



Committee *for*  
Economic Development

CONSULTATION ON THE POTENTIAL INTRODUCTION OF A VERTICAL  
ARRANGEMENTS BLOCK EXEMPTION UNDER GUERNSEY'S COMPETITION LAWS

19<sup>th</sup> November 2019

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## 1. Executive Summary

The Competition (Guernsey) Ordinance, 2012 (the “**Competition Ordinance**”) was introduced in order to protect consumers and to ensure that businesses compete fairly, without unfair advantages.

The Competition Ordinance prohibits anti-competitive agreements between businesses. A business, that is a party to an agreement which may breach the Competition Ordinance may apply to the Guernsey Competition and Regulatory Authority (the “**GCRA**”), if it considers that such an agreement may be eligible for an individual exemption under section 6 of the Competition Ordinance.

Block exemptions can generate significant benefits, including:

- (i) creating legal certainty about the status of business agreements under competition law;
- (ii) reducing the administrative burden, on companies, which would otherwise have to apply to the competition authority for an individual exemption; and
- (iii) assisting with the work load of a competition authority, enabling it to prioritise cases that are likely to have a significant competitive impact, by excluding block exempted cases which do not require individual examination.

This consultation paper is being issued, by the Committee *for* Economic Development (the “**Committee**”), to seek feedback on the proposal to introduce a block exemption, to exempt certain types of vertical arrangements (the “**Proposal**”).

The Committee invites comments from all businesses, stakeholders, consumers, industry associations, practitioners and any other interested parties in respect of the Proposal. Recipients are invited to respond to all, or some, of the questions at their discretion.

The closing date for this consultation is 10<sup>th</sup> January 2020.

Responses will be considered, by the Committee, with a view to further developing the Proposal.

## 2. Background

The Competition Ordinance prohibits anti-competitive practices between businesses, which have the purpose, or effect, of preventing competition in any market in Guernsey for goods or services<sup>1</sup>.

Anti-competitive practices could eventually create a situation in which consumers, and other businesses in Guernsey, are forced to pay more for goods and services of a lower standard and/or may also keep prices artificially high.

## 3. Block exemptions

A block exemption exempts particular categories of agreements which are likely to satisfy the statutory exemption criteria.

Block exemptions can generate significant benefits, both for businesses and for a competition authority, including (i) creating legal certainty about the status of certain business agreements under competition law, (ii) reducing the administrative burden, on companies, which would otherwise have to apply to the competition authority for individual exemption, and (iii) enabling a competition authority to prioritise cases that are likely to have a significant competitive impact, by excluding block exempted cases which do not require individual examination.

The Committee may, by regulation<sup>2</sup>, exempt any class or description of agreements, between undertakings, from the general prohibition on anti-competitive practices. Particularly, in circumstances where such agreement:

- (a) contributes to improving the production or distribution of goods or services or promoting technical or economic progress in the production or distribution of goods or services;
- (b) allows consumers of those goods, or services, a fair share of any resulting benefit;
- (c) does not impose on the undertakings concerned restrictions which prohibit the attainment of the objectives mentioned in paragraphs (a) and (b); and
- (d) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the market in Guernsey, for the goods, or services, in question.<sup>3</sup>

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<sup>1</sup> The Competition (Guernsey) Ordinance, 2012, Section 5.

<sup>2</sup> The Competition (Guernsey) Ordinance, 2012, Section 7.

<sup>3</sup> The Competition (Guernsey) Ordinance, 2012, Section 7(2).

Block exemptions may apply to specific sectors, or to particular types of agreements such as vertical agreements (as discussed in more detail below), and are used in a number of jurisdictions, including in the UK and EU. There are currently no block exemptions in Guernsey.

#### 4. Vertical agreements

Vertical agreements are those entered into between two or more businesses operating at different levels of the production or distribution chain and relating to the conditions under which the parties may purchase, sell or resell certain goods or services. Examples of vertical agreements are selective distribution agreements and exclusive supply agreements.

Certain types of vertical agreements can improve economic efficiency within a chain of production or distribution by facilitating better coordination between the participating undertakings. In particular, they can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels.

#### 5. CICRA's recommendations

In May 2015, the Channel Islands Competition & Regulatory Authority (“CICRA”) published a consultation on the introduction of block exemptions in the Channel Islands. As a result of that consultation, CICRA recommended some sector specific vertical block exemptions be introduced by the Committee<sup>4</sup>.

It is noted, however that since that time international best practice has moved away from sector specific vertical block exemptions, towards more general vertical block exemptions.

Although sector specific block exemptions are still used in other jurisdictions, these have sometimes been “slimmed down” so that the distribution elements are covered by a general supply and distribution exemption and only industry specific elements are retained in a separate block exemption. An example of this is in the motor vehicle industry<sup>5</sup>, where aftermarket issues (where questions of dominance often arise) are

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<sup>4</sup> CICRA recommended that appropriate areas of focus for block exemptions might be (i) franchise arrangements, subject to turnover thresholds and limits on network effects, (ii) fuel forecourt distribution agreements, (iii) motor vehicle trade agreements, and (iv) insurance agreements (sharing of risk related information and co-insurance of specific risks).

<sup>5</sup> The EU's ‘Motor Vehicle Block Exemption’, allows car manufacturers to create networks of selective and exclusive dealerships, provided that they do not contain any serious restrictions on competition.

covered by a sector specific exemption, whilst general distribution elements are dealt with under the general rules on supply and distribution agreements.

CICRA has further highlighted that, as any agreement contravening section (5)1 of the Competition Ordinance is automatically void,<sup>6</sup> introducing a block exemption for agreements which contravene section (5)1, but are, nevertheless, not considered to be harmful, will ensure the validity of such agreements.

In light of the above, it is CICRA's recommendation, to the Committee, that a single vertical block exemption would offer significant flexibility to business, as it could be applied across multiple sectors. This would also align Guernsey's position with the approach to block exemptions taken by other jurisdictions.

## 6. The Proposal

It is proposed that a general vertical block exemption is implemented in Guernsey, broadly in line with the European Commission's [Vertical Agreements Block Exemption Regulation](#) (the "VABER").<sup>7</sup> The Committee is of the view that maintaining consistency with VABER will be an important factor in (i) retaining and attracting international business on Island and (ii) providing increased legal certainty in the application of domestic competition.

The key elements, aligned with CICRA's recommendations, would be:-

- i) The block exemption would expire on 31<sup>st</sup> December 2022.

Expiry dates are generally put in place for block exemptions, due to the changes that take place in markets, for example the increasing technological developments and changes in dynamics with the growing importance of e-commerce.

The VABER block exemption expires on 31<sup>st</sup> May 2022.<sup>8</sup> To ensure sufficient time to consider and respond to any changes that may be made to the VABER, it is proposed that the expiry date for Guernsey's block exemption should be 31<sup>st</sup> December 2022.

- ii) The applicability of the block exemption should be limited to vertical agreements where both the supplier's and the buyer's market share are each 30 % or less.

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<sup>6</sup> The Competition (Guernsey) Ordinance, 2012, Section 5(4).

<sup>7</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010.

<sup>8</sup> The European Commission launched an evaluation of the VABER, which began in October 2018 and is still in process to determine whether to let the VABER lapse, to prolong it, or to revise it.

Such agreements should be less likely to affect competition to the extent that there is a negative effect on prices, output or the variety or quality of goods and services in the market in Guernsey.

The Committee understands that, for most vertical agreements, competition concerns only arise if there is insufficient competition at one, or more, levels of trade. In other words, if there is some degree of market power at the level of the supplier or the buyer, or at both levels.

- iii) For the proposed block exemption to apply, a vertical agreement should not contain any so-called 'hardcore' restrictions, which are likely to hinder competition and harm consumers.

An example of a hardcore restriction is the establishment of fixed or minimum resale prices to be observed by a buyer, also known as resale price maintenance. Such restrictions are capable of limiting competition between distributors or retailers of the same product.

CICRA recommend that if a hardcore restriction is included in a vertical agreement, it automatically precludes the entire arrangement from benefitting from the block exemption.

The Committee proposes to incorporate, in the block exemption, the same list of hardcore restrictions as contained in Article 4 of VABER.

The hardcore restrictions include:

- a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;
- b) a restriction in respect of the territory into which, or of the customers to whom, a buyer may sell the contract goods or services, except:
  - the restriction of active sales into the exclusive territory, or to an exclusive customer group, reserved to the supplier or allocated by the supplier to another buyer;
  - the restriction of sales, to end users, by a buyer operating at the wholesale level of trade;

- the restriction of sales, by the members of a selective distribution system, to unauthorised distributors within the territory reserved by the supplier to operate that system; and
  - the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier;
- c) the restriction of active, or passive, sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member, of the system, from operating out of an unauthorised place of establishment;
- d) the restriction of cross-supplies between distributors, within a selective distribution system, including between distributors operating at different level of trade; and
- e) the restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.<sup>9</sup>
- iv) Non-compete obligations should benefit from the block exemption subtlety to compliance with the VABER.

Non-compete obligations prevent a buyer from providing goods that compete with those of the supplier. They are not hardcore restrictions but are nevertheless capable of foreclosing the market and restricting competition between businesses under certain circumstances.

The Committee therefore proposes to draw on EU legislation and include in the block exemption the same excluded restrictions as are contained in Article 5 of VABER, as follows:

- a) any direct or indirect non-compete obligation, the duration of which is indefinite or exceeds five years;
- b) any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services; and
- c) any direct or indirect obligation causing the members of a selective distribution system not to sell the brands of particular competing suppliers.

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<sup>9</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010, Article 4.



In addition, the Committee proposes that in order for the block exemption to apply to any non-compete restriction in a fuel forecourt arrangement, the duration of that restriction should be limited to 3 years. This deviates from the general rule in the VABER that non-compete obligations may be imposed up to 5 years.

In order to preserve a buyer's commercial freedom, it is also recommended that, where a fuel forecourt arrangement is operated from premises owned by the buyer, any restriction which purports to restrict the ability of the buyer to dispose of those premises should not be able to benefit from the exemption.

- v) CICRA would retain the right to withdraw the benefit of the block exemption if it found, in a particular case, that a vertical agreement, whether in isolation or in conjunction with other similar arrangements, had effects which were found to be detrimental to competition in Guernsey.
- vi) Where access to the relevant market, or competition therein, was significantly restricted by the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers covering more than 50% of a relevant market, the Committee intends that it would amend the block exemption, in particular to exclude a certain category of goods and services.

The Committee is seeking views on the recommendation to exempt, from the prohibition set in Section 5(1) of the Competition Ordinance, certain types of vertical arrangements as set out in this consultation paper.

The Committee acknowledges that the exemption should only apply to those arrangements that are unlikely to give rise to competition concerns in Guernsey and therefore should not be drafted too widely, exempting arrangements that should not be exempted. At the same time, the Committee recognises that a block exemption that is drafted too narrowly is likely to be ineffective.

## 7. Next Steps

The Committee would welcome feedback on the Proposal set out in this consultation paper by **10th January 2020** with a view to ascertaining the merits on the introduction of a general vertical block exemption in Guernsey.

Following closure, feedback and comments received will be analysed by the Finance Sector Development team and put to the Committee.

## 8. Responding to the consultation

Unless specifically requested otherwise, any responses received may be published either in part or in their entirety. Please mark your response clearly if you wish your response and/or name to be kept confidential. Responses may be included in any anonymised summary of comments received.

When submitting your views please indicate whether you are responding on behalf of an organisation.

Please provide your comments by **10th January 2020**.

### **Electronic responses**

The easiest way for many to respond, to this consultation, is to fill in the on-line questionnaire at <https://www.surveymonkey.co.uk/r/7P2GKZD>.

Responses can also be submitted in a format that can be read by Microsoft Word and emailed to Ed Chauvel at [Edward.C Chauvel@gov.gg](mailto:Edward.C Chauvel@gov.gg).

### **Hard copy responses**

Alternatively you may print out the questionnaire, complete manually and post your response to:

Finance Sector Development  
Committee *for* Economic Development  
Market Building  
PO Box 451  
Fountain Street  
St Peter Port  
Guernsey  
GY1 3GX

## **Data protection statement**

Your personal data will be used for the purpose of dealing with this consultation only. We will only keep your personal data for as long as is necessary for the purpose for which it was collected, and your data will not be passed on to any other third party without your prior consent. For further information on how your personal data will be used, please refer to the [Committee for Economic Development's Fair Processing Notice](#).

# Annex 1

## List of Questions

**Q1:** *What is your name?*

**Q2:** *What is your email address?*

**Q3:** *What is the name of your organisation?*

**Q4:** *What is your role within the organisation?*

**Q5:** *How strongly do you support the principle of introducing a single block exemption in Guernsey, covering vertical arrangements in general?*

Strongly support

Somewhat support

No opinion

Somewhat against

Strongly against

*Please provide reasons for your response.*

**Q6:** *Do you agree that the duration of the block exemption should be time limited as proposed?*

Yes

No

No view

*Please provide reasons for your response.*

**Q7:** Do you agree that the block exemption should be limited to vertical agreements where both the supplier's and the buyer's market share are 30% or less?

Yes  No  No view

*Please provide reasons for your response.*

**Q8:** Do you agree that block exemptions should include hardcore restrictions?

Yes  No  No view

*Please provide reasons for your response.*

**Q9:** Do you agree with the hardcore restrictions proposed?

Yes  No  No view

*Please provide reasons for your response.*

**Q10:** *Do you agree that non-compete obligations should only be able to benefit from the block exemption under the circumstances described in the consultation document?*

Yes

No

No view

*Please provide reasons for your response.*

**Q11:** *Do you agree that block exemptions should include the same excluded restrictions as are contained in Article 5 of VABER?*

Yes

No

No view

*Please provide reasons for your response.*

**Q12:** *Please identify any other issues that you think the Committee should be aware of in developing policy proposals in respect of block exemptions:*