



Consultation on a Vertical Block Exemptions Order under the Competition (Jersey) Law 2005

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1. The Role of the Authority and this Consultation

- 1.1 The Jersey Competition Regulatory Authority (**the Authority**) is responsible for promoting competition in the supply of goods and services in Jersey, together with the economic regulation of the ports, postal and telecommunications sectors.
- 1.2 As an independent regulator, the Authority has ambitious aims to help shape and sustain the Island's economic future, for the benefit of Jersey consumers, citizens and businesses. These aims are captured in the Authority's Strategic Plan. This plan is the guiding framework within which the Authority shapes, prioritises and delivers its annual Business Plan.
- 1.3 Competition law and economic regulation seek to achieve economic efficiency and sustainable competition. This allows consumers to have the benefits of fair prices, desirable goods and services and the opportunity to choose what they want to buy. This can be challenging at times in a small market, such as Jersey, given understandable economic constraints. But equally, can present opportunities to consider pragmatic approaches tailored to market needs
- 1.4 The Competition (Jersey) Law 2005 promotes competition in the supply of goods and services in Jersey, and deals with three main issues:
- anti-competitive arrangements;
 - abuse of a dominant position in a market; and
 - mergers that are harmful to competition
- 1.5 In line with the Strategic Plan, the Authority enforces Competition Law effectively, with a focus to prevent the application of anti-competitive arrangements and the abuse of a dominant position in a market. The Authority also assesses mergers to prevent any substantial lessening of competition.

This Consultation

- 1.6 The Authority is consulting on the merits of introducing a Jersey Competition (Vertical Arrangements Block Exemption) (Jersey) Order (**VABEO**) under the provisions of the Competition Law, and seeks stakeholders' views before drafting its recommendation to the Minister for Economic Development, Tourism, Sport and Culture (the **Minster**).

2. Executive Summary

- 2.1 Vertical arrangements are arrangements for the sale and purchase of goods or services between businesses operating at different levels of the supply or distribution chain. This includes, for example, agreements between manufacturers and distributors, or between wholesalers and retailers¹.
- 2.2 The Competition (Jersey) Law, 2005 (**Competition Law**) prohibits anti-competitive arrangements between businesses that may have “the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey”². At present, any business that considers that an arrangement to which it is a party may breach the Competition Law must apply to the Authority for an individual exemption³. Though in many cases, vertical arrangements, despite currently requiring examination under the Competition Law, may not in themselves be harmful. Conversely, they may deliver significant benefits to consumers in terms of improved distribution or availability of goods, increased efficiency and reduced costs.
- 2.3 The Competition Law allows the Minister to grant exemptions for individual arrangements from the blanket prohibition, by way of so-called ‘block exemptions’, where the potentially anticompetitive effects of a certain category of arrangements are typically outweighed by their pro-competitive effects⁴. Block exemptions provide for certain categories of arrangements and practices to be exempt on the basis that they are compatible with the provisions of the relevant competition laws.
- 2.4 In this document, the Authority is consulting on the merits of introducing a VABEO under the provisions of the Competition Law, and seeks stakeholders’ views before drafting its recommendation to the Minister.
- 2.5 Similar vertical block exemptions, as the proposed VABEO, are used in a number of jurisdictions (including the EU and the UK), and can generate significant benefits:
- For businesses, they create legal certainty about the status of certain arrangements under competition law and reduce the administrative burden on companies that would otherwise have to apply for an individual exemption.

¹ See Guideline 11 – Vertical Arrangements (currently under review) - www.jcra.je/legal-frameworks/guidelines/vertical-arrangements/

² Competition Law, Article 8(1).

³ See Guideline 9 – Applications for Guidance and Exemptions - www.jcra.je/legal-frameworks/guidelines/applications-for-guidance-and-exemptions/

⁴ Competition Law, Article 10(1).

- For a competition authority, block exemptions allow them to make more effective use of limited resources, by enabling the authority to prioritise cases that are likely to have a significant competitive impact (since the exempted cases that are unlikely to raise competition concerns would no longer require individual examination).

2.6 In summary, the Authority believes that the introduction of a VABEO would substantially improve the operation of Competition Law in Jersey and offer increased certainty for businesses, as the relevant exemptions may apply provided that:

- all parties to the vertical arrangement have a market share not exceeding 30% of the relevant market in which they operate (a 'safe harbour'); and
- the vertical arrangement does not include a so-called hardcore restriction which removes the benefit of the VABEO.

2.7 As further discussed below, the Authority also considers that the VABEO, where appropriate, should be aligned with international best practice, in particular in the EU and the UK. However, where the EU and UK positions diverge, the Authority seeks input from stakeholders in response to this consultation on what approach would be more appropriate for the VABEO and the Jersey economy.

3. Introduction

Background

- 3.1 Block exemptions are widely used in a number of jurisdictions, including the EU and the UK, to exempt certain types of arrangements from the strict provisions of competition law.
- 3.2 A block exemption for vertical arrangements between undertakings active at different levels in the supply chain for goods and services would offer substantial benefits to the parties involved. In many cases vertical arrangements, even though they may need to be examined under competition law, do not harm the markets in which they operate. On the contrary, they may deliver significant benefits to consumers in terms of improved distribution or availability of goods, increased efficiency and reduced costs.
- 3.3 A block exemption for vertical arrangements would also simplify the issues associated with franchising and similar arrangements. The Authority believes that exempting such arrangements, subject to the fulfilment of appropriate criteria, could encourage such arrangements locally and remove a potential barrier to bringing more businesses and economic development to Jersey.
- 3.4 The VABEO specifies a range of criteria which a vertical arrangement must meet to qualify for exemption and to ensure that the relevant arrangement is not harmful. The Authority retains the power to review individual cases within the area of the exemption, but this is by exception and would generally only occur when there is a specific concern or complaint involved.
- 3.5 The Competition Law allows this type of exemption to be implemented⁵. In 2015, the Authority (then part of the Channel Islands Competition & Regulatory Authorities (**CICRA**)) issued a consultation on the introduction of a number of block exemptions, including one for vertical arrangements, in the Channel Islands. Due to administrative priorities, the block exemptions were not taken forward by government at the point in time. However, given the likely benefits of a VABEO, this has again become an area of priority for the Authority.

Benefits

- 3.6 There are significant benefits to businesses, consumers and the Authority from putting in place a VABEO.
- 3.7 The VABEO, if implemented, would simplify and reduce compliance costs for businesses and greatly increase certainty in their ability to conduct certain types of business (for example, franchising operations), which would benefit consumers and the Jersey economy as a whole.

⁵ Competition (Jersey) Law 2005, Article 10

The existence of a vertical block exemption also ensure consistency, by providing a common framework for business to assess their vertical arrangements against the Competition Law prohibition. Further, it could deliver benefits to consumers in terms of improved distribution or availability of goods, increased efficiency and reduced costs.

- 3.8 The VABEO would also allow the Authority to target its resources to those areas where it can deliver most benefit, without having to engage to clear arrangements that are unlikely to raise competition concerns.

EU and UK Consultations

- 3.9 As mentioned above, block exemptions are widely used in a number of jurisdictions, including the EU and the UK.

- 3.10 The EU Vertical Block Exemptions Regulation (**EU VBER**) expires on 31 May 2022⁶. The European Commission, therefore, launched a public consultation on their proposals for a revised VBER, which sought to take into account recent market developments (mainly in relation to online sales and platforms) (**EU Revised VBER**). The consultation on the EU Revised VBER closed in March 2021, and a summary of responses to the consultation was published in November 2021⁷.

- 3.11 In the UK, the VBER has been retained as UK law after Brexit (**UK Retained VBER**), which is also due to expire on 31 May 2022. Following consultation, the UK Competition and Markets Authority (**CMA**) in November 2021 recommended the Secretary of State to replace the UK Retained VBER with a UK Vertical Agreements Block Exemption Order (**UK Order**) when it expires in 2022⁸.

- 3.12 Although, the EU and UK positions in the EU Revised VBER and the draft UK Order, respectively, appear to be aligned at large, the CMA has nevertheless proposed certain amendments to the UK Order which are UK specific (as further analysed in Section 4 below).

⁶ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

⁷ Further information on the EU public consultation on the draft revised Regulation on vertical agreements and vertical guidelines, including a draft of the EU Revised VBER, a background note to accompany the draft, and a summary of the contributions to the consultation can be found here: https://ec.europa.eu/competition-policy/public-consultations/2021-vber_en.

⁸ CMA, UK competition law: Vertical Agreements Block Exemption Regulation, CMA's recommendation (CMA145con), dated 3 October 2021.

4. The Authority's Recommendations

Alignment with EU and UK Positions

4.1 The Authority considers that alignment with international best practice, in particular in the EU and the UK, is an important source of efficiency and will help promote legal certainty whilst reducing compliance costs for businesses operating in Jersey. However, the Jersey regime needs to be implemented in a way that is responsive to the context of Jersey's economy and the resources of the Authority.

4.2 The Authority, therefore, proposes to recommend to the Minister that Jersey adopts a similar approach to vertical block exemptions as the EU and the UK in areas where the two positions align, unless there are good reasons not to do so. This includes:

- **Definitions** - to largely be aligned with EU and UK vertical block exemptions;
- **Exemptions** – to follow the approach taken in the EU and the UK, including an extension for the dual distribution exemption to also cover wholesalers and importers;
- **Market share thresholds** – to include a 'safe harbour' for certain vertical arrangements where all parties to the arrangement have a market share not exceeding 30% of the relevant market in which they operate;
- **Hardcore restrictions** – to include a list of restrictions that remove the benefit of the block exemption (so-called hardcore restrictions), which includes resale price maintenance (**RPM**) but excludes a prohibition of dual pricing⁹ and an equivalence principle¹⁰; and
- **Excluded restrictions** – to provide a list of excluded restrictions which will require case by case assessment, including non-compete obligations with a duration that exceeds 5 years.

Question 1: Do you agree with the Authority's proposed recommendation to the Minister to make a Jersey VABEO?

Yes	No	Not sure
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Question 2: Please explain your response to Question 1, providing, where possible, examples and evidence to support you answer.

⁹ I.e. charging the same distributor a higher price for products intended to be resold online than for products intended to be sold offline.

¹⁰ I.e. criteria for online sales that are not overall equivalent to the criteria imposed in brick-and-mortar stores in the context of selective distribution.

Question 3: Do you agree with the Authority’s proposal to, where possible and appropriate to do so, align the Jersey VABEO with the approaches taken to vertical block exemption regulations in the EU and UK?

Yes	No	Not sure
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Question 4: Please explain your response to Question 3, providing, where possible, examples and evidence to support you answer.

Question 5: Are there any other areas which should be brought into consideration at this stage. For example, should special provisions be made for fuel distribution/forecourt arrangements?

Yes	No	Not sure
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Question 6: Please explain your response to Question 5, providing, where possible, examples and evidence to support you answer.

Areas in which the Authority seeks particular input from stakeholders

4.3 Where the EU and UK positions do not align, the Authority seeks input from stakeholders on what approach that would better suit the Jersey regulation and economy. In particular, views are sought in relation to the following areas possible divergence discussed below:

- Dual distribution;
- Parity obligations
- Territorial and customer restrictions

Dual distribution

4.4 Vertical block exemptions generally do not apply to horizontal arrangements, i.e. arrangements between competitors. However, the VABEO could provide an exception for ‘dual distribution’ arrangements, meaning non-reciprocal arrangements between competitors. This includes, for example:

- arrangements between a supplier that is both a manufacturer and a distributor of goods, and a buyer that is a distributor not active as a manufacturer; or
- arrangements between a supplier that supplies services at several levels of trades and a buyer that provides goods or services at the retail level without being a competing undertaking with seller at the level of trade from which it purchases contract services.

4.5 The EU and UK vertical block exemption consultations discussed whether an additional (lower) market share threshold (of e.g. 10%) at the retail level for dual distribution arrangements should

be introduced. Such additional threshold could reduce the risk of the block exemption applying to arrangements that could potentially raise horizontal competition concerns. However, it could also reduce legal certainty for business as it could be difficult – in particular for small medium enterprises – to assess downstream market shares.

4.6 The European Commission has indicated an intention to add a market share threshold at the retail level, whereas the CMA has recommended the Secretary of State not to proceed with such an additional threshold.

4.7 Further, the European Commission has proposed that the dual distribution provision of the Revised VBER excludes providers of online intermediation services, also known as ‘Platform to Business’, from the benefit of this exception if they have a hybrid function, that is when they sell goods or services in competition with undertakings to which they provide online intermediation services. The CMA, on the other hand, has found that there is, at present, insufficient evidence for treating dual distribution involving hybrid platforms differently from other dual distribution arrangements, and has therefore recommended that these arrangements should benefit from the block exemption under the UK Order. However, the CMA has reserved its right to keep this matter under review, and to cancel the benefit of the block exemption in individual cases relating to dual distribution by hybrid platforms in the event they give rise to competition concerns.

4.8 If the Authority, following consultation, finds that dual distribution arrangements involving hybrid platforms should benefit from the VABEO, it should also – like the CMA - reserve its right to keep this matter under review and to retain the power to cancel the benefit of the VABEO in individual cases that give rise to competition concerns.

Question 7: In relation to dual distribution arrangements, do you consider that the Jersey VABEO should contain an additional market share threshold of 10% at the retail level?

Yes	No	Not sure
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Question 8: Please explain your response to Question 7, providing, where possible, examples and evidence to support your answer.

Question 9: Should dual distribution arrangements involving hybrid platforms be treated differently from other dual distribution arrangements (i.e. be carved out from and not benefit from the dual distribution provision of the Jersey VABEO)?

Yes	No	Not sure
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Question 10: Please explain your response to Question 9, providing, where possible, examples and evidence to support you answer.

Parity obligations (MFN clauses)

- 4.9 Parity clauses, also known as most-favoured nation (**MFN**) clauses, require one party to an arrangement to offer another party goods or services on terms that are not worse than those offered to third parties.
- 4.10 The EU VBER and the UK Retained VBER do not specifically address parity obligations, i.e. they are currently block exempted. However, parity obligations have increasingly been the focus of enforcement action by both the European Commission and the CMA in recent years.
- 4.11 The UK CMA has proposed: (i) to adopt definitions that provide a clear differentiation between so called ‘narrow’¹¹ and ‘wide’¹² parity obligations, and (ii) to treat ‘wide’ parity obligations in retail markets as hard-core restrictions (conversely, wide parity obligations in business to business markets would not be treated as hard-core restrictions under the UK Order). This is different from the European Commission’s approach in the Revised VBER, in which it proposes to treat ‘wide’ parity obligations as excluded restrictions that needs to be assessed on a case-by-case basis under competition law. Both the CMA and the European Commission propose that ‘narrow’ parity obligations should continue to benefit from the block exemption.

Question 11: Should the Jersey VABEO treat ‘wide’ parity obligations in retail markets as hard-core restrictions or as excluded restrictions?

Hard-core restrictions	Excluded restrictions	Not sure
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Question 12: Please explain your response to Question 11, providing, where possible, examples and evidence to support you answer.

Territorial and customer restrictions

- 4.12 Vertical arrangements that restrict the territory into which, or the group of customers to whom, a buyer can sell, have generally been categorised as hard-core restrictions (subject to certain narrow exceptions).
- 4.13 As a general rule, a distinction has been made between ‘active’ sales (allowing a buyer to actively approach customers) and ‘passive’ sales (allowing a buyer to respond to unsolicited requests from individual customers). The distinction between active and passive sales has been an

¹¹ I.e. parity obligations that require a business to offer the same or better conditions to the contracted party as those offered on its ‘direct’ sales channels (e.g. its own website).
¹² I.e. parity obligations that require a business to offer the same or better conditions to the contracted party as those offered on its ‘indirect’ sales channels (e.g. other platforms such as online market places).

important issue for both the European Commission and the CMA in their recent respective consultations.

4.14 The EU VBER and the UK Retained VBER do not block exempt active or passive sales within the EU or the UK internal markets, respectively, except in limited circumstances. Such exceptions include, for example, restricting active sales to protect the rights of an exclusive distributor or members of a selective distribution system. The treatment of territorial and customer restrictions in the EU has been driven by the ambition to protect the EU internal market, as well as an interest to preserve intra-brand competition and ensure consumer choice. The European Commission’s view has not changed in this regard. Though the UK is no longer part of the EU, the CMA has also proposed that territorial and customer restrictions should continue to be treated as hardcore restrictions within the UK internal market.

4.15 Further, the European Commission and the CMA both propose that the vertical block exemptions should also cover ‘shared exclusivity’, thus allowing a supplier to appoint more than one exclusive distributor in a particular territory or for a particular customer group. The CMA also recommend that a combination of exclusive and selective distribution in the same or different territories should be allowed.

Question 13: Under the Jersey VABEO, should territorial and customer restrictions be treated as ‘hardcore’ restrictions which remove the benefit of the block exemption?

Yes	No	Not sure
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Question 14: Please explain your response to Question 13, providing, where possible, examples and evidence to support you answer.

Question 15: Should ‘shared exclusivity’ in a territory or for a customer group by allowing the allocation of a territory or a customer group to more than one ‘exclusive’ distributor be exempt under the Jersey VABEO?

Yes	No	Not sure
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Question 16: Please explain your response to Question 15, providing, where possible, examples and evidence to support you answer.

Question 17: Should the combination of exclusive and selective distribution within Jersey be exempt under the VABEO?

Yes	No	Not sure
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Question 18: Please explain your response to Question 17, providing, where possible, examples and evidence to support your answer.

5. Consultation

5.1 The Authority encourages the submission of responses to the questions asked in this Consultation by email to info@jcra.je. Responses can also be submitted in writing to the Authority's offices:

Jersey Competition Regulatory Authority
2nd Floor Salisbury House
1-9 Union Street
St Helier
Jersey, JE2 3RF

5.2 The deadline for responses is 17:00 on 12 April 2022. All comments should be clearly marked: "Consultation on Vertical Block Exemptions".

5.3 The Authority's normal practice is to publish all responses to consultations on its website. If you do not want your response to be published in part or in full, the relevant sections should be clearly marked as confidential, and the response should explain why those parts of the response should be treated as confidential.

6. Next steps

- 6.1 The Authority will carefully consider the responses to this consultation and will take them into account in preparing formal advice and making specific recommendations to the Minister. This draft advice will be published and any representations made will be taken into account before finalising the advice.
- 6.2 The Authority will publish its formal proposals to the relevant departments, and the Minister, setting out text including the relevant qualifying criteria and conduct or arrangements which should be excluded under the vertical block exemption.
- 6.3 The departments and/or Ministers would need to consider the Authority's formal proposals and then determine whether or not to approve those. The vertical block exemption would then be put in place by order of the Minister under Article 10 of the Competition Law.
- 6.4 Such exemptions would take effect in line with the relevant Order. Following publication by the Minister of the vertical block exemptions order, the Authority would prepare, and publish on its website, guidance for parties on the implementation and application of the vertical block exemption rules.

Annex A: Competition (Jersey) Law 2005, Article 10

Annex B: Previous Consultations

Annex A: Competition (Jersey) Law 2005, Article 10

10 Block exemptions

- (1) The Minister may, after consulting the Authority, by Order exempt from Article 8(1) a class of arrangements to which that Article would otherwise apply.
- (2) When advising the Minister, the Authority shall, in particular, advise him or her whether in the Authority's opinion the exemption of the class of arrangements –
 - (a) is likely to improve the production or distribution of goods or services, or to promote technical or economic progress in the production or distribution of goods or services;
 - (b) will allow consumers of those goods or services a fair share of any resulting benefit;
 - (c) does not impose on the undertakings concerned terms that are not indispensable to the attainment of the objectives mentioned in sub-paragraphs (a) and (b); and
 - (d) does not afford the undertakings concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.
- (3) Before advising the Minister the Authority must –
 - (a) publish a draft of the advice it intends to give; and
 - (b) consider any representations made to it within any reasonable period to be specified by the Authority when it publishes its draft advice.
- (4) The Authority must publish the advice it gives to the Minister.
- (5) An Order made under this Article may –
 - (a) impose conditions or obligations subject to which an exemption granted by the Order is to have effect;
 - (b) contain different provisions for different classes of arrangements;
 - (c) provide that a breach of a condition imposed by the Order has the effect of cancelling the exemption in respect of the relevant arrangement;
 - (d) provide that if there is a failure to comply with an obligation imposed by the Order, the Authority may cancel the exemption in respect of the relevant arrangement;
 - (e) provide that if the Authority considers that a particular arrangement is not one to which paragraph (2) applies, it may declare that the exemption does not apply to the arrangement;
 - (f) provide for the manner in which the Authority may cancel an exemption in accordance with sub-paragraph (c) or (d) or issue a declaration in accordance with paragraph (e) and the manner in which notice of the cancellation or declaration is to be published;
 - (g) provide for an exemption to have effect from a date earlier than the date on which the Order was made;
 - (h) provide that the Order or any provision of it is to cease to have effect at the end of a period specified in the Order.

Annex B: Previous Consultations and Publications

Consultation on Block Exemptions under Channel Islands Competition Laws - May 2015 (CICRA 15/24) - <https://www.jcra.je/cases/2015/c1139gj-block-exemptions/c1139gj-consultation-block-exemptions-under-channel-islands-competition-laws/>

Block Exemptions Information Note – July 2017 - (CICRA 17/20) - <https://www.jcra.je/cases/2015/c1139gj-block-exemptions/c1139gj-information-note-block-exemptions/>

Competition Law Consultation - White Paper, Consultation Paper and Government Response – November 2019 - <https://www.gov.je/Government/Consultations/Pages/CompetitionLawConsultation.aspx>