

**DRAFT COMPETITION REGULATORY AUTHORITY (JERSEY) LAW 200- (P.191/2000): SECOND
AMENDMENTS
(P.210/2000) - COMMENTS**

**Presented to the States on 21st November 2000
by the Industries Committee**



STATES OF JERSEY

STATES GREFFE

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COMMENTS ON AMENDMENTS OF DEPUTY J.L. DOREY OF ST. HELIER

(i) Proposed new paragraph 5 in Article 6

The Industries Committee does not consider that this amendment should be supported. Its narrower focus, compared with draft Article 6, may disadvantage third parties, including licensees, and it would leave the JCRA out of line with Jersey company law generally. The Committee's reasons are as follows -

- (a) draft Article 6 follows closely the United Kingdom Postal Services Act 2000, which gives powers to the Postal Services Commission for use in the discharge of its functions as the postal services industry regulator in the United Kingdom;
- (b) the proposed amendment follows closely the Financial Services Commission (Jersey) Law 1998, which gives powers to the Financial Services Commission for use in the discharge of its functions;
- (c) all Jersey incorporated companies, by virtue of Article 18 of the Companies (Jersey) Law 1991, now have all the powers of a natural person to use in the carrying out of their business. All Jersey companies, therefore, (and the position is very similar in the United Kingdom and elsewhere) have powers identical to the draft and not the amendment;
- (d) the 1991 measure was introduced for Jersey companies because of the difficulties that could arise for those dealing with companies prior to that date. Up to then, if a company's particular powers under its memorandum of association were restricted, those contracting with the company had been regarded as being fully aware of the fact because it was on the Public Register of Companies. Because of that, if the particular transaction entered into was found to be beyond the powers of a company, the third party could obtain no recompense if the company failed to fulfil its part of the bargain. Worse, the company was not legally able to put it right even if it wished to, because that 'putting right' would also be beyond its powers; and
 - (e) the Committee's approach has, therefore, been to ensure that the arrangements for the JCRA are in line with Jersey company law.

(ii) Proposed deletion of draft Article 7

The Committee does not support this amendment. It would unduly restrict the ability of the JCRA to conduct its business in an effective manner. The Committee's reasons are as follows -

- (a) the provisions of Article 7 follow identically the relevant section of the United Kingdom Postal Services Act 2000;
- (b) draft Article 9 (paragraph 1(c)) makes it clear that the JCRA cannot delegate authority to a committee where the members of that committee are not drawn solely from the JCRA itself;
- (c) outside persons can, therefore, take no part in JCRA decisions. But it is important that the JCRA has the ability readily to utilise outside expertise to committees, etc., if it so wishes, in order to assist its work. Not allowing it to do this would be a very undue restriction on its ability to function effectively.

(iii) Proposed alterations to Article 10

The Committee does not support this amendment. In some respects, it would achieve exactly the same outcome as the draft proposed by the Committee, but in two respects it would not, in a way moreover that could have an unfortunate effect. The Committee's reasons are as follows -

- (a) Article 10 states that directions or guidance by the Committee to the JCRA may not be given about "matters relating directly" to the performance of "functions conferred" on the Authority by "any Law other than this Law";
- (b) the amendment would result in Article 10 saying that directions may not be given about "matters relating directly to the performance of 'licensing and regulatory functions' or the Authority's functions "under Article 6(2) or (4)" (these are respectively the function of forming or recognising consumer bodies and the function of providing advice to the Industries Committee at its, the Committee's, request);
- (c) Article 10 as it currently stands is clear that the prohibition relates to all functions given by future Laws. The amendment does not achieve this. For instance, if the States later gave, by Law, an investigatory function to the

JCRA over cartels, the amendment, if accepted, would allow the Industries Committee to give directions directly relating to that function. That is exactly what is not intended at present; direction relates to corporate governance and not to function. This is a very important distinction to be maintained;

- (d) the amendment brings into the ambit of the prohibition on directions two matters not currently in the draft Law. Neither of those matters - consumer bodies and reports to the Industries Committee itself - are areas in respect of which there would be a need to ensure that the Industries Committee would specifically have to be precluded from giving directions, since under Article 10(1) any directions must be “on matters relating to corporate governance” (Article 10(1)).

(iv) Proposed amendment to Article 13

This amendment would, if passed, result in any grants of funds to the JCRA being made by the States itself and not by the Finance and Economics Committee, on a recommendation by the Industries Committee, the latter having first consulted the JCRA and considered its financial position. The Committee does not support this amendment, for the following reasons -

- (a) Article 13, as it stands, does not alter the normal arrangements whereby anything voted to the JCRA must be included in Budgets and approved by the States;
- (b) the amendment would have the effect of requiring the States to debate every grant to the JCRA as a separate matter from the normal budget process; and
- (c) quite apart from this, and the impracticalities to which it would give rise, such an approach would send entirely the wrong signal about the independence of the JCRA, which it is crucial to maintain, and for the States to be seen to maintain, if the JCRA is to be successful and effective as a competition authority.

(v) Proposed deletion of Article 15

This amendment would, if passed, mean that the JCRA would not need to comply with any guidelines specified by the Committee in investing any of its funds. The Committee does not support this. As part of “corporate governance” it is reasonable and appropriate for there to be such a requirement. Article 15 follows exactly the Financial Services Commission (Jersey) Law 1998 and the Committee strongly believes that there is no case for altering this approach.

(vi) Proposed amendment to Article 19

The effect of this amendment, if passed, would be to remove, in respect of the JCRA, any limitation of liability in damages for acts and omissions in good faith in the carrying out of its functions. The Committee’s strong view is that such limitation of liability should not be removed and it does not, therefore, support the amendment. Its reasons are as follows -

- (a) the position in the United Kingdom for the new Postal Services Commission, established as a regulator under the Postal Services Act 2000, is that it does have a good measure of exemption from liability. This does not arise through the new Act but because that Commission, although a separate body corporate, has the same status, immunity and privilege of the Crown as applies to a government department. Oftel, the regulator of the telecommunications industry in the United Kingdom, and other United Kingdom regulators, are in an identical position and this has stood the test of time as the concept and practice of independent regulation has bedded down over the last 15 years or so;
- (b) the Jersey Financial Services Commission also has its liability limited through similar Articles in various Laws, that limitation having first been granted to the States and the Finance and Economics Committee in the Collective Investment Funds (Jersey) Law 1988 and mirrored in other later Laws;
- (c) Regulators are always in a difficult position. They need to be able to act decisively, and this can be seriously hampered if they are faced with threats of litigation from major businesses seeking their own interests without constraint. Because regulators act in an especially litigious environment, if they are not accorded limitation of liability in damages for acts and omissions in good faith, they find it necessary to take expensive legal advice on many, if not most, issues before them; and
- (d) it would always remain open to someone to seek a judicial review of a JCRA decision if it was considered as an abuse of process or manifestly unreasonable. But that is quite different from liability in damages for acts done in good faith in pursuit of statutory duties laid down in law by the States. The threat of this would seriously hamper efficient and effective regulation.

(vii) Proposed replacement of Article 20 by a new one

Article 20 makes provision for the Committee to bring the new Law into effect by means of Committee Orders. The amendment seeks to replace this process by one of States Regulations. The Committee does not support this amendment. Its reasons are as follows -

- (a) Article 20 is in fact a 'boiler plate' provision. It appears in exactly that form in very many Jersey Laws. It is essentially a safety net for use in the rare event that something needed to be done to carry the Law into effect and that thing was not already in the Law itself (in which case an Order would be unnecessary) and was not able to be done other than by Law (an Order is a part of Jersey Law);
- (b) the Article gives power to the Industries Committee to make Orders **only** "for the purpose of carrying this Law into effect". It does not give any powers to the Committee to make Orders, for instance, about the exercise of any of the functions of the Authority; and
- (c) paragraph (3) of Article 20 states that Orders made under the Article are subject to the provisions of the Subordinate Legislation (Jersey) Law 1960. Because of this any Order made by the Committee may be lodged for debate in the States and can, therefore, be questioned and, if appropriate, annulled.