Case C1673G

The Medical Specialist Group

Decision (Penalty Statement)

Guernsey Competition and Regulatory Authority

29 November 2024

Guernsey Competition and Regulatory Authority
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1. INTRODUCTION

A. Synopsis

1.1 The Guernsey Competition and Regulatory Authority (**GCRA**) was established under The Guernsey Competition and Regulatory Authority Ordinance, 2012 and is responsible for administering and enforcing the Competition (Guernsey) Ordinance, 2012 (the **2012 Ordinance**).

1.2 Following an investigation conducted under section 22(1) of the 2012 Ordinance (the **Investigation**), the GCRA has decided that the Medical Specialist Group (**MSG**) has infringed the prohibition imposed by Section 5(1) of the 2012 Ordinance (prohibition on agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services). The terms and grounds for the GCRA's decision are set out in a Decision dated 29 November 2024 (the **Decision**) which was served on the Medical Specialist Group on that date.[1]

1.3 In consequence of the infringements identified in the Decision, and having considered the representations made by the MSG in relation to the draft penalty statements served on the MSG on 22 May 2024 and 2 October 2024 as well as the further evidence listed in paragraph 2.84 of the Decision, the GCRA has decided to impose a financial penalty on the MSG pursuant to section 32(4) of the 2012 Ordinance. The terms and grounds for doing so are set out in this decision (**Penalty Statement**).

1.4 The MSG has rights of appeal against this Penalty Statement under section 46(1)(j) of the 2012 Ordinance.

B. Confidentiality

1.5 This Penalty Statement may contain information that the GCRA is required by law to keep confidential.

1.6 The MSG may make written representations to the GCRA identifying any information in this Penalty Statement which it considers the GCRA should treat as confidential and explaining why it considers that the GCRA should treat that information as confidential.

[1] 29 November 2024

1.7 Written representations made under the previous paragraph should be provided by 4 p.m. on 6 December 2024 and should be emailed to: info@gcra.gg.

1.8 The GCRA will only treat information as confidential where it has been provided with specific reasons to do so and will not accept blanket requests for confidentiality. The GCRA will treat information as confidential where it considers that it falls into one of the following categories:

(a) Commercial information the disclosure of which may significantly harm the legitimate interests of the undertaking to which it relates; or

(b) Information relating to the private affairs of an individual the disclosure of which may significantly harm the legitimate interests of that individual.

1.9 Pursuant to section 34(2) of the 2012 Ordinance, where a financial penalty is imposed on an undertaking or person, the GCRA may publish their name and the amount of the penalty in such manner and for such period as it considers appropriate. As such, unless there are compelling reasons to do so, the GCRA will not accept a request for confidentiality in respect of the name of the addressee of this Penalty Statement, the amount of the penalty or the basis on which the penalty has been calculated.

2. FACTUAL BACKGROUND AND CONDUCT

2.1 The GCRA refers to the general factual background as set out in section 2 of the Decision and to its findings in relation to the MSG's conduct as set out in section 3 of the Decision. It further refers to its finding in section 4 of the Decision that the MSG has contravened s.5(1) of the 2012 Ordinance by entering into an agreement or agreements with another undertaking that prevent[2] competition within Guernsey for the provision of services (the **Contravention**).

2.2 On 22 July 2024, the MSG made written representations to the GCRA in respect of a draft of an earlier version of this Penalty Statement (**22 July Representations**).[3] The MSG made further representations in respect of the same document through a letter from its advocates dated 22 August 2024 (**22 August Letter**).[4] Finally, on 31 October 2024 the MSG made representations in respect of a draft version of this Penalty Statement served on the MSG on 2 October 2024 (**31 October Representations**).[5] Those representations, together with the evidence listed in paragraph 2.84 of the Decision, have been taken into account by the GCRA and are referred to as appropriate below.

2.3 Particular features of the MSG's conduct relevant to penalty are mentioned as necessary below.

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2 S.60(1) of the 2012 Ordinance provides that ""prevent" in relation to competition means prevent, restrict or distort competition or, in each case, attempt to do so". In this Draft Penalty Statement, "prevent" bears the same meaning as in s.60(1) of the 2012 Ordinance.

3 [MSG5/1-11].

4 [MSG5/12].

5 [MSG5/40-41].

3. LEGAL FRAMEWORK

A. Introduction

3.1 This Part sets out the legal framework within which the GCRA has considered the evidence relevant to penalty.

B. Sources of law

3.2 Pursuant to section 32(4) of the 2012 Ordinance, the GCRA may, in addition to, or in place of, giving a direction make an order imposing a financial penalty on an undertaking which is found to have breached the prohibition contained in section 5(1) of the 2012 Ordinance.

3.3 Section 34(1) of the 2012 Ordinance sets out the factors which the Authority must take into consideration when deciding whether to impose a penalty and, if so, the amount of that penalty.

3.4 The GCRA may take account of the treatment of corresponding questions under European Union (**EU**) competition law when determining questions in relation to Guernsey competition law arising in relation to anti-competitive practices between undertakings[6] but is not prevented from departing from EU precedents where this is appropriate in light of the particular circumstances of the Bailiwick.[7,8]

3.5 The GCRA will also have regard to its own past decision making practice and to its own published guidelines concerning the application of Guernsey competition law, including in particular GCRA[9] Guideline 12 – Financial Penalties, issued June 2013 (**Guideline 12**).

3.6 The GCRA also considers it relevant to have regard to the decision making practice of the UK's competition regulator, the Competition and Markets Authority (the **CMA**) (together with case-law considering those decisions), and to published guidelines issued by the CMA, including the CMA's Guidance as to the appropriate amount of a penalty (CMA73), issued 16 December 2021 (**CMA Penalty Guidance**).

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6 The GCRA considers that issues arising with respect to the determination of a penalty imposed in relation to an anti-competitive practice between undertakings amount to questions that arise in relation to such an anti-competitive practice (2012 Ordinance, section 54(b)). [MSG4/699-823]

7 GCRA Guideline 2, page 6 [MSG4/441-470]

8 Section 54, 2012 Ordinance.

9 Guideline 12 was issued as a Channel Islands Competition and Regulatory Authorities (CICRA) Guideline. [MSG4/471-487]

3.7 The statutory considerations set out in section 34(1) partially overlap with factors taken into account for the purpose of imposing penalties for infringements of EU and UK competition law. The way in which the EU and UK competition authorities have dealt with those factors have been taken into account only insofar as:

(a) they overlap with section 34(1) of the 2012 Ordinance, and/or

(b) they inform the GCRA's consideration of whether its overall conclusions are reasonable and proportionate.

C. The framework for deciding whether to impose a penalty

3.8 The GCRA must take into consideration the factors set out in section 34(1) of the 2012 Ordinance when determining whether to impose a penalty.

3.9 By section 34(1) of the 2012 Ordinance:

> "In deciding whether or not to impose a financial penalty under section 31(4), 32(4) or 33(7) and, if so, the amount thereof, the Authority must take into consideration the following factors -
>
> (a) whether the contravention was brought to the attention of the Authority by the undertaking or person concerned,
>
> (b) the seriousness of the contravention,
>
> (c) whether or not the contravention was intentional, negligent or reckless,
>
> (d) what efforts, if any, have been made to rectify the contravention and to prevent a recurrence,
>
> (e) the potential financial consequences to the undertaking or person concerned, and to third parties including customers and creditors of that undertaking or person, of imposing a penalty, and
>
> (f) the penalties imposed by the Authority in other cases."

D. The framework for deciding the amount of the penalty

Background

3.10 The GCRA must take into consideration the factors set out in section 34(1) of the 2012 Ordinance when determining the amount of any penalty. The GCRA must also have regard to section 34(3) of the 2012 Ordinance as to the maximum penalty which may be imposed.

The three stage approach

3.11 GCRA Guideline 12, section 3, sets out the approach that the GCRA will take in calculating a penalty where it has decided that the imposition of a financial penalty is appropriate:

(a) Step 1 – Basic penalty: In this step, the basic penalty is calculated having regard to the value, in sterling, of the sales of goods or services to which the infringement relates in Guernsey for the business year preceding the date on which the decision of the Authority is taken,[10] which is then multiplied by the number of years or months of the duration of the infringement.[11] As a general rule, the basic penalty will be set at a level of up to 30% of the value of sales, with the percentage being selected depending on how serious the infringement is. In assessing the seriousness of the infringement (section 34(1)(b)), the GCRA will also have regard to whether or not the contravention was intentional, negligent or reckless (section 34(1)(c)) and the penalties imposed by the Authority in other cases (section 34(1)(f)). Given that there is only one previous decision of the Authority imposing a penalty under the 2012 Ordinance,[12] the GCRA has also taken into account the penalties imposed by the European Commission and the CMA in order to guide its decision making on this point.

(b) Step 2 – Adjustments to the basic penalty (section 34(1)(a), (c) and (d)): The basic penalty may be increased having regard to aggravating factors or decreased having regard to mitigating factors, insofar as they fall within the scope of subsections 34(1)(a), (c) and (d) of the 2012 Ordinance.[13]

(c) Step 3 – Legal Maximum: In this step, the penalty is reduced if the maximum penalty of 10% of turnover up to a maximum period of three years is exceeded.[14]

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10 Competition (Calculation of Turnover) (Guernsey) Regulations, 2012 (**Turnover Regulations**), Regulation 2(1). [MSG4/691-698]

11 Under the Turnover Regulations where a business year does not equal 12 months, the applicable turnover is the amount that bears the same proportion to the applicable turnover during that business year as 12 months does to that period. [MSG4/691-698]

12 On appeal: Case Civil 2397: *BTC Sure Group and others v. The Guernsey Competition and Regulatory Authority*.

13 Lists of possible factors are set out in GCRA Guideline 12, section 3. [MSG4/471-487] For the avoidance of doubt, the GCRA has not taken into account any of the aggravating or mitigating factors listed in its guidelines insofar as these fall outside the scope of section 34(1) of the 2012 Ordinance. [MSG4/758]

14 By section 34(3) of the 2012 Ordinance: **"**The amount of the penalty must not exceed 10% of the turnover of the undertaking or person during the period of the contravention of the prohibition in question, up to a maximum period of 3 years." [MSG4/758]

3.12 Finally, the GCRA will consider the potential financial consequences of imposing a penalty (section 34(1)(e)) through an additional step, a "step back", in which the totality of the proposed penalty is assessed for appropriateness and proportionality.

4. LEGAL ASSESSMENT

A. Whether to impose a penalty

Overview

4.1 For the reasons set out below, the GCRA finds that this is an appropriate case for the imposition of a financial penalty on the MSG because:

(a) The Contravention was not brought to the attention of the Authority by the MSG.

(b) The Contravention was serious.

(c) The Contravention was intentional, negligent or reckless.

(d) The efforts made by the MSG, if any, to rectify the Contravention only occurred after the GCRA had intervened and were only partial. The reduction in the duration of the non-compete clause was made in respect only of Mr Vhadra's work with First Contact Health and thus in any event did not address the totality of the contravention, the remainder of which continued until the contractual expiry of the five year non-compete clause.

(e) The MSG is well resourced and able to pay a financial penalty, and

(f) There is no existing GCRA decisional practice that suggests that it would be inappropriate to impose a financial penalty. Practice in other jurisdictions, such as the EU and the UK, suggests that imposing a financial penalty for a breach of competition by object of this nature would be appropriate.

The contravention was not brought to the attention of the GCRA by the MSG[15]

4.2 As set out in the Decision,[16] the Contravention was brought to the attention of the GCRA by Mr Vhadra and not by the MSG.

4.3 Moreover, not only was the Contravention not brought to the attention of the GCRA by the MSG but the MSG rather took active steps to prevent the GCRA from investigating the contravention by attempting to restrict the ability of Mr Vhadra and his business partner, Mr Watson, to communicate with the GCRA.

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15 2012 Ordinance, section 34(1)(a). [MSG4/758]

16 Decision, paragraph 2.36.

4.4 First, the evidence before the GCRA indicates that MSG required Mr Vhadra to write to the GCRA withdrawing the complaint.[17]

4.5 Second, according to the evidence of Mr Watson, as part of its settlement negotiations with Mr Vhadra the MSG initially sought to require Mr Watson and Mr Vhadra only to communicate with the GCRA through the MSG's advocates.[18] The GCRA notes that this requirement does not appear in the Settlement Agreement. However, the GCRA considers that clause 2.6 of that agreement, which provides that:

> "Mr Vhadra and Mr Watson will withdraw the Complaint to the GCRA in writing. The agreed wording in relation to the withdrawal of this complaint can be found at Schedule 1. First Contact are to include the MSG in all correspondence, which is not subject to confidentiality, from the date of this Agreement in relation to the Complaint to the GCRA."

does restrict the ability of Mr Vhadra to communicate with the GCRA (at least in connection with his work at First Contact) by requiring him to include the MSG in all correspondence with the GCRA in relation to the complaint he had made to the GCRA. The GCRA considers that the effect of such a requirement is likely to be to impede full and frank disclosure to the GCRA of matters material to an investigation.

4.6 To ensure that its investigation was not prejudiced by the enforcement or threat of enforcement of clause 2.6 of the Settlement Agreement, on 24 April 2019, the GCRA wrote to Mr Vhadra and Mr Watson to direct them that the fact of, and their responses to, information requests sent to them by the GCRA on 25 and 26 March 2019 should be kept confidential from the MSG, notwithstanding clause 2.6 of the Settlement Agreement.[19]

4.7 The GCRA therefore finds that the MSG did not bring the Contravention to the attention of the GCRA but rather took active steps to obstruct the investigation of the Contravention by the GCRA.

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17 Email from Ranjan Vhadra to Sarah Livestro of 8 February 2019 [MSG2/1092]. By e-mail of 27 March 2019 Mr Vhadra did so. [MSG4/591]

18 GCRA interview with Peter Watson [01:15:53] – [01:16:59]. [MSG2/1348-1349]

19 GCRA letter to Mr Vhadra (24 April 2019) [MSG2/1232-1233]; GCRA letter to Mr Watson (24 April 2019). [MSG2/1234-1235]

The contravention was serious[20]

4.8 In this case, the GCRA has found that the MSG engaged in behaviour constituting a restriction of competition by object. As explained in the Decision,[21] object infringements are those forms of collusion between undertakings which can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.

4.9 The GCRA therefore concludes that the Contravention was serious.

The contravention was intentional, negligent or reckless[22]

4.10 The GCRA considers that a contravention will be intentional[23] where an undertaking by its conduct acts to bring about a prevention[24] of competition. The GCRA further considers that a contravention will be intentional if the undertaking in question intended to prevent[25] competition, irrespective of whether that undertaking also intended to contravene the 2012 Ordinance and/or knew that their conduct amounted to a breach of the 2012 Ordinance. [26]

4.11 Having regard to the statutory language used in section 34(1)(c) of the 2012 Ordinance,[27] the GCRA considers that although it may choose to do so it is not required to identify which of the three levels of culpability applies (i.e. whether the contravention was intentional or whether it was negligent or whether it was reckless) but rather that it has to determine "whether or not" the conduct falls within or outside of the scope of "intention, negligence or recklessness" as a whole. Nevertheless, on the facts of this particular case[28] and for the reasons set out below, the GCRA has concluded that the Contravention was intentional.

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20 2012 Ordinance, section 34(1)(b). [MSG4/758]

21 Decision, paragraph 3.45.

22 2012 Ordinance, section 34(1)(b). [MSG4/758]

23 As to the meaning of intention see, inter alia, Halsbury's Laws of England/Criminal Law (Vol. 25 (2020), paras 1-552; Volume 26 (2020), paras 553-1014/1 – Principles of Criminal Liability (2) The Elements of Crime/(iii) Fault Element/16. Intention.

24 See footnote 1 above for the definition of "prevention".

25 See footnote 1 above for the definition of "prevent".

26 This interpretation is consistent with that applied under EU and UK competition law: see *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, paragraph 456; Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124.

27 "whether or not the contravention was intentional, negligent or reckless".

28 See paragraphs 2.47 – 2.60 and paragraphs 3.49 – 3.59 of the Decision

4.12 First, the Non-Compete Restrictions[29] that the GCRA has found amount to a contravention of s.5(1) of the 2012 Ordinance were contained in written agreements concluded between the MSG and Mr Vhadra. They were therefore deliberately entered into and maintained; the MSG by its conduct acted to bring them about. A non-compete clause, by its nature, is designed to prevent competition.[30] In this case, their purpose was to prohibit Mr Vhadra from competing to any extent with the MSG for the provision of medical services in Guernsey.[31] By maintaining the Non-Compete Restrictions in its written agreements with Mr Vhadra, the GCRA concludes that the MSG prevented competition intentionally.[32]

4.13 Second, MSG's own conduct in seeking to enforce those restrictions against Mr Vhadra demonstrates that it intended to prevent competition. As set out in paragraph 3.58(b) of the Decision, correspondence indicates that the MSG, which is an established provider of secondary healthcare services in Guernsey, sought to offer, or actually began offering, new services in order to address the competitive threat it considered that Mr Vhadra's company, First Contact Health, posed. It did so at the same time as it was attempting to prevent Mr Vhadra, the founder and CEO of First Contact Health with the relevant necessary medical experience to operate such a business, from working with First Contact Heath. It is reasonable to infer that the MSG must have realised that restricting Mr Vhadra in this way would damage his ability, through First Contact Health, to compete with the MSG. In particular, in respect of an MSG proposal to begin offering a private "scan at first appointment service"[33] for patients suffering

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29 In this Penalty Statement, the five-year restrictions contained in clause 35 of the General Partnership Agreement, clause 6 of the Retirement and Settlement Agreement and clause 3 of the Settlement Agreement are referred to as **Non-Compete Restrictions**.

30 "It seems to me clear that the restrictive covenants prima facie fall within the scope of section 2(1) [of the prohibition on anti-competitive agreements] on the basis that they may affect trade within (at least) the territories of the agreements, and they have as their object the prevention or restriction of competition. That, after all, is the whole point of a covenant in restraint of trade.", per Henderson, J. in *Carewatch Care Services Limited* v. *Focus and ors* [2014] EWHC 2313 (Ch).

31 Decision, paragraph 3.54.

32 See footnote 1 for the definition of "prevent".

33 On 11 September 2018, around the time of the establishment of First Contact Health, Dr [A], the then Chair of the MSG, wrote to the Chief Secretary of the Office of the Committee for Health and Social Care, Mr Mark de Garis. Dr [A] stated that it was important for the MSG to improve its services so as to be able to begin competing with First Contact Health in offering a "scan at initial appointment" service. Dr [A] stressed the importance of the MSG not "losing market share" because of the entry of First Contact Health into the market:
"The new clinic promises to be a state-of-the-art one-stop shop offering speedy assessment and diagnosis with experienced and well-respected clinicians. It will inevitably bring competition to the existing healthcare providers in this specialism, including the GP practices, physios, and, of course, HSC and MSG in the provision of secondary care. I would hope that this means that we rise to the challenge by improving our services; I am aware through the Re-Profiling work being done by HSC that you hope to grow private practice to bolster HSC's income, so it is important that we don't lose market share.

with musculoskeletal complaints, the GCRA notes that the timing of the MSG's request to begin offering these services broadly coincided with and was therefore likely to have been a direct response to Mr Vhadra's establishment of First Contact Health. Thus, on 5 October 2018, less than a month after he had proposed that MSG introduce a "scan at first appointment service" as First Contact Health was doing and less than a week after First Contact Health opened,[34] Dr [A] wrote to Mr Vhadra expressing the MSG's concern that Mr Vhadra's involvement with First Contact Health breached the terms of clause 35 of the MSG General Partnership Agreement (the **General Partnership Agreement**; the **GPA**). This was followed by a letter from the MSG's advocates to Mr Vhadra on 16 November 2018, which required Mr Vhadra to provide the MSG with a written undertaking that he had ceased all involvement with First Contact Health (see paragraph 2.49 of the Decision). The MSG also reserved its right to seek damages of £1000 per week from Mr Vhadra in respect of losses the MSG had incurred as a result of Mr Vhadra's work with First Contact Health.[35] It is reasonable to infer, and the GCRA infers, that the intention of communicating with Mr Vhadra in these terms would have been to exert pressure on him to stop with his work through First Contact Health and so to restrict competition with the MSG.

4.14 Third, the evidence demonstrates that the MSG knew that the duration of the non-compete clause it was attempting to enforce against Mr Vhadra (five years) was longer than was objectively necessary and was therefore anti-competitive.

(a) On 16 November 2018, the MSG's lawyers wrote to Mr Vhadra, requiring him to provide the MSG with an undertaking that he would not be involved in any way with First Contact Health until after 12 October 2022 – a <u>five year</u> period of restriction. However, in an e-mail sent to a colleague and copied to the MSG Management Board on 17 November 2018, Dr [A] explained that in terms of lost private income and morale of the MSG's new orthopaedic surgeons a period of <u>one year</u> (from that date) would be sufficient to allow the MSG's new orthopaedic surgeons to establish local reputations.[36] When discussing

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With this in mind, I am writing to ask you to give consideration to the provision of a timely radiology service for private patients. I understand the staffing challenges you have faced in radiology over the last year but it seems there is light at the end of that particular tunnel now and hopefully some normality can be restored.

In particular, we think a one week turn-around for private patients requiring imaging for their diagnosis and treatment plan would be an adequate minimal response to the 'scan at the initial appointment' (not feasible at the PEH in the short-term) being offered in the MSK clinic [First Contact Health]." Letter from Dr [A] to Mark de Garis of 11 September 2018. [MSG1/6249-6251].

34 First Contact Health was opened in October 2018.

35 Letter from the MSG's advocates to Mr Vhadra on 16 November 2018 [MSG2/1034 – 1035].

36 Email of 17 November 2018 from Dr [A] to [✂], [Ms B, MSG Chief Executive] and MSG Management Board. [MSG1/6335]. A key part of the MSG's justification for having imposed the non-compete clauses

the rationale for ultimately accepting a shorter period of restriction (until 1 January 2020) on Mr Vhadra, Dr [A] noted[37] that "it is enough for our Orthopods to establish local reputations". Thus, by attempting to enforce a five year period of restriction under these circumstances, the MSG by its conduct acted to bring about (and so intended) a prevention of competition.[38] Because the MSG knew that the period of five years went beyond what was justifiable, it intended to prevent competition.[39]

(b) This conclusion is reinforced by the reasons given by Dr [A] for insisting on the five year restriction. In his e-mail of 17 November 2018, he noted that the reason for the MSG's insistence upon the five year restriction was that "[n]ot working in competition upon retirement is what Ranjan promised to do, so he's being given a chance to honor [sic] that".[40] In other words, the MSG was seeking to enforce the five year restriction not because that period was objectively justifiable but simply because the MSG and Mr Vhadra had agreed that they would not compete with each other following Mr Vhadra's retirement. The GCRA notes, in that regard, that part of the MSG's rationale for ultimately settling for a shorter period of restriction was that "FCH [the vehicle through which Mr Vhadra was competing with the MSG] as a business is not going to go away regardless"[41] – i.e. that the MSG had by that point accepted that it was not possible to prevent all competition between the MSG and Mr Vhadra, operating through FCH.

(c) In its 22 July Representations,[42] the MSG argues that it is incorrect to conclude that the MSG knew that the duration of the non-compete clause it was attempting to enforce against Mr Vhadra (five years) was longer than was required to protect any legitimate interest of the MSG and was therefore anti-competitive. This is because, according to the MSG, the GCRA has overlooked the "actual real-world effect"[43] of the ancillary restriction of 2 years and 3 months ultimately agreed upon between the MSG and Mr Vhadra and should have focussed upon whether the MSG knew that that shorter period of restriction was anti-competitive. The fact that the MSG ultimately agreed to a shorter

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was that incoming consultants needed a period of time to build up a local reputation without having to face competition from the outgoing consultant.

37 Email of 12 February 2019 from Dr [A] to the MSG Management Board. [MSG1/6507 – 6508]

38 See footnote 1 above for the definition of "prevention".

39 Ibid.

40 Email of 17 November 2018 from Dr [A] to [✂], [Ms B, MSG Chief Executive] and MSG Management Board. [MSG1/6335]

41 Email of 12 February 2019 from Dr [A] to the MSG Management Board. [MSG1/6507 – 6508]

42 22 July Representations, paragraphs 29 – 30 [MSG5/9-10]

43 22 July Representations, paragraph 30 [MSG5/9-10]

period of restriction does not demonstrate that prior to that point it did not intend to enforce the five year restriction. Rather, it is reasonable to infer (and the GCRA so infers) that the evidence outlined in this paragraph 4.14 indicates that the MSG did intend to enforce the five year restriction against Mr Vhadra but ultimately abandoned its attempt to do so because:

(i) Mr Vhadra had initiated legal proceedings against the MSG, and

(ii) Mr Vhadra had complained to the GCRA about the MSG's attempts to enforce the five year restriction, and

(iii) The MSG had recognised that "FCH as a business is not going to go away regardless" and continuing to insist on the five year restriction would not prevent Mr Vhadra from competing with the MSG.

4.15 Accordingly, the GCRA finds that the infringement in this case was committed intentionally. Whether or not the MSG realised that its conduct was in breach of competition law is not relevant.[44]

Efforts made to rectify the contravention and prevent a recurrence[45]

4.16 The GCRA notes that there is no longer a post-term non-compete restriction in place between the MSG and Mr Vhadra. The period of restriction to which Mr Vhadra was subject in respect of his work with First Contact Health was reduced from 5 years to 2 years and approximately 3 months pursuant to the Settlement Agreement, enabling Mr Vhadra to recommence that work on 1 January 2020. Mr Vhadra remained subject to the five year restriction other than in respect of his work with First Contact Health. That period expired either on 12 October 2022 or on 31 March 2023 (see Decision, paragraph 2.60).

4.17 The GCRA does not consider that the reduction of the term of the non-compete clause identified above amounts to an effort to rectify the Contravention or, to the extent that it does, that this is a factor that indicates that no financial penalty should be imposed. First, the GCRA notes that Mr Vhadra remained subject to the five year restriction save in respect of his work with First Contact Health. Second, in respect of his work with First Contact Health, the GCRA notes that that restriction was reduced by the MSG only after pressure had been brought to bear on the MSG to do so, in that Mr Vhadra had complained about the MSG's conduct to the GCRA and

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44 Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124; *Ping Europe Ltd v CMA* [2020] EWCA Civ 13, para 117. Case T-460/13 *Ranbaxy* v. *Commission* EU:T:2016:453 , paragraph 306.

45 2012 Ordinance, section 34(1)(d). [MSG4/758]

GCRA case officers had indicated to the MSG's legal representatives that an investigation might be opened in respect of that conduct[46] and Mr Vhadra had commenced legal proceedings against the MSG. Under these circumstances, the GCRA does not consider that the conduct of the MSG in reducing the period of restriction indicates that no financial penalty should be imposed.

4.18 In its 22 July 2024 Representations, the MSG argues that:

> "[g]iven that the GCRA makes no findings in respect of the MSG's present covenants (two years/18 months), it follows that, at least for the purposes of the current decisions, the GCRA is obliged to accept that the MSG entirely remediated the position of its own volition. Suitable mitigation should be given for that fact."[47]

4.19 The GCRA does not understand the relevance of this point. The Decision and this Penalty Statement address only the five year restrictions to which Mr Vhadra was subject. Mr Vhadra was not subject to either the eighteen-month or the two year restriction referenced by the MSG in the above representation.[48] It follows that the fact that the MSG reduced the periods of restriction imposed on its other consultants cannot amount to remediation of the contravention in respect of Mr Vhadra. In that regard, the GCRA notes that since it has not reached any decision in relation to those shorter periods of restriction, the question of whether they infringe competition law remains open at the present time and so no conclusion on whether these amount to a rectification of the contravention can yet be drawn.

4.20 The GCRA therefore concludes that there have been no efforts by the MSG to rectify the contravention and prevent a recurrence, or, to the extent that there have, that these are factors indicating that it would not be appropriate to impose a financial penalty on the MSG.

Potential financial consequences[49]

4.21 The GCRA considers that the MSG is well resourced and can afford to pay a financial penalty and that imposing a financial penalty is unlikely to have an adverse impact on third parties. The MSG has not produced evidence to suggest otherwise in its representations to the GCRA. The appropriate level of the penalty will be considered below.

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46 Email from Sarah Livestro (GCRA) to Ranjan Vhadra, copied to Mourants (MSG's advocates) of 11 February 2019 [MSG2/1093]

47 22 July Representations, paragraph 22 [MSG5/7].

48 Although it has made no finding as to whether the period of restriction to which Mr Vhadra was ultimately subject contravened the 2012 Ordinance, the GCRA notes that that period of restriction exceeded the two years referenced by the MSG, which further demonstrates the irrelevance of this argument.

49 2012 Ordinance, section 34(1)(e). [MSG4/758]

Penalties imposed by the Authority in other cases[50]

4.22 There has been one penalty imposed by the Authority in another case involving a contravention by object of section 5(1) of the 2012 Ordinance. In that case, it was considered appropriate to impose a financial penalty in respect of a restriction of competition by object.[51] Therefore to impose a penalty in this case is not inconsistent with any relevant previous decision of the GCRA.

Conclusion

4.23 For the above reasons, the GCRA considers it appropriate to impose a financial penalty on the MSG. These factors are considered at the first stage of the assessment only for the purpose of determining whether to impose a financial penalty at all. The factors are considered for a second time below in determining the appropriate level of the penalty.

B. The calculation of the penalty

4.24 In calculating the appropriate level of the penalty, the GCRA will take into consideration the factors set out in section 34(1) of the 2012 Ordinance, using the three step approach set out in its Guideline 12, section 3 as a framework for its analysis.

Step 1 – Basic penalty – relevant factors

4.25 In determining the amount of the basic penalty, and within the framework of the 2012 Turnover Regulations, the GCRA will take into account:

(a) The seriousness of the contravention[52], together with whether or not the contravention was intentional, negligent or reckless.[53]

(b) The penalties imposed by the Authority in other cases.[54]

Step 1 – Basic penalty – framework

4.26 As a general rule, the basic penalty will be set at a level of up to 30% of the value of sales in the affected sector.[55]

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50 2012 Ordinance, section 34(1)(f). [MSG4/758]

51 On appeal: Case Civil 2397: *BTC Sure Group and others v. The Guernsey Competition and Regulatory Authority*

52 2012 Ordinance, section 34(1)(b). [MSG4/758]

53 2012 Ordinance, section 34(1)(c). [MSG4/758]

54 2012 Ordinance, section 34(1)(f). [MSG4/758]

55 GCRA Guideline 12, section 3 (page 11). [MSG4/481]

4.27 As regards penalties imposed in previous cases and given the relative lack of previous decisions in Guernsey, the Authority considers it relevant to have regard not only to its own decision making practice but also to that of the European Commission and the CMA.

4.28 In its decision making practice, the Commission has applied a "gravity percentage" in the region of 15%[56] - 19%[57] for cartel infringements of EU competition law.

4.29 The CMA Penalty Guidance states:

> "The CMA will generally use a starting point between 21 and 30% of relevant turnover for the most serious types of infringement, that is, those which the CMA considers are most likely by their very nature to harm competition most. In relation to infringements of the Chapter I prohibition, this includes cartel activities, such as price-fixing and market sharing and other, non-cartel object infringements which are inherently likely to cause harm to competition. […] In relation to infringements of the Chapter I prohibition, a starting point between 10 and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect."[58]

Step 1 – Basic penalty – assessment

4.30 For the reasons set out above,[59] the GCRA considers the contravention to have been carried out **intentionally**. As such, the culpability of the MSG is greater than would be the case for a reckless or negligent infringement and this fact should be reflected in the level at which the starting percentage is set.

4.31 Regarding **seriousness**, as the GCRA has already observed, the Non-Compete Restrictions are restrictions of competition by object. As such, they are serious restrictions[60] likely by their very nature to harm competition. However, the GCRA does not consider that they amount to "price-fixing or market-sharing agreements [or] other cartel activities" and, as such, should attract a lower "gravity percentage" than that generally applied to cartel behaviour.

4.32 The GCRA therefore considers that the appropriate starting point in this case is 10% of relevant turnover, which is at bottom of the appropriate range for object infringements.[61]

4.33 As to **duration**, the GCRA has found that the conduct lasted between 12 October 2017 and 12 October 2022 save that by clause 2 of the Settlement Agreement, the five year period of

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56 See, for example, Case C-590/18 P *Fujikura* v. *Commission* ECLI:EU:C:2019:1135, paragraph 15.

57 See, for example, Case C-607/18 P *NKT Verwaltungs GmbH and NKT* v. *Commission* ECLI:EU:C:2020:385, paragraph 18.

58 CMA Penalty Guidance, Paragraph 2.5. [MSG4/835]

59 See paragraphs 4.10 - 4.15.

60 2012 Ordinance, section 34(1)(b). [MSG4/758]

61 See paragraph 4.29.

restriction in respect of Mr Vhadra's involvement with First Contact Health ended on 21 March 2019.[62]

4.34 Regulation 1 of the 2012 Turnover Regulations provides that:

> "In order to calculate the applicable penalty for the purposes of section 34(3) of the Ordinance, the applicable turnover must be calculated in accordance with regulations 2 to 7 and then multiplied by the period of the contravention, by reference to whole or part years, however, such multiplicand cannot exceed the number 3."

4.35 The GCRA considers that it would be possible to apply a multiplier of 3 in this case, since Mr Vhadra remained subject to the five year period of restriction in respect of all work except that he carried out through First Contact Health. The GCRA has determined, however, that to do so in this case would be disproportionate because there is no evidence that Mr Vhadra actually sought to provide medical services other than through First Contact Health. The GCRA will therefore take as the multiplier the length of time that the five year restriction was in place in respect of Mr Vhadra's work with First Contact Health, which was a period of 1 year, 18 weeks and 4 days (1.36 years).

4.36 The duration for which the five year restriction was in place for the purposes of this penalty calculation is therefore 1 year, 18 weeks and 4 days, therefore the multiplier is 1.36.

4.37 **Turnover** is calculated on the basis set out in the **2012 Turnover Regulations**.[63]

4.38 The applicable turnover of an undertaking is the turnover for the business year preceding the date on which the decision of the GCRA is taken or, if figures are not available for that business year, the immediately preceding it.[64] In this case, the relevant business year is 2023.

4.39 The applicable turnover of an undertaking is limited to the amounts derived by it from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, value added tax and other taxes directly related to turnover.[65]

4.40 In this case, the restriction imposed on Mr Vhadra by the MSG was not limited to a prohibition on practising in the specialism which he had practised at the MSG. Rather, it was broadly drafted and prevented him from being involved in the "Practice of Medical Practitioner in the

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62 Decision, paragraph 4.3.
63 The Competition (Calculation of Turnover) (Guernsey) Regulations, 2012. [MSG4/691-698]
64 2012 Turnover Regulations, regulation 2. [MSG4/692]
65 2012 Turnover Regulations, regulation 3. [MSG4/692]

Bailiwick of Guernsey" in any capacity.[66] Thus, services to which the Non-Compete Restrictions (and thus the infringement) relate are the provision of private medical services in Guernsey.[67] The MSG's turnover in respect of those services in 2023 was £6,767,150.[68]

4.41 The basic penalty is therefore as follows:

0.1 x 6,767,150 x 1.36	£920,332.40

Step 2 – Adjustments to the basic penalty

4.42 In this step, the basic penalty may be increased or decreased having regard to the factors set out in section 34(1)(a), (c) and (d) of the 2012 Ordinance (which constitute aggravating and mitigating factors).

66 See paragraph 2.25 of the Decision, which sets out the terms of clause 35 in full.

67 "If the share of any Partner in the Practice shall be purchased by the remaining Partners under any clause of this Agreement the outgoing Partner shall not at any time within five years thereafter **directly or indirectly exercise or carry on or be concerned or interested in exercising or carrying on upon his own account or in partnership with or as assistant to any other person the Practice of Medical Practitioner in the Bailiwick of Guernsey** except at the request of the Medical Specialist Group. If the outgoing Partner shall so practice or assist any other person in practicing within the limits aforesaid or in any way violate this provision he/she shall pay to the remaining Partners the sum of £1,000 per week or any part thereof during which he shall violate the provision as ascertained and liquidated damages and not by way of penalty. It is specifically acknowledged that this sum is a genuine pre-estimate of damage and is not fixed in terrorem. The aforesaid sum may be adjusted from time to time by the Partners to take into account inflation occurring since the date of this Agreement. The aforesaid is without prejudice to any other legal or equitable remedy which may be available to the remaining Partners for the purpose of restraining such violation." General Partnership Agreement, clause 35 [[MSG1/3135-3158]], emphasis added.

68 By taking this turnover figure as its starting point, the GCRA has already offered a substantial discount compared with the figure it could have used under Regulation 3 of the Turnover Regulations, which point to a total turnover figure.

A. Aggravating factors

4.43 In this case, as described above at paragraphs 4.2 - 4.7, the GCRA finds that, MSG did not bring the Contravention to the attention of the GCRA but rather took active steps to obstruct the investigation of the Contravention by the GCRA by:

(a) Requiring Mr Vhadra to write to the GCRA to withdraw the complaint that he had made (see paragraph 4.4 above).

(b) Requiring Mr Vhadra to copy the MSG's lawyers to all correspondence between Mr Vhadra and the GCRA (see paragraphs 4.5 - 4.6 above).

4.44 The GCRA considers that the conduct of MSG in relation to the GCRA's investigation, which was aimed at causing the investigation to be discontinued and at obtaining copies of correspondence entered into between Mr Vhadra/Mr Watson and the GCRA, is an aggravating factor.[69] As explained at paragraph 2.63 of the Decision, the purpose of the GCRA's competition law enforcement functions is to protect competition in the market (thereby ensuring that consumers ultimately have access to high quality goods and services at competitive prices) and not to protect individual competitors within that market. The fact that two businesses have settled a legal dispute privately between them is not determinative of the question of whether the agreement or practice that gave rise to their dispute was anti-competitive and thus amenable to enforcement action by the GCRA. As such, there was no basis on which MSG could legitimately have considered that its settlement of a private dispute in relation to the non-compete clauses could or should have had any impact on the continuation by the GCRA of its investigation. The MSG's conduct in this regard, therefore, had no legitimate basis and was aimed at obstructing the GCRA's investigation.

4.45 In its 22 July 2024 Representations, the MSG argues that:

"[g]iven that the GCRA makes no findings in respect of the MSG's present covenants (two years/18 months), it follows that, at least for the purposes of the current decisions, the GCRA

[69] Attempting to obstruct an investigation is a factor regarded by the Commission as aggravating (Commission's Fining Guideline, paragraph 2, second bullet). Similarly, the CMA considers "persistent and repeated unreasonable behaviour that delays the CMA's enforcement action" as aggravating (CMA Penalty Guidance, paragraph 2.16, first bullet). In *Greek Ferries*, OJ 1999 L109/24, [1995] 5 CMLR 47, the Commission imposed an uplift of 10% in respect of behaviour (a proposal by a cartel instigator to restructure that cartel after the Commission had begun its investigation, so as to make it more difficult to detect) it considered to be obstructive and therefore aggravating (paragraphs 160 – 161).

is obliged to accept that the MSG entirely remediated the position of its own volition. Suitable mitigation should be given for that fact."[70]

4.46 For the reasons given at paragraphs 4.18 - 4.20, the GCRA does not accept that the MSG should be given credit in mitigation in respect of matters (the two year and 18 month non-compete restrictions) that are not the subject of these proposed decisions.

4.47 In consequence, the GCRA will impose a modest uplift in relation to aggravating factors of 5%, taking the total penalty to £966,349.02 at this stage.

Conclusion

4.48 The penalty at the end of step 2 is therefore £966,349.02.

Step 3 – Legal Maximum

4.49 In this step, the penalty is reduced if the maximum penalty of 10% of worldwide turnover up to a maximum period of three years is exceeded.[71]

4.50 MSG's total turnover in 2023 was £29,477,520. The proposed total penalty of £966,349.02 does not exceed 10% of MSG's total turnover over the relevant period.

Step back

4.51 Finally, the GCRA has considered the potential financial consequences of imposing a penalty (section 34(1)(e)) and whether, when taken in the round, the proposed penalty of £966,349.02 is reasonable and proportionate.

4.52 It is axiomatic that any financial penalty will have some adverse financial consequences on an undertaking on which it is imposed. The GCRA has previously indicated that it would be guided on this point by the Commission's Fining Guidelines,[72] which indicate that in order for any reduction under this provision to be justifiable in terms of the financial consequences for MSG, it would be necessary to demonstrate that the proposed financial penalty would jeopardise the economic viability of the MSG.[73] There is no evidence before the GCRA that demonstrates that this is the case. Similarly, the GCRA has not been presented with evidence that the proposed

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70 22 July Representations, paragraph 22 [MSG5/7].

71 2012 Ordinance, section 34(3).

72 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C210/2, 1.9.2006

73 Commission's Fining Guidelines, paragraph 35. [MSG4/848]

financial penalty will have an adverse financial impact on third parties. The GCRA is therefore not minded to make any reduction to the proposed financial penalty on the basis of s.34(1)(e).

4.53 However, the GCRA considers that it should also assess whether the proposed financial penalty of £966,349.02 is reasonable and proportionate[74] on the facts of this case when considered in the round.

4.54 In that regard, the GCRA takes into account that it had previously decided to impose a total financial penalty of £1,532,590[75] on the MSG in respect of:

(a) The post-term non-compete restrictions of five years that it had imposed on all consultants who were party to the General Partnership Agreement; and

(b) The post-term non-compete restrictions of two years that it had imposed on all consultants who were party to the LLP Agreement; and

(c) The post-term non-compete restrictions of eighteen months that it had imposed on its associates.

4.55 By contrast, the present proposed penalty of £966,349.02 relates only to a single five year restriction on one consultant. If that amount is not reduced, the penalty for this single restriction would amount to almost two-thirds of the total penalty the GCRA had previously imposed in respect of the multiple restrictions identified above. The GCRA concludes that that outcome would, when taken in the round, be disproportionate.

4.56 The GCRA considers that the degree to which the above figure should be reduced on the grounds of proportionality requires the exercise of discretion by the GCRA, it being a matter of evaluation and judgment not lending itself to an "elaborate explanation".[76] In the exercise of its discretion, it proposes to reduce the proposed penalty in this case to £96,635 (i.e. a reduction of 90%), which it considers appropriately to take account of the fact that these decisions relate to a single infringement only.

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74 The GCRA is under a duty to act proportionately when exercising its powers under the 2012 Ordinance (see s.46(2)(d), 2012 Ordinance).

75 Penalty Statement issued by the GCRA on 16 December 2021.

76 *FP McCann* v. *Competition and Markets Authority* [2020] CAT 28, paragraph 312.

5. CONCLUSION

5.1 In consequence of the infringements identified in the Decision, the GCRA imposes a financial penalty under section 31(4) of the Competition (Guernsey) Ordinance 2012 on MSG of £96,635.

6. SIGNATURE

Signed: 

Michael Byrne, Chief Executive

for and on behalf of the Guernsey Competition and Regulatory Authority

Annex 1 – Particulars of the right of appeal conferred by section 46 of the 2012 Ordinance

Section 46 - Appeals against decisions of Authority or [Committee]

(1) An undertaking aggrieved by a decision of the relevant authority -

(a) to refuse an application by the undertaking for -

(i) an exemption under section 3, 4, 6, 9, 10, 14 or 15, or

(ii) an approval of a merger or acquisition under section 13(1),

(b) to revoke the undertaking's exemption or approval,

(c) to impose, vary or rescind any condition in respect of the undertaking's exemption or approval,

(d) to refuse to extend the period of validity of the undertaking's exemption or approval under section 18(2),

(e) following an investigation conducted under section 22, that the undertaking -

(i) has contravened section 1(1), 5(1) or 13(1),

(ii) has contravened any condition of an exemption or approval,

(iii) has contravened a direction of the Authority under section 21, 31, 32, 33 or 35, or

(iv) intends to contravene section 13(1),

(f) to refuse the undertaking consent for the provision of copies of documents under section 26 instead of originals or to impose, vary or rescind any term or condition in respect of any such consent,

(g) to give the undertaking a direction under section 27(1),

(h) to refuse the undertaking access to documents or to allow the undertaking to copy documents under section 28(2) or to impose, vary or rescind any term or condition in respect of any such access or copying,

(i) to exercise any relevant power in relation to the undertaking at the request of an overseas competition authority under section 30(1),

(j) to impose a financial penalty on the undertaking under section 31(4), 32(4) or 33(7),

(k) under section 34(8), to vary -

(i) the amount of a financial penalty, or

(ii) the number, amounts and times of the instalments by which the financial penalty is to be paid,

(l) to give the undertaking a direction under section 21, 31, 32, 33 or 35,

(m) to vary or rescind any direction so given,

(n) to omit, pursuant to the provisions of section 45(2), any matter from a statement of reasons given to the undertaking,

(o) to serve a notice on the undertaking under section 23(1), (2) or (3),

(p) which is a decision of such description as [the Committee] may by regulation prescribe for the purposes of this section,

may appeal to the Royal Court against the decision.

(2) The grounds of an appeal under this section are that -

(a) the decision was ultra vires or there was some other error of law,

(b) the decision was unreasonable,

(c) the decision was made in bad faith,

(d) there was a lack of proportionality, or

(e) there was a material error as to the facts or as to the procedure.

(3) An appeal under this section shall be instituted -

(a) within a period of 28 days immediately following the date of the notice of the relevant authority's decision, and

(b) by summons served on [the President] of [the Committee] or, as the case may be, the Authority stating the grounds and material facts on which the appellant relies.

(4) The relevant authority may, where an appeal under this section has been instituted, apply to the Royal Court, by summons served on the appellant, for an order that the appeal shall be dismissed for want of prosecution; and on hearing the application the Royal Court may -

(a) dismiss the appeal or dismiss the application (in either case on such terms and conditions as the Royal Court may direct), or

(b) make such other order as the Royal Court considers just.

The provisions of this subsection are without prejudice to the inherent powers of the Royal Court or to the provisions of rule 52 of the Royal Court Civil Rules, 2007[f].

(5) On an appeal under this section the Royal Court may -

(a) set the decision of the relevant authority aside and, if the Royal Court considers it appropriate to do so, remit the matter to the relevant authority with such directions as the Royal Court thinks fit, or

(b) confirm the decision, in whole or in part.

(6) On an appeal under this section against a decision described in subsection (1)(c), (l) or (m) the Royal Court may, on the application of the appellant, and on such terms and conditions as the Royal Court thinks just, suspend or modify the operation of the condition or direction in question, or the variation or rescission thereof, pending the determination of the appeal.

(7) For the purposes of determining an appeal under this section against a decision described in subsection (1)(n) to omit, pursuant to the provisions of section 45(2), any matter from a statement of reasons, the Royal Court may examine the information the disclosure of which the relevant authority considers would be prejudicial, and unless the Royal Court orders otherwise the information shall not, pending the determination of the appeal, be disclosed to the appellant or any person representing him.

(8) An appeal from a decision of the Royal Court made on an appeal under this section lies, with leave of the Royal Court or Court of Appeal, to the Court of Appeal on a question of law.

(9) Section 21 of the Court of Appeal (Guernsey) Law, 1961[g] ("powers of a single judge") applies to the powers of the Court of Appeal to give leave to appeal under subsection (8) as it applies to the powers of the Court of Appeal to give leave to appeal under Part II of that Law.

(10) This section does not confer a right of appeal on a question which has been determined by the Royal Court on an application by the Authority for directions, or for a determination of a question of fact, law or procedure, under section 8 of the Guernsey Competition and Regulatory Authority Ordinance, 2012.