term. There is no consequential amendment in consumer protection law.

E.C. competition law already applies in Jersey to certain agricultural products in certain circumstances and the Law ought to bear this fact in mind in dealing with the interaction of E.C. competition law (albeit in a limited field) and the new Law. This is pursuant to Protocol 3 and the Community Rules that give the Community itself the discretion to decide the extent to which agricultural products are covered by the competition rules of the Treaty.

The Law might also usefully state that the Law shall be without prejudice to any laws relating to taxation or company law

generally. This is to avoid any confusion when terms such as “regulation” are used in the context of the new Law.

The Competition Law will have an impact on the way the Regulation of Undertakings and Development Law (RUDL) is administered. No changes to the RUDL will be prescribed in the Competition Law, but the Industries Committee is of the view that there will be a need to review the policies which the Committee currently applies in licensing new undertakings and the extent to which existing arrangements could limit competition. This need for a review fits in well with the overall review of the RUDL and Housing Qualification Laws required by the States.

To which sectors would the Law apply?

The Law would apply to all economic sectors including the services sector (e.g. professional services but not employment), the utilities sector (e.g. telecommunications, post and electricity) and trade generally (e.g. retailing). The Law should not exclude any particular economic sector because such exclusions are discriminatory, cause controversy and result in only some of the gains of competition with consumers of some goods or services benefiting from competition while other consumers gain nothing. The Law should apply to all economic sectors.

What is the style of the Law?

This Law will be based on the traditional and well-established principle of “prohibition” rather than the more ineffective approach of “control of abuse”. The former type of approach that has been used by many small island nations around the world, and is supported by the fact that it is the approach in the Treaty of Rome, now brought into effect in the U.K.

Competition laws that rely more on form than substance tend to be less than effective. Therefore, the Law will indicate in some way that substance should triumph over form.

Given the absence of any history of competition legislation in Jersey and the courts of Jersey and given the desirability of reducing compliance costs and speeding up litigation, several concepts that might not otherwise be defined should be defined so as to facilitate the application and construction of this Law.

Substance should triumph over form

The Law will be based on the *substance* of behaviour rather than simply the *form* of the behaviour, for example, the Law needs to control arrangements or practices which are not covered by formal written arrangements but also informal oral arrangements otherwise the Law could be easily circumvented.

The Law should embody “light-handed regulation”

The Law will not be the embodiment of heavy-handed regulation. An over-bearing and heavy-handed law is unhelpful to the general perception of the system and leads to inefficient regulation. The Law should therefore embody flexibility by allowing the JCRA to adopt Notices, to amend rules of procedure and otherwise approach matters with considerable flexibility so as to allow the Law to be adopted and adapted to evolving circumstances.

The Law should be seen as a framework document

Experience amply demonstrates that competition legislation must be flexible enough to adapt itself to changing circumstances as they evolve over time. This means that the drafting style is usually succinct without too much rigidity built in to it.

Guidance from the Industries Committee

The Law should provide that the Industries Committee (its successor Economic Development Committee in future) should have the right, but not the duty, to issue guidance or policy statements to the Authority from time to time on issues of competition and competitiveness, with the assistance of the Authority, bearing in mind the special circumstances of Jersey and the Industries Committee’s experience, expertise and representational role.

What should be the structure of the Law?

It is possible in a Law of this type to divide out the provisions that relate to anti-competitive arrangements so that they are kept entirely separate from those provisions relating to abuse of dominance. This is largely the approach taken by the U.K. in the Competition Act, 1998. It is proposed however that in this Law for Jersey, a more attractive and appropriate manner would be to set out the substantive rules initially and then follow it by the procedural and other rules.

What about sanctions?

International experience clearly demonstrates that some sanctions are needed so as to ensure compliance with the competition law. Without some sanctions, the Law would come into disrepute and that would reflect badly on Jersey thus some, albeit appropriate, sanctions are needed.

These sanctions can take a wide variety of forms. It is appropriate that the following sanctions be incorporated into the Law -

Sanctions on undertakings: some jurisdictions around the world provide that individuals who are engaged in grievous breaches of competition law could be imprisoned. It is not proposed that sanctions on individuals be adopted in the present Law. Some other sanctions are needed so as to ensure compliance with competition law and in this context, only measured and reasoned sanctions are appropriate. The Law should provide for three types of remedies -

- (i) if the Authority believes that there is a breach of competition law, then the Authority should be able to request an undertaking breaching (or about to breach) competition law to make a “commitment” not to breach competition law (including, for example, agreeing to amend an agreement or not to engage in a particular practice) and such commitments will be enforceable in court by the Authority in much the same way as one would enforce a contract and a breach of a commitment should be equivalent to a contempt of court;
- (ii) monetary sanctions on undertakings (but not executives of undertakings) should be capable of being imposed by the courts following a prosecution brought by the Attorney General (or any other appropriate officer); and
- (iii) assuming that this is a possibility in Jersey law, any person who breaches competition law (i.e. this Law) should be disqualified or restricted from serving as a director of a company for a period of years (it is submitted that it should be for a period of up to five years in the case of hard-core offences and three years in the case of other breaches of competition law). (If Jersey law does not already provide for such disqualification or restriction then the provision could easily be incorporated into the Law, and the Draftsman will be familiar with the rules in other jurisdictions which have such rules on disqualification and restriction on directors.)

What about small and medium-sized enterprises?

The Law should not be overly-bureaucratic or cumbersome. Small and medium-sized enterprises (SMEs) would be unduly burdened were the rules to be bureaucratic or cumbersome. This is particularly important, as most companies in Jersey will fall within the category of SMEs, small being less than 10 staff, and medium being between 11 and 50 staff.

Benign arrangements between SMEs which have no appreciable effect on competition and thus they should be outside the scope of the new Law.

Nonetheless, SMEs can (and sometimes do) engage in the most serious breaches of competition law and they should not be seen as entirely virtuous or beyond reproach in this context. For example, a price-fixing arrangement between all the SMEs in a particular sector has the same effect notwithstanding that they might be individually small or relatively insignificant. Price-fixing arrangements, quota-fixing or market sharing arrangements should not be seen as benign.

In essence, the Law should apply to all undertakings, but the Law should provide that the Law may be disapplied by virtue of a Notice being adopted by the Authority (this would give a legal basis to the practice at European Community level where the European Commission adopts *de minimis* notices from time to time).

What about bodies which perform both a regulatory and a commercial function?

In so far as a body engages in a regulatory function, then competition law should not apply to the practice or behaviour of that body in so far as it is engaged in a regulatory activity. However, if the same body is also engaged in a commercial activity, then the Law should apply to the commercial activities of the body, for example, if a port authority is engaged in a regulatory activity (e.g. marine pollution clean-up activities) then the Law would not apply to the port in that capacity but if the port also provided wharfage or warehousing services then the Law would apply to that activity. The Law needs to make this point clear in the context of what constitutes an undertaking and in the context of enforcement.

Should the Law only apply to undertakings established in Jersey?

From the simple perspective of administering or enforcing a law, it would be much easier for the Law to apply only to

undertakings established in Jersey. However, that would be unfair and discriminatory against undertakings that have chosen to establish in Jersey. The Law should provide that where an arrangement or practice has an effect on Jersey then the Law should apply (in particular circumstances) irrespective of where the entity is incorporated or based. This means that the domicile or nationality of the undertakings is irrelevant and that Jersey and non-Jersey businesses are treated equally.

Severance

As was stated above, the Law will provide for a mechanism for the severance of provisions of an arrangement from the rest of an arrangement where the provisions are contrary to the Law. This should be possible provided the remainder of the arrangement was capable of survival as an arrangement within the reasonable contemplation of the parties.

Investigations

The JCRA needs to have adequate and appropriate powers of investigation. Otherwise, the Law would come into disrepute because breaches would go un-investigated, even where a breach was suspected or even widely known. The Law needs to provide for appropriate and effective investigative powers to be conferred on the Authority. These powers need to include search, seizure, compulsion to produce documents and compulsion to answer questions. The intention will be to work with the Viscount's Department on investigations, rather than set up a separate unit.

Court action/presumptions

Competition litigation can be very difficult to mount. The difficulties usually revolve around issues of proof ("Was that document prepared by X?"), unwillingness to co-operate ("Why should I co-operate?"), lack of evidence because it is abroad ("What do we do when the other document is in Guernsey?") and the need to prove some quite abstract concepts which are easy to express but not so easy to prove (e.g. "That a price-fixing arrangement distorts competition"). In order to address these issues, the Law needs to provide for presumptions and certain other procedural mechanisms.

Consultation

These comments have been produced to provide a description of the overall background to the proposed Law and to the approach followed in preparing Law Drafting Instructions.

The draft Law will be available by the end of September this year, and it will be circulated widely so that all interested parties are able to give their views before it is progressed to the States before the end of 2002.