



Consultation –
Vertical Arrangements
Block Exemption

Background

In 2005, the Competition (Jersey) Law 2005 (“Competition Law”) was introduced to ensure that businesses in Jersey compete fairly with each other on the basis of their products and prices and without any unfair advantages.

Under Article 8(1) of the Competition Law, anti-competitive arrangements between businesses are prohibited. This prohibition covers, among other things, arrangements 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. These are so-called vertical arrangements. The negative effects that may result from restrictions contained in vertical arrangements may concern market foreclosure, a reduction of rivalry and the facilitation of collusion between undertakings operating on the market.

It can however be presumed that under certain conditions vertical arrangements are likely to help realise efficiencies and the development of new markets which may offset any possible negative effects resulting from the restrictions contained in the arrangement. In particular, certain types of vertical arrangements can lead to a reduction in the transaction and distribution costs of the parties and to an optimisation of their sales and investment levels. To enable such “good arrangements” to be concluded, the Chief Minister (“Minister”) may under Article 10 of the Competition Law, by Order, exempt a specific class of arrangements from the prohibition in Article 8(1) for which it can be assumed with sufficient certainty that they:

1. produce objective economic benefits;
2. allow consumers to receive a fair share of the resulting benefits;
3. do not contain restrictions on competition that are not indispensable to attain the efficiencies; and
4. do not afford the parties the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

The exemption of a class of arrangements from the prohibition on anti-competitive arrangements is commonly known as a block exemption. Parties to an arrangement, satisfying all the conditions of a block exemption, are no longer required to make an application to the Jersey Competition Regulatory Authority (“JCRA”) for an individual exemption under Article 9 of the Competition Law.

Through this targeted stakeholder consultation, the Government of Jersey is seeking views on its recommendation for a Ministerial Order to exempt from the prohibition laid down in Article 8(1) of the Competition Law certain types of vertical arrangements for which it can be assumed with sufficient certainty that they satisfy the above four conditions.

The Government is interested in your views on whether the proposed block exemption overall only covers those arrangements that are unlikely to give rise to competition concerns in Jersey. This entails that the Order should not be drafted too widely, exempting arrangements that should not be exempted. On the other hand, a block exemption that is drafted too narrowly is likely to be ineffective, as it will not exempt those arrangements that should be exempted. If you are of the opinion that the proposed block exemption does not strike the right balance between these interests and may restrict competition and harm consumers in Jersey, please explain and substantiate your views.

To have your views considered, you are kindly invited to respond, before Friday 17 January 2020, to the consultation by e-mail to: CompetitionPolicy@gov.je.

Which are the concrete policy recommendations?

A sufficiently clear block exemption creates legal certainty for businesses in Jersey as this allows them to determine whether their arrangements are exempted from the prohibition in Article 8(1) of the Competition Law. This simplifies procedures and reduces costs for businesses. The purpose of the proposed block exemption is furthermore to allow the JCRA to focus its resources on those areas where it can deliver the most benefit.

Furthermore, it is also possible that there is currently a degree of under-reporting of vertical arrangements. In doing so, parties run the risk that their arrangement is void. However, as the proposed block exemption can be applied across multiple sectors, it will offer significant flexibility to businesses and reduce the risk that an arrangement is void simply because it was not notified to the JCRA.

To ensure that only those vertical arrangements that confer sufficient benefits to outweigh any anti-competitive effects are exempted from Article 8(1) of the Competition Law, the Order will contain several conditions that need to be fulfilled. The Government has drawn on EU precedent (in particular the European Commission's [Vertical Agreements Block Exemption Regulation](#), VABER) when developing applicability criteria.

The key Government recommendations regarding the introduction of a vertical block exemption are as follows:

1. The introduction of an Order for a single block exemption covering vertical arrangements in general. Provided that the conditions of the block exemption are met, all vertical arrangements, irrespective of the sector, can benefit from the exemption from Article 8(1) of the Competition Law. The Government's recommendation is supported by the JCRA. In 2015, the JCRA initially [recommended](#) the introduction of four sector specific block exemptions. However, because of a move away from sector specific block exemptions in the EU, the JCRA indicated that it now supports the introduction of a general vertical block exemption.
2. The duration of the Order will be aligned with that of the VABER, which expires on 31 May 2022. However, to ensure sufficient time to respond to any changes that will be made at the EU level and to consider the reasonableness of adopting such changes in Jersey, the Government proposes 31 December 2022 as the expiry date of the Order.
3. The applicability of the Order should be limited to vertical arrangements where both the supplier's and the buyer's market share are 30 % or less. The purpose of the Order is to create a safe harbour, as arrangements that meet the conditions set out therein will, in principle, be unlikely to affect actual or potential competition to such an extent that a negative effect on prices, output or the variety or quality of goods and services can be expected on the market in Jersey. It is generally accepted that for most vertical arrangements 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.
4. In order for the block exemption to apply, a vertical arrangement should not contain any so-called hardcore restrictions, which are likely to hinder competition and harm consumers. If a hardcore restriction is included in a vertical arrangement, this automatically precludes the entire arrangement from benefitting from the Order. An example of a hardcore restriction is the establishment of fixed or minimum resale prices to be observed by a buyer. Such restrictions are capable of limiting competition between distributors or retailers of the same branded product (e.g. a particular men's polo shirt). The Government proposes to incorporate in the Order the same list of hardcore restrictions as contained in the VABER. This would be in line with the practice of several EU Member States, which have also introduced in their domestic legislation vertical block exemptions based on the VABER.

5. So-called excluded restrictions, such as non-compete obligations, should furthermore be precluded from benefitting from the Order as they are capable of foreclosing the market and restricting competition between brands. For example, the exemption provided by the Order should not apply where an obligation in excess of 5 years is imposed on a buyer preventing them from manufacturing, purchasing, selling or reselling goods or services which compete with the contract goods or services. The insertion of an excluded restriction should however not necessarily prevent the possibility of the remaining provisions of the arrangement benefitting from the Order. This is only the case where the excluded restrictions are not severable from the other provisions of the arrangement. The Government proposes to draw on EU precedent and include in the Order the same excluded restrictions as are contained in the VABER.
6. The VABER also provides an exception in respect of vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers if all the members are retailers of goods (not services) and if each individual member of the association has a turnover not exceeding €50 million. A similar exemption is not included in the block exemption proposed by the Government. In this respect, the Government follows the approach taken by the Irish Authorities which have also introduced a block exemption closely resembling the VABER, without the inclusion of a retailer buyer pool exemption for the Irish market.
7. In respect of fuel forecourt arrangements, the Government particularly invites views on the period of exclusivity to be permitted in arrangements between oil companies and motor fuel retailers. In 2004 the Government was strongly advised to pass legislation to limit the maximum period of exclusivity in such arrangements to 3 years.¹ This is less than the period of 5 years which is permitted under the VABER but was justified by arguments that such legislation will force greater levels of competition between oil companies for retail market share.
8. Furthermore, in order to preserve a buyer's commercial freedom, the Government recommends that, where a fuel forecourt arrangement is operated from premises owned by the buyer, any obligation which purports to restrict the ability of the buyer to dispose of those premises should not be able to benefit from the exemption.
9. The JCRA may withdraw the benefit of the Order if it finds in a particular case that a vertical arrangement, whether in isolation or in conjunction with other similar arrangements, nevertheless has certain effects which are incompatible with the Article 9(3) of the Competition Law.

¹ James Milne (Consultancy Solutions for the Oil Industry), Review of the Current Arrangements for the Importation, Storage and Supply of Petroleum Products to the Distribution and Retail System in Jersey (2004).

10. The Minister may amend the Order, in particular to exclude a certain category of goods or services, where in the Minister's opinion access to the relevant market or competition therein is 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.

In order to strengthen the proposal, the Government would also welcome any further comments and inputs on the introduction of a general vertical block exemption in Jersey.

All responses should be clearly marked 'Responses to Block Exemption Consultation Document'.

Responses received to this consultation will be published on gov.je/blockexemptions. It is however possible that parts thereof remain confidential. Should this be the case, please indicate clearly on the front page of your submission that it should not be made publicly available and also provide a non-confidential version for publication.

Next steps

The Government will carefully consider your views on the introduction of a general vertical block exemption in Jersey. Once a draft Order is prepared, the Government will share this with the respondents to this consultation to enable any final comments to be submitted. Following this, the formal consultation process required under Article 10(1) of the Competition Law will be completed with the JCRA. Upon completion of this process, the Minister may, by Order, put in place the block exemption.