



Draft Advice to the Minister 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:
 - anticompetitive 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 anticompetitive 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 draft advice to the Minister on the introduction of a Jersey Competition (Vertical Arrangements Block Exemption) (Jersey) Order (**VABEO**) under the provisions of the Competition Law, and seeks stakeholders' views before finalising its recommendation to the Minister for Economic Development, Tourism, Sport and Culture (the **Minister**).

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 anticompetitive 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 draft advice to the Minister on the introduction of a VABEO under the provisions of the Competition Law, and seeks stakeholders’ views before finalising 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.
 - 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:

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).

- 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.

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. The existence of a vertical block exemption also ensures consistency, by providing a common framework for businesses to assess their vertical arrangements against the Competition Law

⁵ Competition (Jersey) Law 2005, Article 10

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 onto 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**) expired 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 also expired 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.

4. Draft Advice to the Minister

Legal Framework

- 4.1 Article 8(1) of the Competition Law prohibits arrangements between businesses that 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” (Article 8(1) Prohibition) . Currently, a business that considers that an agreement to which it is party may breach the Competition Law must apply to the Authority for an individual exemption.
- 4.2 However, under Article 10(1) of the Competition Law the Minister may exempt certain categories of arrangements from the prohibition by way of a so-call “block exemption”, provided that the Minister is satisfied that the potentially anticompetitive effects of that category of arrangements are typically outweighed by their pro-competitive effects. In such case, arrangements that meet the criteria set out in the block exemption will be exempt on the basis

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.

that they are presumed compatible with the Competition Law and will, therefore, no longer be required to apply for individual exemption .

- 4.3 The Minister is required to consult the Authority before issuing an Order to exempt a class of arrangements to which the Article 8(1) would otherwise apply. Before advising the Minister, the Authority must publish a draft of the advice it intends to give, and consider any representations made within any reasonable period when it publishes its draft advice.

Draft Advice

- 4.4 Draft advice to the Minister is attached at Annex C.

5. Consultation

- 5.1 The Authority encourages the submission of responses to the draft advice 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 24 June 2022. All comments should be clearly marked "Consultation on Vertical Block Exemptions".

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.
- 6.2 Any responses received in relation to this draft advice will be used to inform the Authority's final advice to the Minister, which will subsequently be published in accordance with Article 10(4) of the Competition Law.
- 6.3 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.
- 6.4 The departments and/or Minister would need to consider the Authority's formal proposals and then determine whether or not to approve them. The vertical block exemption would then be put in place by order of the Minister under Article 10 of the Competition Law.
- 6.5 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: Draft Advice to the Minister

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

Annex C: Previous Consultations

Annex A: Proposed Text Draft Advice to the Minister

Introduction

In line with the requirements of Article 10 of the Competition (Jersey) Law 2005 (**Competition Law**), the Jersey Competition Regulatory Authority (the **Authority**) sets out its draft advice to the Minister in relation to the introduction of a Jersey Vertical Arrangements Block Exemption Order (**VABEO**).

Block exemptions are used in a number of jurisdictions, such as the European Union (EU) and the United Kingdom (UK), and introducing VABEO in Jersey – in line with international best practice – could generate significant benefits for businesses, consumers and the relevant authorities in Jersey (as set out further below). The Authority, therefore, advises the Minister to introduce a VABEO in Jersey.

Legal framework

Article 8(1) of the Competition Law prohibits arrangements between businesses that 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’ (Article 8(1) Prohibition)”. Currently, a business that considers that an agreement to which it is party may breach the Competition Law must apply to the Authority for an individual exemption.

However, under Article 10(1) of the Competition Law the Minister may exempt certain categories of arrangements from the prohibition by way of a so-call “block exemption”, provided that the Minister is satisfied that the potentially anticompetitive effects of that category of arrangements are typically outweighed by their pro-competitive effects. In such case, arrangements that meet the criteria set out in the block exemption will be exempt on the basis that they are presumed compatible with the Competition Law and will, therefore, no longer be required to apply for individual exemption.

Vertical arrangements

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 retailers.

Though vertical arrangements are currently caught by the Article 8(1) Prohibition, this category of agreements often do not harm the markets in which they operate. Conversely, they may, as set out further below, deliver significant benefits to businesses, consumers, and relevant authorities.

Benefits

Block exemptions can create significant benefits for businesses, consumers, and relevant authorities in terms of improved distribution or availability of goods, increased efficiency, and reduced costs.

In particular, vertical block exemptions are used in a number of jurisdictions (including the EU and the UK) and can generate significant benefits. For example, the introduction of a Jersey VABEO:

(a) **for businesses**, could 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;

(b) **for consumers**, could provide significant benefits in terms of improved distribution or availability of goods, increased efficiency, and reduced costs; and

(c) **for the Authority**, allow the authority 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).

Accordingly, the Authority considers that the potentially anticompetitive effects of the vertical arrangements that would be caught by a Jersey VABEO would typically be outweighed by their pro-competitive effects in accordance with Article 10(1)-(2) of the Competition Law.

Relevant Procedure

The Authority published a Consultation paper on 1 March 2022, indicating its intention to propose the introduction of the proposed VABEO and seeking stakeholders' input on its scope⁹. The Authority did not receive any responses to the Consultation paper.

The fact that no stakeholder opposed the introduction of a Jersey VABEO, has reinforced the Authority's view that such a block exemption could benefit the Jersey economy and, therefore, advise the Minister to proceed with the introduction of a Jersey VABEO. This draft advice and reasoned opinion concerning the proposed VABEO's compliance with the Competition Law is therefore published in accordance with Article 10(3) of the Competition Law.

The proposed VABEO

The Authority believes that the introduction of a VABEO would substantially improve the operation of Competition Law in Jersey provided that:

- (a) 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
- (b) the vertical arrangement does not include a so-called hardcore restriction which removes the benefit of the VABEO.

The Authority considers that alignment with international best practice is an important source of efficiency that would 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.

The Authority recommends that Jersey adopts a similar approach to vertical block exemptions as the EU and the UK in areas where the two positions align. This includes:

- (a) **Definitions** - to be aligned with EU and UK vertical block exemptions;
- (b) **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;

⁹ [C-001 - Vertical Block Exemption Consultation | JCRA](#)

(c) **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;

(d) **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 pricing and an equivalence principle ; and

(e) **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 five years.

Where the EU and UK positions do not align, the Authority proposes that the Jersey VABEO follows the approach taken in the UK Vertical Agreements Block Exemption Order (UK Order) and the accompanying guidelines, which will replace the current retained vertical block exemption regulation and guidance upon expiration on 31 May 2022 .

Under Article 60 of the Competition Law, the Authority “shall attempt to ensure that so far as possible questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under European Union law in relation to competition within the European Union”. However, given that most companies operating in Jersey are UK (rather than EU) based, the Authority considers that following the EU position, in this case, would create unnecessary regulatory burden and decreased legal certainty for many businesses active in Jersey. The Authority, therefore, proposes to follow the UK position wherever the EU and UK block exemptions do not align.

Accordingly, the Authority proposes the following:

(a) **Dual distribution**: to not introduce an additional market share threshold at the retail level, or to treat dual distribution involving hybrid platform differently from other dual distribution arrangements.

(b) **Parity obligations (MFN clauses)**: to adopt definitions that provide a differentiation between so called “narrow” and “wide” parity obligations, and to treat “wide” parity obligations in retail markets as hardcore restrictions (conversely, wide parity obligations in business-to-business markets would not be treated as hard-core restrictions under the UK Order).

(c) **Territorial and customer restrictions**: to treat territorial/customer restrictions as ‘hardcore’ restrictions that remove the benefit of the proposed VABEO (to support consumer choice across all parts of Jersey and promote intra-brand competition, and to align with EU and UK best practices despite the Jersey market being significantly smaller than the EU single market and the UK internal market), but to allow an exemption for both “shared exclusivity” (thus allowing a supplier to appoint more than one exclusive distributor in a particular territory or for a particular customer group) and a combination of exclusive and selective distribution in the same or different territories.

Finally, the Authority does not propose, at this stage, to include specific provisions relating to fuel forecourts. Instead, the Authority will consider whether there would be merit in introducing a separate block exemption in relation to certain fuel forecourt arrangements. This would be in line with international best practices in the EU and UK, where the general vertical block exemption regulation is supplemented by sector specific block exemptions, for example in relation to motor vehicles.

Conclusion

As indicated above, a vertical block exemption order could generate significant benefits for Jersey businesses, consumers, and relevant authorities. The Authority, therefore, recommends that an order is made to introduce a Jersey Vertical Arrangements Block Exemption.

Annex B: 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 C: Previous Consultations and Publications

Consultation on Block Exemptions under Channel Islands Competition Laws - May 2015 (CICRA 15/24) - <https://www.jcra.je/cases/2015/c1139gi-block-exemptions/c1139gi-consultation-block-exemptions-under-channel-islands-competition-laws/>

Block Exemptions Information Note – July 2017 - (CICRA 17/20) - <https://www.jcra.je/cases/2015/c1139gi-block-exemptions/c1139gi-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>

Vertical Block Exemption Consultation – March 2022 – (JCRA 22/17) - [C-001 - Vertical Block Exemption Consultation | JCRA](#)