Government of JERSEY

Consultation – Vertical Arrangements Block Exemption
Feedback received & Government response

A. Introduction

In November 2019, the Government of Jersey ("**Government**") consulted on its recommendation for a Ministerial Order introducing a so-called General Vertical Block Exemption ("**Block Exemption**") in Jersey's competition framework. Under the Block Exemption, certain types of vertical arrangements are exempted from the prohibition on anti-competitive arrangements set out in Article 8 of the Competition (Jersey) Law 2005 ("**Competition Law**").

A detailed explanation of the Government's proposal, including the conditions that need to be satisfied in order to benefit from the Block Exemption, can be found in the Consultation Paper.

https://www.gov.je/Government/Consultations/Pages/CompetitionLawConsultation.aspx

The consultation closed on 17 January 2020. The Government would like to thank those who contributed to the consultation. This paper provides a summary of the feedback received, the Government's response and sets out the next steps.

B. Feedback received

Three Jersey based law firms and the Jersey Consumer Council responded to the consultation. The responses received from law firms have been anonymised.

1. Feedback from Jersey law firms

Two law firms responded positively and provided their support for the introduction of a Block Exemption along the lines proposed. Positive aspects of the proposal noted by these respondents are:

- Increased legal certainty for businesses and advisers operating in Jersey. The current legal framework requires parties to individually notify their arrangements to the JCRA, which can create an element of uncertainty as to whether the JCRA will approve the arrangement in question.

- Potential for reduced compliance costs for businesses in the Island as the Block Exemption provides a safe harbour.

- A *general* Block Exemption, which can be applied widely and across sectors, offers benefits over sector-specific block exemptions.

- Building on EU precedent enhances legal certainty as this enables business and their advisors to have regard to existing guidance and case law.

Support was also expressed for the Government's proposals to:

- Limit the application of the Block Exemption to vertical arrangements where both the supplier's and the buyer's market share are 30 % or less.

- Provide that arrangements containing so-called hardcore restrictions (as defined in the European Commission's vertical agreements block exemption ("**VABER**")) cannot benefit from the Block Exemption.

- Provide that certain non-exempted restrictions (as defined in the VABER) are precluded from benefitting from the Block Exemption.

In relation to "fuel forecourt arrangements",[1] one law firm sought the views of clients operating in this market. This law firm indicated that putting in place a Block Exemption as proposed would not appear to be inconsistent with what they consider to be market practice in Jersey. The certainty provided by the Block Exemption would likely be welcomed by market participants.

Fuel forecourt arrangements often contain so-called non-compete obligations which have as their main element that the buyer is obliged to concentrate their fuel orders with one supplier. Regarding the period of exclusivity to be allowed in fuel forecourt arrangements, it was remarked, by the abovementioned law firm, that market operators may prefer to have the flexibility to agree an exclusivity period of up to five years. This law firm also indicated that it was not in a position to comment on whether three-year exclusivity arrangements are likely to force greater levels of competition between oil companies.

The other law firm that was supportive of the proposed Block Exemption indicated that, whilst they have limited experience in respect of fuel forecourt arrangements, they are generally supportive of the Government's proposals in this area.

In addition, the Government was reminded of the complexity of the VABER and was advised to ensure that adequate support and guidance is available for businesses who may be eligible to benefit from the Block Exemption. The Government was also advised to have regard to any changes the European Commission may make to the VABER which expires on 31 May 2022.

The third law firm to respond to the consultation indicated that the introduction of a Block Exemption modelled on the VABER may not be the most effective approach for Jersey. This law firm made reference to the JCRA's 2006 consultation on the possible introduction of Block Exemptions in Jersey. In 2006, the JCRA ultimately advised the Government not to issue any Block Exemption Orders under Article 10 of the Competition Law. The third law firm to respond stated that it believes that the JCRA's 2006 reasons for not proposing Block Exemptions are still relevant and noted that:

- The JCRA has not (yet) been required to deal with a significant number of individual exemptions.

- Any block exemption to be introduced in Jersey should be tailored to local market conditions, rather than being based purely on the terms of the VABER. In this regard, Jersey's high market concentration, high barriers to entry and reliance on air and sea transport for imports and exports were mentioned.

- Capping the application of the Block Exemption to vertical arrangements where both the supplier's and the buyer's market share are 30 % or less may mean that few arrangements in Jersey may benefit from the Order. In particular, the nature of distribution and franchise agreements in the Island could mean that the 30 % market share test would not reduce the number of arrangements caught by Article 8(1) of the Competition Law, nor exempt those arrangements that are intended to be exempt as a result of the benefits they bring to the Island.

[1] A "fuel forecourt arrangement" means an arrangement entered into between two or more undertakings each of which operates, for the purposes of the arrangement, at a different level of the production or distribution chain relating to the conditions under which the supplier will supply and the buyer will purchase motor vehicle fuel and other motor vehicle related products for resale in fuel forecourts operated by or on behalf of the buyer.

- Any block exemption to be introduced in Jersey should be drafted in the light of experience gained in dealing with individual notifications. If exemption conditions are not drafted carefully with reference to local market conditions, the JCRA would be at risk of having to withdraw the Block Exemption at a later date. The absence of past experience may reduce the level of legal certainty provided by any Block Exemption.

The third law firm to reply did however emphasise that the introduction of the proposed Block Exemption would provide equivalency between Jersey and the EU. In their experience, most applications in respect of vertical arrangements come from large, international organisations engaged in cross border agreements. These organisations are sophisticated and familiar with block exemptions in the UK and EU. Being able to apply the same regime across jurisdictions would be helpful for them and would provide legal certainty when conducting business in Jersey.

On balance, the third law firm to respond stressed that, in order to be effective, any block exemption to be introduced in Jersey should tailored to the local market.

2. Feedback from the Jersey Consumer Council

On 29 January 2020, Government Officials delivered a "Lunch Time Talk" to the Jersey Consumer Council. The talk focussed on explaining the rationale for introducing a General Vertical Block Exemption in Jersey and what this would mean for consumers and businesses in the Island.

In its response, the Consumer Council indicated that it believes that the proposal for a General Vertical Block Exemption is generally sound. The Consumer Council did however make several recommendations for the Government to take into account when moving forward with its proposal for a General Vertical Block Exemption. The Consumer Council's feedback focussed on explaining the context of the proposal and the impact it may have on consumers in Jersey. The Consumer Council also emphasised the importance of visibility and communication with consumers and businesses in Jersey when introducing this piece of legislation.

More generally, the Consumer Council also stressed that it would be useful to explain the functions of the JCRA to consumers in the Island so that they are aware and confident that there is an independent body in charge of competition supervision in Jersey.

C. Government response

As indicated above, the Government would like to thank all respondents for their valuable feedback on the proposal for a General Vertical Block Exemption in Jersey.

The positive feedback provided by two law firms and the Consumer Council strengthens the Government's proposal to introduce a General Vertical Block Exemption. The noted increase in legal certainty for businesses contributes to the Government's objective to create and maintain an attractive business climate in the Jersey. The anticipation that the proposed Block Exemption will simplify procedures and reduce costs for businesses also contributes towards this objective. Economics advice obtained by the Government in 2017 and 2019 regarding the introduction of Block Exemptions in Jersey furthermore suggests that building on EU precedent is sensible as the Commission's Block Exemptions are based on years of legal and economic assessment and jurisprudence. Similar comments were made by one of the responding law firms.

In relation to non-compete obligations in fuel forecourt arrangements, the Government takes the view that it is justified to limit the permitted length of such obligations under the proposed Block Exemption to three years. This is less than the non-compete period of five years which is generally permitted under the VABER and in principle allowed for other types of arrangements covered by the Government's proposed Block Exemption. However, given the possible competition risks of non-compete obligations in fuel forecourt arrangements (e.g. foreclosure of the market to competing suppliers and potential suppliers), the Government will proceed on the basis that the Block Exemption should not apply to non-compete obligations in fuel forecourts arrangements which are indefinite or exceed three years in duration. Relevant in this regard are the below considerations.

- Although one of the respondents to the consultation stated that market operators may prefer to have the flexibility to agree an exclusivity period of up to five years, overall, respondents did not provide strong and compelling reasons for extending the application of the Block Exemption to non-compete obligations of up to five years in fuel forecourt arrangements.

- The JCRA has previously found that the common use of exclusive contracts in the motor fuel sector can have cumulative foreclosure effects in the relevant market, potentially restricting the ability of suppliers to enter or expand in this market. In 2014, the JCRA stated that, to the best its knowledge, a substantial proportion of motor fuel supplied at a retail level in Jersey remains subject to single branding agreements.[2]

- The JCRA has previously referred to the Milne Report[3] and stressed that "[m]arket characteristics in Jersey may suggest that a shorter [than five years] period of exclusivity is preferable, as it would enable the three suppliers to compete among themselves for motor fuel supply agreements more frequently".[4] The Milne Report (albeit now slightly out of date) also suggested that many of the forecourts in Jersey are modern, well developed with up-to-date pumping equipment and canopies. There would appear to be little short-term requirement for substantial capital investment, thus obviating the need for long periods of supply agreements.

- The above by no means entails that fuel forecourt arrangements that contain non-compete obligations, the duration of which exceeds three years, are by definition incompatible with the criteria for individual exemption as set out in Article 9(3) of the Competition Law. However, in previous decisions approving such arrangements, the JCRA consistently imposed additional conditions to ensure that effective competition in Jersey is not impeded through the arrangement. In particular, the condition applied that where the oil company proposed to increase the length of the exclusivity period, the retailer would be allowed to contact other suppliers to request competitive quotes.[5]

- The Government of Guernsey also recently carried out a consultation on the possible introduction of a General Vertical Block Exemption under Guernsey's competition laws. In line with the Government's proposal, the Guernsey Committee *for* Economic Development also proposed that in order for the Block Exemption Regulation to apply to any non-compete restriction in a fuel forecourt arrangement, the duration of that restriction should be limited to three years. The Government of Guernsey will publish its own summary of findings in due course.

Furthermore, in order to implement the recommendations issued by the Jersey Consumer Council, the Government will produce an article for the Consumer Council's newsletter, outlining the policy for the Block Exemption in layman's terms for both consumers and local businesses. In addition, the JCRA will be approached regarding the publication of an article in their quarterly competition

[2] See e.g. JCRA Decision C1037j Concerning Motor Fuels Supply Agreements between Esso Petroleum Company Limited and Citriche Limited notified under Article 9 of the Competition (Jersey) Law 2005.
[3] 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).
[4] See JCRA Decision C416/09 - Decision - Exemption Motor Fuels Supply Agreement between Esso and Crowe Holdings.
[5] Ibid.

newsletter to inform businesses operating in Jersey about the new Block Exemption Order. To ensure that sufficient guidance and support is available for businesses and their advisors when applying the complex provisions of the Block Exemption Order, it is also proposed that the JCRA will publish guidelines on the application of the Order. The Government will furthermore have regard to any changes made to the European Commission's policy on vertical agreements following the expiry of the VABER on 31 May 2022.

As indicated, one law firm commented that the introduction an "EU-style" vertical Block Exemption may not be the most effective approach for Jersey. In this regard the Government notes that the JCRA consulted on Block Exemptions in 2005, 2006 and 2015. As noted, the JCRA previously advised the Government not to issue any Block Exemption Orders. However, in light of the current circumstances, the Government now takes the view that the introduction of a General Vertical Block Exemption in Jersey would be appropriate.

- In July 2015, the JCRA wrote to the Assistant Chief Minister suggesting 4 areas that may be appropriate for Block Exemptions. Furthermore, in April 2019, the JCRA wrote to the Government proposing, instead, that a covering general Block Exemption is introduced in Jersey, in line with the VABER in force in the EU. The JCRA has therefore clearly departed from its 2006 view not to support the introduction of a Block Exemption.

- Since the introduction of the Competition Law, the JCRA has received and granted several applications for an exemption under Article 9 of the Law and has hence gained experience applying the conditions set out in this Article. Furthermore, as expressed in the Consultation Paper, there may currently be a degree of underreporting of vertical arrangements. In doing so, parties run the risk that their arrangement is void. The introduction of a General Vertical Block Exemption will, in the Government's view, provide greater legal certainty to businesses operating in the Island.

- The Government has previously been advised that building on EU precedent is sensible as the VABER is based on years of legal and economic experience. However, as was advised by one of the law firms, it is important that any Block Exemption introduced in Jersey takes into consideration the special characteristics of Jersey's markets. This is evidenced by the Government's proposal that the Block Exemption should not apply to non-compete obligations in fuel forecourts arrangements which are indefinite or exceed three years in duration. The Government is of the opinion that a five-year period of exclusivity in fuel forecourt arrangements, in line with the period that would be allowed under the VABER, would not be appropriate in the Jersey context.

- The proposed market share threshold of 30 % matches that of the VABER. In the absence of specific information to the contrary, the Government considers that matching the 30 % threshold of the VABER is sensible. Furthermore, the Government has previously obtained economics advice which suggests that anti-competitive effects generally tend to be more likely in more concentrated markets, regardless of what the reason for such concentration might be. From a consumer protection perspective, the Government therefore takes the view that including a 30 % market share threshold in the Block Exemption is currently appropriate.

D. Next steps

The Minster has approved and authorised the publication of this paper setting out the Government's response to the consultation on the merits of introducing a General Vertical Block Exemption in Jersey.

The Minister has furthermore approved the submission of law drafting instructions for the creation of a Ministerial Order introducing a General Vertical Block Exemption in the manner proposed in the Consultation Paper. As indicated in the Consultation Paper, once a Draft Ministerial Order is prepared, the Government will share this with the respondents to the 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.