Case C1637G

The Medical Specialist Group

Decision

Guernsey Competition & Regulatory Authority

29 November 2024

Guernsey Competition and Regulatory Authority
Suite 4, 1st Floor, La Plaiderie Chambers
La Plaiderie, St Peter Port
Guernsey, GY1 1WG
Tel: +44 (0)1481 711120
Web: www.gcra.gg

1. INTRODUCTION

Having considered the representations made by the MSG in response to the GCRA's proposed decision of 22 May 2024 and the revised proposed decision of 2 October 2024, the GCRA is issuing this decision finding that the MSG has infringed the prohibition imposed by section 5(1) of the Competition (Guernsey) Ordinance, 2012 (prohibition on agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services) by entering into an agreement with another undertaking (a former MSG partner, Mr Ranjan Vhadra) that imposed a post-term non-compete restriction of five years' duration on Mr Vhadra. The GCRA has concluded that this amounts to a restriction of competition by object.

In consequence of this infringement, the GCRA will impose a financial penalty on MSG under section 31(4) of the 2012 Ordinance. The GCRA will issue a separate penalty notice in this regard.

A. Synopsis

1.1 The Guernsey Competition and Regulatory Authority (**GCRA**) was established by 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 On 16 September 2021, the GCRA adopted a Decision, finding that the Medical Specialist Group LLP (the **MSG**) had infringed the prohibition imposed by section 5(1) of the 2012 Ordinance (**First Infringement Decision**).[1]

1.3 By a summons dated 13 October 2021, which was served on the GCRA by e-mail on that date, pursuant to section 46 of the 2012 Ordinance the MSG appealed against the First Infringement Decision (the **MSG Appeal**).[2]

1.4 The Royal Court heard the MSG Appeal on 30 March 2022 – 1 April 2022.

1.5 By a judgment handed down on 10 March 2023 (the **Judgment**), the Royal Court allowed the MSG Appeal.

1.6 In the Judgment, the Royal Court confirmed that the MSG Appeal was confined to the issue of whether "there could properly be a finding that clause 81.1 of the MSG's LLP Agreement (the

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1 Final Decision, 16 September 2021. [MSG4/3-73]

2 MSG summons dated 13 October 2021. [MSG4/133-157]

LLP Agreement) and the corresponding provisions found in the associates' contracts [of two years and eighteen months respectively] contravene section 5(1) of the 2012 Ordinance. This is the appeal pursuant to section 46(1)(e)."[3]

1.7 The Royal Court further stated it did not need to rule on the correctness of the First Infringement Decision's finding that the five-year non-compete restriction contained in clause 35 of the MSG's General Partnership Agreement (the **General Partnership Agreement**; the **GPA**)[4] contravened s.5(1) of the 2012 Ordinance, because the MSG had already "moved away from that length of clause".[5]

1.8 The Royal Court remitted the matter to the GCRA, stating that "as the regulator [….] I am persuaded that the GCRA should not be precluded from having the chance to issue a fresh Statement of Objections if it is minded to do so."[6]

1.9 The GCRA sought leave to appeal against the Judgment, first from the Royal Court and subsequently from a single judge of the Court of Appeal. The single judge of the Court of Appeal refused the GCRA's application for leave (**Court of Appeal Judgment**), finding that the Royal Court had exercised its discretion reasonably in not making a finding in respect of clause 35 of the GPA because, *inter alia*, the Royal Court had remitted the matter to the GCRA.[7] Thus, the GCRA was able to make a fresh finding on the issue of clause 35 of the GPA, should it decide to do so.

1.10 Given that the effect of the remittal by the Royal Court was to remit to the GCRA both the matters that were the subject of the MSG Appeal (the two year non-compete restrictions contained in the LLP Agreement and the corresponding eighteen-month non-compete clauses contained in the associates' contracts) and the matters that were not the subject of that appeal (the five year non-compete restrictions contained in the GPA), the GCRA decided first to reconsider those matters that were not the subject of the appeal by the MSG.

1.11 Having reconsidered those matters, in May 2024 the GCRA issued a proposed decision to the MSG, provisionally finding that the MSG had infringed Guernsey competition law. On 22 July 2024, the MSG made written representations to the GCRA on that proposed decision.

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3 Judgment, paragraph 125. [MSG4/212]
4 General Partnership Agreement. [MSG1/3135-3158]
5 Judgment, paragraph 173. [MSG4/226]
6 Judgment, paragraph 170. [MSG4/226]
7 Court of Appeal Judgment. [MSG4/230-241]

1.12 The GCRA considered the written representations made by the MSG and amended the proposed decision issued to the MSG in May 2024 to take account of those representations. On 2 Oct, it reissued the proposed decision making a fresh finding of infringement of Guernsey competition law on the part of the MSG. On 31 October 2024, the MSG made written representations on the GCRA on that proposed decision.

1.13 Having taken the written submissions of the MSG into account, the GCRA has decided that the 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) by entering into an agreement with another undertaking (a former MSG partner, Mr Ranjan Vhadra) that imposed a post-term non-compete restriction of five years' duration on Mr Vhadra. The GCRA has concluded that this amounted to a restriction of competition by object.

1.14 An undertaking aggrieved by this Decision may exercise the right of appeal conferred by section 46 of the 2012 Ordinance, particulars of which are set out in Annex 1 of this Decision.

1.15 In consequence of the infringement identified in this document (the **Decision**), the GCRA will impose a financial penalty on MSG under section 31(4) of the 2012 Ordinance. The GCRA will issue a separate penalty notice in this regard.

B. Confidentiality

1.16 A copy of this Decision will be published on the GCRA's website (www.gcra.gg).

1.17 Before publishing the Decision, the GCRA will redact confidential information from it.

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

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

1.20 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 whose disclosure may significantly harm the legitimate interests of the undertaking to which it relates; or

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

2. FACTUAL BACKGROUND

A. Healthcare services in Guernsey

Primary healthcare

2.1 Primary healthcare in Guernsey[8] includes GP services, A&E visits, ambulance use, dentistry, and physiotherapy (where requested by a GP).[9] Such services must be paid for by the patient, either directly or through healthcare insurance schemes. The full cost of primary healthcare is covered for those in receipt of specific benefits. The cost of primary healthcare for other patients is also partially subsidised by the States of Guernsey.

Secondary healthcare

2.2 As set out in a 1990 Policy Letter entitled "Health Care in Guernsey – Medical Services", prior to 1 January 1992 there were a number of private medical practices in Guernsey, each one comprising both general practitioners and medical specialists.[10] Although at that time some GPs continued to combine general practice with a specialist interest and all GPs had the right to admit, treat and discharge patients at the Princess Elizabeth Hospital (**PEH**), it had become increasingly common for doctors to become either GPs or specialists.[11] Where a patient required hospital treatment, this would generally be provided by a specialist attached to the medical practice where the patient was registered. Thus, a patient's medical care was generally wholly provided within that patient's Group Practice, with the patient being responsible for meeting the cost of their own care.[12]

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8 The GCRA published a Review of the Primary Healthcare Market in Guernsey in 2015 (Document No: CICRA 15/04), which focused on the provision of out of hours and A&E services, from which this summary is taken in part and to which reference may be made for further detail. In its Written Representations, MSG also noted that there are many providers of private primary health services in Guernsey, such as "physiotherapists, counsellors, podiatrists [and] dentists." (Written Representations of MSG, paragraph 3.11 [MSG4/661]).

9 Patients may also access physiotherapy services directly on a non-referral basis. In addition to the Guernsey Therapy Group Ltd, which is the largest provider of both non-referred and referred physiotherapy services (and in addition holds the contract with the States of Guernsey for the provision of hospital inpatient physiotherapy service), there are a number of other providers of both non-referred and referred physiotherapy services, one of which is First Contact Health, as set out in further detail in this Decision. The MSG also provides physiotherapy services [MSG4/548-551].

10 Billet d'Etat XIX of 1990, policy letter entitled "Health Care in Guernsey – Medical Services" (the **Policy Letter**), Appendix A. [MSG4/592-654]

11 Policy Letter, Appendix A, paragraph 7, 8. [MSG4/618-619]

12 Policy Letter, Appendix A, paragraph 8. [MSG4/619]

2.3 By the time that the Policy Letter was put before the States, the States had for a number of years been considering the "feasibility of alternative methods of providing general practice and specialist care" and how that the costs of that care should be met.[13] It noted that "the long-standing organisation of medical services, whereby general and specialist doctors work alongside each other, [was] no longer feasible due to increasing sophistication of medical technology".[14]

2.4 The Policy Letter noted that close working links that had been developed between the medical profession and the States Board of Health as a result of the establishment of the Medical Advisory Committee. The need for this close working between the medical professionals and the States to ensure that the healthcare needs of the Island were met and that expenditure was controlled and spent to best advantage of patients was also acknowledged.[15]

2.5 The Policy Letter set out the perceived disadvantages of a change to a National Health Service (**NHS**) type system in Guernsey, including the loss of continuity of care to patients which arose through the existing close links between local doctors, whether working as specialists or in general practice, the likely increase in costs to the States and the undesirability of the introduction of a "two-tier" system of healthcare under which those who could afford to pay privately would be treated by a consultant whereas those that could not would be treated by a junior doctor.[16]

2.6 The difficulties of recruiting and retaining well-qualified and able doctors, particularly in a climate of uncertainty as to the future structure of the provision of medical services in Guernsey, was also highlighted as an area of concern.[17]

2.7 To address these issues, the Policy Letter recommended that alongside the general practitioner service, specialists should no longer be members of Group Practices but instead should form a specialist partnership. This would increase efficiency, whilst at the same time making it possible for specialists both to work closely together and to maintain their links with

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13 Policy Letter, paragraph 3. As detailed in the Policy Letter, the Board of Health had submitted a report to the States in November 1989, which itself was an update of a report submitted in 1983. Paragraph 8 of the Policy Letter sets out that the States had, as far back as 1951, requested a report on "the institution of Health Services Scheme" and that many reports on various aspects of healthcare had been produced for the States since that time. [MSG4/594]

14 Policy Letter, paragraph 58, subparagraph 2. [MSG4/513-615]

15 Policy Letter, paragraph 38. [MSG4/607]

16 Policy Letter, paragraph 30. [MSG4/604-605]

17 Policy Letter, paragraph 35. [MSG4/604-605]

their general practitioner colleagues. It would also provide more job satisfaction to doctors with specialist qualifications and experience.[18]

2.8 The recommendations of the Board of Health, as set out in the Policy Letter, were approved and became Resolutions.

2.9 As a result, some secondary care and specialist services are now made available by the States of Guernsey through the Office of the Committee *for* Health & Social Care (the **Committee**).

2.10 The Committee provides secondary healthcare services in a number of ways:

(a) It works in partnership with private entities, the principal of which is the MSG, which was formed on 1 January 1992 in response to the approval of the recommendations set out in the Policy Letter.[19] The relationship between the MSG and the States of Guernsey is governed by the terms of a Secondary Healthcare Contract (**SHC**), the first iteration of which became effective on 1 January 1996.[20] The current SHC was signed on 3 March 2017 and commenced on 1 January 2018.[21]

(b) It oversees the employment of some PEH doctors and consultants directly by the States of Guernsey. These include doctors in the Emergency Department and consultants in certain areas of specialism, including Psychiatry, Medical Imaging (Radiology), Pathology and Public Health.[22]

(c) It funds the provision of visiting and off-Island specialist services (such as neurology, haematology, rheumatology, microbiology and renal) provided by UK-based hospitals.[23]

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18 Policy Letter, paragraphs 42 – 44. [MSG4/608]

19 Other providers with which the Committee works include the Guernsey Therapy Group (**GTG**), and other visiting or off-Island providers who offer specialisms not provided by the MSG. [MSG4/493-495]

20 "[t]he first contract with the MSG went live on 1st January 1996. This contract has undergone a number of revisions since this date and the current contract commenced on the 1st January 2018." [MSG4/493-495]

21 Contract between the States of Guernsey and MSG dated 3 March 2017 (SHC). [MSG/1465-1616] The GCRA understands that at the time at which it was entered into, the SHC was worth approximately £[✂] (SHC, Schedule 3, clause 1.1.) [MSG/1465-1616] The basis on which the fees payable to the MSG are calculated is set out in Schedule 3 to the SHC. It is a rolling contract which may be terminated on either side on the provision of [✂] years' notice (SHC, section 14, clause 54.1). Earlier termination either of certain Service Areas or of the entire contract is possible under certain circumstances (for example in the case of [✂]; SHC section 4, clause 19.13).

22 Under the heading "States Employed Doctors" these areas of specialism are not covered by the MSG. [MSG4/488-489]

23 Off-Island specialist services. [MSG4/493-495]

2.11 Residents of Guernsey (together with residents of Alderney, Herm and Jethou) are registered for the payment of Social Security contributions and are thereby covered by a Specialist Health Insurance Scheme (**SHIS**) which entitles them to receive this specialist care and treatment free at the point of delivery.

B. The MSG

Structure and Services

2.12 The MSG is a partnership of medical and surgical consultants. It has since 1 January 2018 been a Limited Liability Partnership. Prior to that date it was a General Partnership. In this Decision, the term **MSG** is used to refer to the General Partnership and to the Limited Liability Partnership as appropriate.

2.13 The MSG employs associates (who are also all consultants)[24] and other medical support staff (such as surgical assistants, nurses and audiologists).[25] As the MSG does not employ junior doctors,[26] its services are wholly consultant led and delivered.

2.14 According to its website,[27] there are currently 50 consultants working at the MSG. Information supplied by the MSG[28] indicates that it offers secondary medical services within the following specialisms:

(a) Orthopaedics;
(b) Anaesthetics;
(c) General surgery;
(d) Obstetrics and gynaecology;
(e) Oncology;
(f) Ophthalmology;
(g) Urology;
(h) Cardiology;
(i) Ear, Nose and Throat;
(j) Geriatrics;
(k) Gastroenterology;
(l) Paediatrics;
(m) Diabetics;
(n) Neurology;
(o) Respiratory
(p) Nephrology;
(q) General Medicine.

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24 Response of MSG to GCRA information request of 19 September 2019, question 3. [MSG3/128]
25 2020 Annual Report – recruitment. [MSG4/538-540]
26 2022 Key Performance Indicators. [MSG4/504-525]
27 https://www.msg.gg/clinical-team/, accessed on 2 October 2024.
28 [MSG5/13]

2.15 As explained above, pursuant to the SHC, the MSG supplies "free at the point of delivery" secondary medical services to patients covered by the SHIS.[29] In this Decision, these services are referred to as **Contract Services** and the patients who access them are referred to as **Contract Patients**.

2.16 As part of the Contract Services, the MSG is required to provide emergency care for patients requiring emergency specialist treatment. As a result, MSG consultants are expected to provide both emergency care provision and elective care provision, with consultants from each specialism on-call to deal with any such emergencies 24 hours a day, 365 days a year.[30]

2.17 MSG consultants also offer private elective secondary healthcare services (**Private Services**).[31] Privately funded patients (**Private Patients**) may pay for such services either directly or through healthcare insurance schemes. The Private Services are advertised on the States of Guernsey's website.[32]

2.18 On its website, the MSG explains that patients opting for private elective secondary healthcare (**Private Services**) can receive "extra benefits" (i.e., benefits not available to Contract Patients). Those "extra benefits" include flexible operating dates and appointment times, access to treatments and services not available to Contract Patients (such as new technologies or drugs that are not funded by the States Contract and access to clinics that are available to private patients only), consultant selection (rather than, as for Contract Patients, being required to see the consultant to whom their case is allocated), and private hospital rooms.[33]

2.19 A list of Private Patient initial consultation charges is made available on the MSG's website.[34]

2.20 More recently, the MSG has begun to offer private physiotherapy and other primary musculoskeletal services. The MSG's website includes a list of physiotherapy services, which are provided by the MSG's Advanced Specialist Physiotherapist.[35]

2.21 The MSG's most recent publicly available annual report notes that the MSG's income comes primarily from the SHC (90%), with the balance from private earnings. It notes that due to

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29 Becoming a Patient. [MSG4/569-572]

30 Oral representations of MSG. [MSG3/151]

31 Private Patient Information. [MSG4/541-547] Where hospital based care is required, those services must be provided at the PEH which is run by the States of Guernsey.

32 Secondary Health Care. MSG4/493-495]

33 Private Patient Information. [MSG4/541-547]

34 Private Patient Information. [MSG4/541-547]

35 Physiotherapy Service. [MSG4/548-551]

Covid-19 restrictions, there was an impact on the services that the MSG was able to provide during the lockdown period, which in turn impacted its income.[36]

The terms of the Partnership Agreements

2.22 The terms on which the MSG General Partnership operated between 24 December 2002 and 31 December 2017 are set out in the Practice Agreement of the Medical Specialist Group, as amended (the **General Partnership Agreement**; the **GPA**).[37]

2.23 According to the terms of the General Partnership Agreement:

(a) The partners agreed to practise together in partnership (the **Practice**) as medical consultants within their own specialties in the Bailiwick of Guernsey.[38] The partners agreed to employ themselves diligently in the work of the Practice.[39]

(b) MSG's expenses were to be paid out of the receipts of the Practice, with any expenses which exceeded receipts to be borne by the partners in equal shares.[40]

(c) The earnings of MSG partners were to be shared with each other according to equal shares,[41] including earnings from medical appointments and other work carried out in the Bailiwick.[42]

(d) Fees arising from private work, however, were to be distributed so that the partner conducting the private work retained the option to retain the profits from that work.[43] Until 7 April 2011, partners had the option either to retain 100% of their private practice earnings while also meeting 100% of their private practice overheads, or to retain 60% of their private practice earnings with the remaining 40% going to MSG. From 7 April 2011, only the latter option was permitted. Partners were not permitted to undertake private practice work which compromised or interfered with work carried out under the SHC.[44]

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36 Organisation Chart 2020 Report. [MSG4/556-561]
37 GPA. [MSG1/3135-3158]
38 GPA, clause 1. [MSG1/3136]
39 GPA, clause 20. [MSG1/3139]
40 GPA, clauses 4 and 17. [MSG1/3136 & 3139]
41 GPA, clauses 4 and 12. [MSG1/3136 & 3137]
42 GPA, clause 14. [MSG1/3138]
43 GPA, clause 13 and Appendix II. [MSG1/3138 & 3154]
44 GPA, Appendix II. [MSG1/3154]

(e) Each partner was obliged to join and maintain professional indemnity insurance with a Medical Defence Union approved by the Practice.[45]

(f) Partners could be required to retire in the event of a lengthy sickness[46] or because of the reorganisation of medical provision in the Bailiwick of Guernsey[47] or could retire voluntarily from the practice.[48] However, until 2010 it was not possible for a group of partners in the same specialism to retire at the same time.[49]

(g) Partners could also be removed from the partnership in the event of gross or persistent breach of the General Partnership Agreement or in the event of being removed from the medical register, and only by an 85% vote of the partnership.[50]

(h) Disputes under the General Partnership Agreement were to be referred to an arbitrator.[51]

2.24 Partners joining MSG "bought in" to the partnership.[52]

2.25 Clause 35 of the Partnership Agreement provided in full:

> "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."

2.26 The term **Medical Practitioner** is defined as "any person whose name is inscribed on the Medical Register maintained by the General Medical Council".[53]

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45 GPA, clause 22. [MSG1/3140]
46 GPA, clause 26. [MSG1/3143]
47 GPA, clause 36. [MSG1/3147]
48 GPA, clause 28. [MSG1/3145]
49 GPA, clause 28(ii). [MSG1/3145]
50 GPA, clause 21. [MSG1/3141]
51 GPA, clause 38. [MSG1/3148]
52 Transcript of Ranjan Vhadra interview, [22:27] – [26:08] [MSG2/1236-1315].

2.27 The effect of clause 35 is to prohibit outgoing partners bound by it from being in any way involved in work as a Medical Practitioner for a period of five years following the purchase of their shares by the other partners (which could itself occur up to three months after the outgoing partner's departure). The prohibition is expressed in broad terms: the outgoing partner is not permitted to "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". Thus, the prohibition extends to work not necessarily undertaken in the direct capacity of Medical Practitioner.

2.28 The MSG converted into a limited liability partnership on 1 January 2018. An "LLP Committee" was formed by the MSG to examine the terms of the General Partnership Agreement and consider transition to an LLP and the considerations of the LLP Committee are recorded in a document entitled **LLP Committee Output Document**.[54] The LLP Committee Output Document recorded that MSG wished to retain a restriction on the ability of departing consultants to practise, but noted that that restriction currently set out in clause 35 of the GPA needed to be updated following legal advice on what was reasonable and enforceable.[55]

2.29 The terms on which the new limited liability partnership operates are set out in the Limited Liability Partnership Agreement (**LLP Agreement**).[56]

2.30 The LLP Agreement provides that:

(a) Each Partner's private practice within the Bailiwick of Guernsey must be conducted entirely through the LLP, which collects that income on the Partner's behalf.[57]

(b) [✂]% of the private practice income is remitted by the LLP to the Partner and the remaining [✂]% is retained by MSG.[58]

2.31 The LLP Agreement also contains a non-compete clause. Clause 81.1 provides as follows:

> "Save with the prior written approval of the Management Board, each Partner covenants with the LLP that he will not during the period of 24 months after his Retirement Date, either alone or in partnership with or as partner, member, officer,

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53 GPA, clause 41.1. [MSG1/3149]
54 See LLP Committee Output Document (7 July 2017). [MSG1/1617-1640]
55 See LLP Committee Output Document (7 July 2017), p. 23. [MSG1/1639]
56 LLP Agreement. [MSG1a/1-96]
57 LLP Agreement, clause 43.1. [MSG1a/31]
58 LLP Agreement, clause 43.2. [MSG1a/31-32]

director, employee, consultant or agent of any other person or Undertaking or otherwise howsoever, directly or indirectly:

(a) provide, supervise, manage, or have any other involvement with the provision of, medical services in the Bailiwick of Guernsey in the same specialism as that which he practised as a Partner, save as an employee of the States of Guernsey[.]"

2.32 Accordingly, the non-compete provision in the new LLP Agreement is different from that in the old General Partnership Agreement, in particular in that:

(a) It lasts for two years from the actual retirement date, not five years from the purchase of shares[59] (which may be three months after the actual retirement date).

(b) It continues to include very broad language ("either alone or in partnership with or as partner, member, officer, director, employee, consultant or agent of any other person or Undertaking or otherwise howsoever, directly or indirectly") and uses the language of "involvement with the provision of medical services" rather than referring to the status of Medical Practitioner.

(c) It is narrower in that it limits the restriction to the specialism in which the partner in question worked while at MSG.

(d) It provides an exemption for work as an employee of the States of Guernsey.

2.33 Clause 82.2 of the new LLP Agreement includes a liquidated damages clause in the amount of £1,000 per week in respect of breaches of clause 81.1(a) (said to represent a genuine and reasonable pre-estimate of loss). In addition, clause 79.5 permits the MSG partnership to withhold from an outgoing partner who is in breach of any provision of the LLP Agreement a reasonable estimate of the cost, damage or loss suffered as a result of the breach.

The terms of the associates' contracts

2.34 The MSG also employs associates. Like partners, associates are consultant doctors or surgeons. It appears that the purpose of employing associates is to allow them to work for a short period of time in Guernsey and for the MSG before deciding whether or not they wish to become partners in the MSG. It is the case, however, that there is no requirement for an MSG

[59] See clause 35 of the GPA. [MSG1/3147]

associate to become a partner; the MSG has a number of consultants who have chosen to remain as associates.[60]

2.35 The MSG has provided a selection of individual associates' contracts (those entered into by the current partners before they joined the partnership) which indicate that they have also contained a series of non-compete clauses over the years. The duration of each of these non-compete clauses is eighteen months.

C. The complaint to the GCRA

Background

2.36 The existence of the non-compete clauses between the MSG and its former consultants was brought to the attention of the GCRA through a complaint by a consultant who had previously been an MSG partner, Mr Ranjan Vhadra.

2.37 Mr Vhadra trained as an orthopaedic surgeon in the UK. He joined MSG as an associate on 1 December 2004, having moved to Guernsey on 17 November 2004.[61] He executed the General Partnership Agreement on 1 January 2006.[62] Mr Vhadra worked as a specialist orthopaedic surgeon for the MSG for nearly 13 years.

2.38 On 30 September 2017, Mr Vhadra retired from the MSG and on 10 October 2017 signed a Retirement and Settlement Agreement (the **Retirement and Settlement Agreement**).[63] Pursuant to this Agreement:

(a) Mr Vhadra retired from the MSG.[64]

(b) The MSG agreed to pay a purchase price of [✂] for Mr Vhadra's share in the partnership, with the final payment to be made within 7 days of 30 June 2018.[65]

(c) An "Ongoing Obligations" clause 6 provided: "For the avoidance of doubt, save as amended by this Agreement, those terms of the Partnership Agreement that apply on

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60 MSG response to GCRA Information Request of 19 September 2019, response to question 3: "there is no obligation for an associate to become a partner; MSG have some long-term consultants who choose to stay as associates". [MSG3/128]

61 Interview with Mr Vhadra on 24 June 2019 [00:37:22.860] [MSG2/1236-1315]; Contract of Employment between MSG and Ranjan Vhadra (24 August 2004). [MSG1/1123-1128]

62 General Partnership Agreement on 1 January 2006. [MSG1/6322-6323]

63 12 October 2017, Retirement and Settlement Agreement. [MSG1/9191-9200]

64 Retirement and Settlement Agreement, clause 2. [MSG1/9193]

65 Retirement and Settlement Agreement, clause 3.1. [MSG1/9193]

and after a partner's retirement shall continue to apply to Mr Vhadra including, without limitation, clauses 22 and 24 (Partner's duties) *and clause 35 (Restriction on future practice) of the Partnership Agreement*, and even if the MSG converts to a limited liability partnership or other successor body in due course." (Emphasis added).

(d) Further, Mr Vhadra again acknowledged and accepted that "any obligations owed by him to the MSG shall continue to bind and to apply to him even if the MSG converts to a limited liability partnership or other successor body" after his retirement, and any successor body of the MSG would be entitled to enforce the terms of the Retirement and Settlement Agreement as if it were party to it.[66]

(e) The parties submitted to the jurisdiction of the courts of Guernsey.[67]

2.39 As set out above at paragraph 2.25, clause 35 of the General Partnership Agreement prevents a departing consultant from directly or indirectly carrying on or being involved in the practice of medical practitioner in the Bailiwick of Guernsey for a period of five years after leaving the MSG.

2.40 In October 2018, one year after his resignation from the MSG and 18 months after he had stopped practising as an orthopaedic surgeon, Mr Vhadra opened a new business called First Contact Health[68] of which he is the co-founder, CEO and shareholder.

2.41 First Contact Health operates from premises in St Peter Port. Patients can approach First Contact Health directly or be referred by a GP. They can pay directly or through private health insurance. According to information on First Contact Health's website, it is recognised by the majority of private medical insurance companies.[69]

2.42 According to its website,[70] First Contact Health presently offers a range of services related to musculoskeletal health including physiotherapy, sports therapy and injury prevention services, including:

66 Retirement and Settlement Agreement, clause 9.3. [MSG1/9195]
67 Retirement and Settlement Agreement, clause 16. [MSG1/9197]
68 First Contact Health is operated through two legal entities, First Contact Health (Guernsey) Ltd and First Contact Ltd, referred to collectively in this Statement as "First Contact Health".
69 First Contact Price List [MSG4/58].
70 See generally, First Contact Health website. [MSG4/577-588]

(a) Diagnostics using First Contact Health's own MRI, CT and ultrasound scanners.[71] First Contact Health can also carry out walking analysis and VO_2 Max (oxygen consumption) testing and preventative health screening.[72]

(b) Treatments, including physiotherapy/sports therapy, sports massage, injection therapy, rheumatology diagnostic services, orthotics services, an Alter G Treadmill, which allows a patient to exercise at reduced body weight, and women's health services.[73] First Contact Health also works with specialist UK based Orthopaedic Surgeons who hold regular clinics at First Contact Health's premises in Guernsey.

(c) Injury prevention, including sports massages and musculoskeletal "MOTs".[74]

(d) A shop which sells products to assist with musculoskeletal health, which can be recommended by a Specialist Clinician at a Diagnostic Appointment.[75]

2.43 A full price list is available on First Contact Health's website.[76]

2.44 According to its website, First Contact Health's team currently includes:

(a) Mr Vhadra, the CEO and co-founder, who is currently advertised as the Medical Director, able to offer consultations, injections and ultrasound scans.

(b) Nine physiotherapists, including a physiotherapist/sonographer and an advanced physiotherapy practitioner (lower limb).

(c) Two MRI/CT specialist radiographers.

(d) A sports therapist, an image practitioner, and a practice manager.

2.45 As noted, First Contact Health offers appointments with specialist Orthopaedic Surgeons who First Contact Health procures to visit Guernsey. These specialist Orthopaedic Surgeons are said to have skill sets not offered by any of the partners at the MSG.[77]

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71 The GCRA understands that this is the only MRI scanner in Guernsey outside the PEH. (Response of First Contact Health to the GCRA's information request of 26 March 2019 [MSG2/2]).

72 First Contact Health scanning service. [MSG4/581-583]

73 First Contact Health treatment. [MSG4/577-580]

74 First Contact Health injury prevention. [MSG4/588-590]

75 First Contact Health products. [MSG4/585-587]

76 First Contact Health price list. [MSG4/584]

77 For example, a specialism in spinal complaints - see Summons dated 1 February 2019, para 15. [MSG1/6427]

2.46 First Contact Health also has a Chairman, Peter Watson, who is the co-founder of First Contact Health with Mr Vhadra.

The MSG's attempt to enforce the non-compete clauses against Mr Vhadra

2.47 On 5 October 2018, less than a week after Mr Vhadra had opened First Contact Health, Dr [A] wrote to Mr Vhadra in his capacity as Chairman of the MSG. By this letter, the MSG noted Mr Vhadra's involvement with First Contact Health, referenced the non-compete restriction set out in clause 35 of the General Partnership Agreement (and recalled that, under the terms of the Settlement Agreement, that clause continued to apply to Mr Vhadra), expressed concern that Mr Vhadra might be in breach of that clause and invited Mr Vhadra to explain how his involvement with First Contact Health complied with it. It also informed Mr Vhadra that the MSG reserved all its rights to hold Mr Vhadra liable for any losses suffered in respect of any past or future breaches of the non-compete restriction.[78]

2.48 Mr Vhadra responded to the MSG's letter stating that he believed that clause 35 was void and unenforceable because it constituted an unreasonable restraint of trade. He objected to the wide scope of the clause, which prevented him from working even in an area not in direct competition with the MSG, the long length of time during which it applied, and to the £1,000 liquidated damages stipulation, which he considered to be a penalty clause. [79]

2.49 The MSG next wrote to Mr Vhadra through their lawyers, Mourant Ozannes, on 16 November 2018.[80] The MSG pointed out that, at that time, First Contact Health's website advertised Mr Vhadra's availability to discuss "surgical options and advice on complex conditions", and that Mr Vhadra continued to be registered on the Medical Register maintained by the General Medical Council. Given that Mr Vhadra had made no request from the MSG to permit him to "provide consultant services in relation to First Contact Health", the MSG considered that he was in breach of his obligations under clause 35 of the General Partnership Agreement. The £1,000 per week liquidated damages and availability of other remedies were noted. The MSG required Mr Vhadra to provide a written undertaking by 26 November 2018 stating:

(a) That he had "permanently ceased any and all involvement with First Contact Health, including, but not limited to, any form of consultancy, treatment, advice and/or guidance".

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78 Letter from Dr [A] dated 5 October 2018. [MSG1/6275]

79 Letter from Mr Vhadra, 21 November 2018. [MSG1/6339]

80 Letter from Mourant Ozannes, 16 November 2018. [MSG1/6333 – 6334]

(b) That his name and contact details had been permanently removed from First Contact Health's website.

(c) That any materials anywhere identifying him as providing services to First Contact Health had been removed from the clinic (and indeed anywhere else) and would be destroyed, and

(d) That he would not be involved in First Contact Health, "or indeed any similar enterprise/venture/business", until after 12 October 2022.

2.50 Failing the provision of such an undertaking, the MSG stated that it would seek injunctive relief (and the costs of bringing any such proceedings) and reserved its right to seek damages.

2.51 An internal e-mail from Dr [A] to an MSG colleague, copied to the MSG Management Board, commented on the 16 November 2018 letter as follows:

"I think that this is just the first step [..]. In terms of value (lost private income) and morale of new orthopedic [sic] surgeons *the best outcome would be for Ranjan to stand down for a year; this would allow them to establish local reputations*. Not working in competition upon retirement is what Ranjan promised to do, so he's being given a chance to honor that.

The compensation payment side of things only comes in to [sic] play if he continues to work, despite our request for him to honor his agreement with us, and we wish to continue to pursue him.

So the first stage is to await his response to 'seriously' being requested to stop, with our threat of further action if he doesn't. This might include frank discussions of the details of why he had to leave MSG in a legal, public hearing; which I think he will want to avoid?

Kind regards

[Dr A][81]

(Emphasis added).

2.52 By a reply dated 23 November 2018, Mr Vhadra did not provide the written undertaking sought by the MSG but rather stated that he was taking legal advice and requested an extension of time to respond to the MSG's letter.[82]

2.53 On 1 December 2018, Mr Vhadra complained to the GCRA by way of an e-mail entitled "Non compete".[83]

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

82 Hand-written letter from Ranjan Vhadra to Mourant Ozannes, dated 23 November 2018. [MSG/6341]

2.54 On 5 December 2018, the MSG issued an Arbitration Notice by which it requested the President of the Chartered Institute of Arbitrators to appoint an arbitrator to resolve the dispute. Mr Vhadra contested the jurisdiction of the arbitrator, contending that the Courts of Guernsey were the suitable place for resolution of a competition law dispute.

2.55 On 1 February 2019, Mr Vhadra commenced proceedings in the Guernsey Royal Court in the name of himself, Mr Watson, and the two First Contact Health companies (First Contact Health (Guernsey) Limited and First Contact Limited) (**Plaintiffs**) against the MSG.[84] By their Cause, dated 1 February 2019 and served on the MSG on the same day, the Plaintiffs sought the sum of £566,666 together with costs and declaratory relief. Paragraph 18 of the Cause noted that Mr Vhadra had complained about the MSG's behaviour to the GCRA and the GCRA would be entitled to participate in the proceedings. Paragraph 25 of the Cause alleged that the MSG had breached its statutory duty not to abuse a dominant position under Section 1(1) of 2012 Ordinance, and its duty not to engage in anti-competitive practices under Section 5(1) of the 2012 Ordinance. The Plaintiffs sought declarations to the effect that clause 35 was thereby void; alternatively that Mr Vhadra's involvement in First Contact Health did not breach it; and that the liquidated damages clause was in any event an unenforceable penalty clause.[85] They also sought an award of "general or punitive or exemplary damages", calculated by reference to the MSG's turnover.[86]

2.56 On 12 February 2019, Dr [A] wrote to the MSG Board Members regarding settlement negotiations that the MSG had been pursuing with the Plaintiffs and, specifically, the possibility of restricting Mr Vhadra from working as a Medical Practitioner in Guernsey until 1 January 2020. He stated as follows:

> "I think [Mr Vhadra] not working for the rest of the year [until 1 January 2020] is a significant gain (it bridges the gap of contention between the September and March dates, when respectively he left the Partnership and was paid until) and I think it is enough for our Orthopods to establish local reputations. FCH as a business is not going to go away, regardless." [87] (Emphasis added.)

2.57 On 21 March 2019, the MSG and Mr Vhadra (together with Mr Watson, First Contact Health (Guernsey) Ltd and First Contact Ltd) concluded a settlement agreement (the **Settlement**

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83 Email from Ranjan Vhadra to Sarah Livestro (1 December 2018). [MSG2/999]
84 Summons dated 1 February 2019. [MSG1/6423 – 6434]
85 Summons, paragraph 26.1 – 26.7. [MSG1/6423 – 6434]
86 Summons, paragraph 26.8. [MSG1/6423 – 6434]
87 Email of 12 February 2019 from Dr [A] to the MSG Management Board. [MSG1/6507 – 6508]

Agreement).[88] The Settlement Agreement settled both the arbitration and the court proceedings. Pursuant to the Settlement Agreement:

(a) Mr Vhadra agreed that he would not "work as, or hold himself out to be or in any way portray himself as a Medical Practitioner in the Bailiwick of Guernsey until 1 January 2020" save for a two-week handover period and save that he was entitled to describe himself as a Consultant Orthopaedic Surgeon in the past tense. He was thereby prohibited from having any further contact with patients in his capacity as a Medical Practitioner (though he was permitted to do so in his capacity as CEO and for limited tasks including taking MRI scans, writing expert medical reports for personal injury cases, and supervising staff for compliance purposes).[89]

(b) Mr Vhadra was in consequence required to remove all references to himself as a Medical Practitioner on First Contact Health materials and not to book any appointments with patients until after 1 January 2020.[90]

(c) Mr Vhadra and Mr Watson were required to "withdraw the Complaint to [the GCRA] in writing" in agreed language set out in Schedule 1 to the Settlement Agreement. Further, they were required 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]".[91]

(d) The arbitration proceedings initiated by the MSG and the court proceedings initiated by Mr Vhadra and the other Plaintiffs were both withdrawn and settled.[92]

(e) Save that the MSG agreed that Mr Vhadra could continue in his role at First Contact Health on the agreed terms, it was again expressly stated that Mr Vhadra still owed ongoing obligations under clause 35 of the General Partnership Agreement in relation to any other enterprises.[93]

(f) Mr Vhadra acknowledged and accepted that "any obligations owed by him to the MSG shall continue to bind and to apply to him even if the MSG converts to a limited liability partnership or other successor body" after his retirement, and any successor body of

88 Settlement Agreement (12 March 2019). [MSG1/6563-6571]
89 Settlement Agreement, clauses 2.2 and 2.3. [MSG1/6566-6567]
90 Settlement Agreement, clauses 2.4 and 2.5. [MSG1/6566-6567]
91 Settlement Agreement, clause 2.6. [MSG1/6567]
92 Settlement Agreement, clauses 2.7, 2.8 and 5 [MSG1/6567-6568]
93 Settlement Agreement, clause 3. [MSG1/6567]

the MSG would be entitled to enforce the terms of the Retirement and Settlement Agreement as if it were party to it.[94]

(g) The parties also undertook to keep the terms of the Retirement and Settlement Agreement confidential and not to make or permit to be made any derogatory remarks about one another. In addition, Mr Vhadra, Mr Watson and First Contact agreed that they would not make or cause to be made any statement or comment to any member of the general public, the press or other media (including any form of social media) concerning the GCRA complaint without the prior consent of the MSG.[95]

(h) The parties submitted to the jurisdiction of the courts of Guernsey.[96]

2.58 On 27 March 2019, Mr Vhadra emailed the GCRA in the terms agreed pursuant to the Settlement Agreement, purporting to withdraw his complaint to the GCRA:

> "Dear Madam
> Please accept this email as confirmation that I, along with First Contact Health (Guernsey) Limited, First Contact Limited and Peter Watson, do not wish to pursue the complaint notified to you on 17 December 2018 against Medical Specialist Group LLP (MSG) and relating to the terms of my engagement as an orthopaedic surgeon with MSG.
> Regards
> Ranjan Vhadra
> cc. Peter Watson"[97]

2.59 As of 1 January 2020, under the terms of the Settlement Agreement, Mr Vhadra was free to operate as he wished in relation to his work at First Contact Health.

2.60 As set out in the Settlement Agreement, the five-year period of restriction on Mr Vhadra remained in place in respect of all types of work described in Clause 35 of the GPA other than that undertaken by him at First Contact.[98] That period expired either on 12 October 2022 (5 years from the date on which Mr Vhadra retired from the MSG and his shares were purchased in accordance with clause 35 of the General Partnership Agreement) or 31 March 2023 (5 years from the end of the period in respect of which the MSG paid Mr Vhadra a sum of £[✂]

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94 Settlement Agreement, clause 5.3. [MSG1/6568]

95 Save in relation to senior employees (for MSG), immediate family (for Mr Vhadra and Mr Watson), professional advisors, and as required by law or by any regulatory or supervisory body or tax authorities, Settlement Agreement, clause 11. [MSG1/6569]

96 Settlement Agreement, clause 13. [MSG1/6569]

97 27 March 2019, Mr Vhadra emailed the GCRA. [MSG4/ 591].

98 See paragraph 2.57(e) above.

in lieu of profit distribution).[99] The GCRA notes that the MSG had taken the view that the latter date (31 March 2023) should be the date on which the restriction on Mr Vhadra ended. An e-mail from the then Chief Executive of the MSG to Mr Watson, sent on behalf of Dr [A], stated as follows:

"[Mr Vhadra left] the Partnership on 30th September 2017, and was paid £[✂] in lieu of profit distributions for the period up to 31st March 2018; so any 2 or 5 year period should in our view start from 1st April 2018."[100]

D. The GCRA's investigation

2.61 At Board meeting 213B dated 18 March 2019 the GCRA Board determined pursuant to section 22(1) of the 2012 Ordinance, that there were reasonable grounds to suspect that there were non-compete agreements in effect between the MSG and its former consultants and that these contravened Section 5(1) and Section 1(1) of the 2012 Ordinance. The scope of the potential contravention therefore included but went beyond the specific arrangements between Mr Vhadra and MSG to encompass its arrangements with its consultants more generally. The GCRA Board further determined that investigation of this matter fell within the GCRA's administrative priorities. Accordingly, it decided to open an investigation into these suspected contraventions.

2.62 On 18 and 22 March 2019, the GCRA wrote to Mr Vhadra, Mr Watson, First Contact Health and the MSG to notify them of its decision to open its investigation into whether the MSG had contravened s.5(1) and s.1(1) of the Ordinance.[101] On 22 March 2019, the GCRA wrote to the same parties requesting information relevant to its investigation pursuant to s.23 of the 2012 Ordinance.[102]

2.63 As set out above, the MSG and Mr Vhadra (together with Mr Watson and First Contact Health) had been engaged in private litigation in relation the matters covered by the GCRA's investigation. That private litigation was settled between the parties on 21 March 2019[103] by the Settlement Agreement.[104] The GCRA does not consider that the settlement of such private litigation is relevant to its investigation (unless the terms on which the litigation is

99 The letter sent from the MSG's advocates to Mr Vhadra on 16 November 2018 states that the restriction applied until 12 October 2022 (see paragraph 2.49 above). [MSG1/6333 – 6334]

100 Email from [Ms B, MSG Chief Executive] (sent on behalf of Dr [A]) to Peter Watson dated 2 January 2019 [MSG1/6499].

101 GCRA letters to MSG and Mr Vhadra (18 March 2019) [MSG2/1104-1107].

102 GCRA 22 March 2019 letters [MSG2/1110-1129].

103 See MSG file note (12 February 2019) [MSG1/6535-6536].

104 Settlement Agreement (12 March 2019) [MSG1/6563-6571].

settled themselves potentially infringe the 2012 Ordinance). This is because 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.

2.64 The GCRA further notes that the terms of any agreement between parties settling private litigation may itself infringe competition law. In that regard, it notes that the Settlement Agreement imposed non-compete obligations on Mr Vhadra[105] and, to that extent, it fell within the scope of application of the investigation. It also required Mr Vhadra to withdraw his complaint to the GCRA[106] and purported to restrict the ability of Messrs Vhadra and Watson to communicate with the GCRA.[107]

2.65 On 25 and 26 March 2019, the GCRA wrote to Mr Vhadra and Mr Watson (respectively) to make a further information request arising from the Settlement Agreement and to invite them to attend separate interviews.[108]

2.66 On 2 April 2019, the GCRA wrote to the MSG to make a further information request arising from the Settlement Agreement.[109]

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105 Mr Vhadra agreed that he would not "work as, or hold himself out to be or in any way portray himself as a Medical Practitioner in the Bailiwick of Guernsey until 1 January 2020" save for a two-week handover period and save that he was entitled to describe himself as a Consultant Orthopaedic Surgeon in the past tense (clause 2.2). He was thereby prohibited from having any further contact with patients in his capacity as a Medical Practitioner (though he was permitted to do so in his capacity as CEO and for limited tasks including taking MRI scans, writing expert medical reports for personal injury cases, and supervising staff for compliance purposes) (clauses 2.2 and 2.3). Mr Vhadra was in consequence required to remove all references to himself as a Medical Practitioner on First Contact Health materials (clause 2.4) and not to book any appointments with patients until after 1 January 2020. Save in that MSG agreed that Mr Vhadra could continue in his role at First Contact Health on the agreed terms, it was again expressly stated that Mr Vhadra still owed ongoing obligations under clause 35 of the General Partnership Agreement in relation to any other enterprises (clause 3).

106 By clause 2.6 of the Settlement Agreement, Mr Vhadra and Mr Watson were required to "withdraw the Complaint to CICRA in writing" in agreed language set out in Schedule 1 to the Settlement Agreement. [MSG1/6567].

107 By clause 2.6 of the Settlement Agreement, Messrs Vhadra and Watson were required 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 CICRA". [MSG1/6567]

108 GCRA letter to Mr Vhadra (25 March 2019)]; [MSG2/1180-1196]; GCRA letter to Mr Watson (26 March 2019) [MSG2/1197-1212].

109 GCRA letter to MSG (2 April 2019) [MSG2/1216-1231].

2.67 On 24 April 2019, the GCRA wrote to Mr Vhadra and Mr Watson to direct them that the fact of and their responses to the 25 and 26 March 2019 requests should be kept confidential from the MSG, notwithstanding clause 2.6 of the Settlement Agreement, in order to avoid prejudicing the investigation.[110]

2.68 On 24 June 2019, the GCRA interviewed Mr Vhadra and Mr Watson.

2.69 On 19 September 2019, the GCRA sent a request for further information to the MSG.[111]

2.70 On 8 October 2019, the GCRA sent a request for information to the States of Guernsey.[112]

2.71 On 10 July 2020, pursuant to section 43(2) of the 2012 Ordinance the GCRA sent to the MSG a notice in writing[113] (**First Statement of Objections**; **First SO**), setting out its preliminary conclusions in respect of the above matters.[114]

2.72 The MSG provided the GCRA with both written and oral representations in respect of the matters set out in the First Statement of Objections[115] (**Written Representations**; **Oral Representations**). The GCRA prepared a transcript of MSG's oral representations (the **Transcript**), which were provided to the MSG on 30 October 2020. The MSG was invited to review the Transcript and to make any amendments, clarifications or additions to it by 6 November 2020.[116] That deadline was extended to 13 November 2020 at the request of the MSG's advocates.[117]

2.73 On 13 November 2020, the MSG's advocates sent to the GCRA an amended version of the Transcript. They also stated that the MSG did not at that time wish to add anything further to its written submissions.[118]

2.74 In December 2020, and in order to ascertain whether the representations made by the MSG were supported by evidence, the GCRA sent further information requests to:

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

111 GCRA letter to MSG (19 September 2019). [MSG2/1359-1410]

112 GCRA letter to 8 October 2019 - first information request to States of Guernsey. [MSG2/1452-1467]

113 Pursuant to section 43(2) of the 2012 Ordinance.

114 Email from Sarah Livestro to Stuart Le Maitre of 10 July 2020, attaching First Statement of Objections. [MSG3/24-82]

115 Email from Elliot Aron to Sarah Livestro of 11 September 2020, attaching MSG's Written Representations. [MSG4/656-689] Oral representations were made on 20 October 2020.

116 Email from Sarah Livestro to Elaine Gray and Elliot Aron of 30 October 2020. [MSG3/16737]

117 Email from Elaine Gray to Sarah Livestro of 30 October 2020. [MSG3/16903 -16905].

118 Email from Elliot Aron to Sarah Livestro of 13 November 2020, attaching marked up transcript and covering letter [MSG3/16829]; [MSG3/16906-16907].

(a) The MSG;[119]

(b) Healthcare Group (GPs);[120]

(c) Island Health (GPs);[121]

(d) The Queens Road Medical Practice (GPs);[122]

(e) The Committee *for* Health and Social Care (States of Guernsey).[123]

2.75 Final responses to, and clarifications in respect of, those information requests were received in early July 2021.[124]

2.76 On 30 July 2021, the GCRA provided the responses of Healthcare Group, Island Health and The Queens Road Medical Practice to the MSG. The MSG was invited to provide any comments that it wished to make on those responses to the GCRA by 4 p.m. on Friday 27 August 2021.[125]

2.77 On 27 August 2021, the MSG responded as follows:

> "The MSG has carefully reviewed the primary healthcare providers' answers. Each of the relevant practices has provided detailed, clear and considered responses. The information provided does, of course, stand on its own. The MSG does not wish to supplant, misrepresent or add an unintended gloss to the views of other experienced medical practitioners; and accordingly it is not considered helpful for the MSG to add its own commentary to those answers."[126]

2.78 On 16 September 2021, the GCRA adopted the First Infringement Decision.[127]

2.79 By a summons dated 13 October 2021, the MSG lodged the MSG Appeal.[128]

2.80 The Royal Court heard the MSG Appeal on 30 March 2022 – 1 April 2022.

2.81 By a judgment handed down on 10 March 2023, the Royal Court allowed the MSG Appeal and, pursuant to section 46(5)(a) of the 2012 Ordinance, remitted the matter to the GCRA without directions.[129]

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119 By email on 11 December 2020. [MSG3/284 - 310]
120 By email on 9 December 2020. [MSG3/14866-14884]
121 By email on 9 December 2020. [MSG3/14885-14903]
122 By email on 9 December 2020. [MSG3/14904-14922]
123 By email on 9 December 2020 [MSG3/16704-16722].
124 Letter and email to GCRA from Carey Olsen, 2 July 2021. [MSG3/16724-16736]
125 Letter from Michael Byrne to Carey Olsen, 30 July 2021. [MSG3/16805-16825]
126 Letter from Carey Olsen to Michael Byrne/Sarah Livestro, 27 August 2021. [MSG3/16826-16828]
127 Final Decision, 16 September 2021. [MSG4/3-73]
128 First Statement of Objections - 10 July 2020. [MSG4/74-132]

2.82 On 22 May 2024 the GCRA issued a fresh proposed finding of infringement of Guernsey competition law on the part of the MSG, in respect of which the MSG made written representations to the GCRA on 22 July 2024 (**22 July Representations**).[130]

2.83 On 2 October 2024, the GCRA amended and reissued its proposed finding of infringement of Guernsey competition law on the part of the MSG in respect of which the MSG made further written representations to the GCRA on 31 October 2024 (**31 October Representations**).

2.84 Having reconsidered the matter, and having taken into account the reasoning and conclusions set out in the Judgment, the representations made by the MSG in connection with the MSG Appeal and all the evidence provided to it:

• MSG Written Representations to First Statement of Objections	11 September 2020
• MSG Oral Representations to Statement of Objections	20 October 2020
• MSG invited to provide supplementary submissions and/or evidence	20 October 2020 (oral invitation); 30 October 2020 (written invitation)
• Further questions put to MSG	11 December 2020
• MSG response to evidence of Healthcare Group, Island Health and The Queens Road Medical Practice	27 August 2021
• 22 July Representations	
• 31 October Representations	

the GCRA finds that the MSG infringed the prohibition imposed by section 5(1) of the 2012 Ordinance[131] by entering into a series of agreements, namely the General Partnership Agreement, the Retirement and Settlement Agreement and the Settlement Agreement, with Mr Vhadra each of which contained a post-term non-compete restriction of five years'

129 Royal Court Judgment, MSG v GCRA, 10 March 2023. [MSG4/167-229]

130 [MSG5/1-11]

131 Prohibition on agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services.

duration[132] that had the object of preventing competition within a market or markets in Guernsey for services.

2.85 At this time, for reasons of administrative efficiency, the GCRA will not make a finding in respect of the agreements between the MSG and any of its other ex-consultants. The MSG has raised a procedural objection to the GCRA proceeding in this way and this is dealt with in section 3 (paragraphs 3.2 - 3.8).

[132] In the terms set out in clause 35 of the General Partnership Agreement, clause 6 of the Retirement and Settlement Agreement and clause 3 of the Settlement Agreement

3. LEGAL FRAMEWORK AND ASSESSMENT

A. Introduction

3.1 After addressing a procedural issue raised by the MSG in its 22 July Representations, this Part sets out the legal framework within which the GCRA has considered the evidence presented in this Decision and the GCRA's assessment of the evidence within that framework.

B. Procedural issue raised by the MSG

3.2 In paragraph 8 of the 22 July Representations, the MSG has objected to the GCRA making findings of infringement against the MSG on a consultant-by-consultant basis. It states that the GCRA should consider all infringements "in the round" and that it would be "oppressive" for it to proceed on a consultant-by-consultant basis[133] because:

> "The latest decisions provide no certainty to the MSG in relation to when this process will finally end. It is unsatisfactory that the MSG is uncertain if there is an ongoing investigation in relation to its current, operative covenants (or whether an investigation in that regard is planned). The MSG is entitled to finality in relation to these matters, not least since it also needs clarity on the position of its extant non-compete restrictions in the LLP Agreement and Associate contracts."[134]

The MSG makes similar observations in the 31 October Representations.[135]

3.3 The GCRA considers that it is within the scope of its discretion to decide whether to pursue particular cases and the manner in which it does so. Those decisions are made by the GCRA using its prioritisation principles.[136] The budgetary resources available to the GCRA will also be relevant to its assessment whether to pursue a case and the manner in which it does so.

3.4 Further, the GCRA refers to paragraph 142 of the Judgment, which states as follows:

> "I further take the view that [when assessing whether the non-compete clauses were objectively justified] there really ought to have been more detailed consideration of the occasions on which vacancies have been created and then filled. This is because the finding of a contravention should have regard to realities and not just theory. From the material set out in the Decision, with particular reference to the table after para. 3.19, it is apparent that not all of the specialisms of MSG consultants will attract the same levels of private work. Accordingly, there will be a difference in emphasis between, for example, a paediatrician and a surgeon as to the relative importance of whatever private work may be available. Again, there appears to be nothing in the Decision that seeks to draw that distinction, possibly by reference to the number of persons who have left over a period of time (which can only run

133 22 July Representations, paragraph 8.1 [MSG5/3].
134 22 July Representations, paragraph 8.6 [MSG5/4].
135 31 October Representations, paragraph 5 [MSG5/41].
136 GCRA Prioritisation Principles, May 2021 (https://gcra.gg/media/598324/prioritisation-principles.pdf)

from when the 2012 Ordinance came into force, but might be some later date, if appropriate) and how quickly or otherwise the vacancy created was filled. Whilst this is clearly an issue associated as well with the time taken to recruit, the degree of relevance of the incentive that being able to include the offer of some element of private practice, where that matter, I think needs to be reviewed in more detail before reaching any conclusion. In that regard, it may have assisted if there had been some actual analysis of the length of time a departing consultant had already spent with the MSG before leaving and so how readily an incoming consultant would overcome the reputation already established. Again, if the person leaving was an associate, rather than a partner, it begs the question as to whether the levels of incentive for a new consultant joining would be greater or lower. There may be arguments in both directions, but these have not been dealt with by the GCRA. This omission affects the reasonableness of the Decision."

3.5 That paragraph makes clear that an "in the round" assessment of the MSG's non-compete clauses would, in the judgment of the Royal Court, be unreasonable because:

(a) The relevance of the incentive of being able to offer private work will vary from specialism to specialism. This implies that a "one size fits all" non-compete clause might not be appropriate because the importance to an incoming specialist of being able to earn private income – and thus the potential justification for protecting that specialist against competition from an outgoing consultant by way of a non-compete clause – might vary according to specialism.

(b) The length of time that a departing consultant had spent with the MSG might be relevant in determining how readily an incoming consultant could overcome the reputation established by the outgoing consultant (and thus, the GCRA infers, relevant to the duration of non-compete restriction that might justify a requirement for protection).

(c) The levels of incentive for a new consultant joining (and thus, the GCRA infers, the length of time for which that consultant might justify a requirement for protection against competition from an outgoing consultant) might differ depending on whether the outgoing consultant was an associate or a partner.

3.6 In the view of the GCRA, this means that, in the particular circumstances of the MSG, it will be necessary to assess the position of each departing consultant on a case-by-case basis to determine whether, and to what extent, a non-compete clause will be objectively justifiable. The turnover data submitted by the MSG in response to the GCRA's information request of 7 August 2024 bears this out, showing that the average private income earned by an orthopaedic surgeon in 2023 was £[✂] but by contrast, and on the assumption that there were five consultant paediatricians working at the MSG in 2023, the average private income

earned in that specialism in that year was £[✂] – or 7% of the private earnings of an orthopaedic surgeon. This comparison suggests that the amount of private income a specialist is able to earn whilst at MSG will vary significantly from specialism to specialism and thus the potential justification for a period of protection from competition from their predecessor for an incoming consultant by way of a non-compete clause and the length of clause permissible might similarly vary from specialism to specialism.

3.7 It further follows that any decision that the GCRA takes now will not provide the MSG with the finality it requires because the above analysis by the Royal Court indicates that the assessment will depend on the circumstances when a specialist departs the MSG.

3.8 For those reasons, the GCRA does not accept the arguments made by the MSG relating to procedural fairness.

C. Sources of law

3.9 The 2012 Ordinance contains the competition law which applies in Guernsey. It came into force on 1 August 2012.

3.10 When applying the 2012 Ordinance, the GCRA will apply the principles set down by the Guernsey courts and also have regard to its own past decisional practice. It will also have regard to its own published guidelines concerning the application of Guernsey competition law, including in particular GCRA Guideline 2 – Anti-Competitive Agreements.

3.11 The GCRA may also take account of the treatment of corresponding questions under European Union (EU) competition law when determining questions in relation to Guernsey competition law.[137] Given that, as is the case for many competition law regimes around the

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[137] The 2012 Ordinance, provides in section 54:

"**Authority and Court to have regard to EU authorities.**
The Authority and the Court [may] in determining questions arising in relation to -
(a) the abuse by one or more undertakings of a dominant position within any market in Guernsey for goods and services,
(b) anti-competitive practices between undertakings, and
(c) the merger and acquisition of undertakings,
take into account the principles laid down by and any relevant decisions of the Court of Justice or General Court of the European Union in respect of corresponding questions arising under Community law in relation to competition within the internal market of the European Union."

The word "may" (in square brackets) was substituted for the word "must" by the European Union (Competition) (Brexit) (Guernsey) Regulations, 2021.

world, Guernsey competition law is very closely modelled on EU competition law and that there is currently little local case law in this area of law, the GCRA will take EU competition law principles into account as a matter of practice unless departing from those precedents is appropriate in light of the particular circumstances of the Bailiwick.

3.12 Relevant sources of EU competition law include judgments of the European Court of Justice (the **Court of Justice**) or European General Court (the **General Court**), decisions taken and guidance published by the European Commission (the **Commission**), and interpretations of EU competition law by courts and competition authorities in the EU Member States.

3.13 In addition, the GCRA will have regard to relevant decisional practice of the UK's Competition and Markets Authority (**CMA**) and its predecessor the Office of Fair Trading (**OFT**), which apply competition laws which are materially similar to those contained in the 2012 Ordinance,[138] together with any relevant court or tribunal decisions applying competition law in the United Kingdom.

D. Prohibition on anti-competitive agreements

Scope

General

Section 5(1) of the 2012 Ordinance, prohibits agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services[139]. To "prevent" competition means to "prevent, restrict or distort competition or, in

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138 The Competition Act 1998.

139 "**Prohibition on preventing competition.**

5(1) Subject to the provisions of this Part of this Ordinance, agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services are prohibited.

(2) Subsection (1) applies, in particular, to agreements between undertakings which -

(a) directly or indirectly fix purchase or selling prices or any other trading conditions,

(b) limit or control production, markets, technical development or investment,

(c) share markets or sources of supply,

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage,

(e) make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts.

(3) Subsection (1) applies only if the agreement is, or is intended to be, implemented in Guernsey."

each case, attempt to do so".[140] The wording of section 5(1) closely follows that of Article 101(1) on the Treaty on the Functioning of the European Union (**TFEU**) and of s.2 of the Competition Act 1998. For the reasons set out above at paragraph 3.13, the GCRA will have regard to the interpretation of these provisions by the EU and UK authorities when considering the application of section 5(1) in Guernsey, as appropriate.

Anti-competitive agreements prohibited as a matter of public policy

3.14 Anti-competitive agreements are prohibited as a matter of public policy, irrespective of the fact that both parties to the arrangement have consented to them. The section 5(1) prohibition therefore overrides the ability of the parties to enter into such agreements as a matter of private law. This principle is expressed in section 5(4) of the 2012 Ordinance, which states that an agreement between undertakings is void (and therefore unenforceable) to the extent that it comprises or concludes an anti-competitive agreement prohibited by section 5(1).

Competition law and restraint of trade

3.15 Section 58 of the 2012 Ordinance states that its provisions are in addition to, and not in derogation from the customary and common law of Guernsey relating to restraint of trade, except to the extent that there is an inconsistency between them. If there is such an inconsistency, then the competition law rules, and not the restraint of trade rules, will apply. Thus, if a restraint is void and unenforceable under the 2012 Ordinance, it will also be void and unenforceable as a matter of Guernsey customary and common law.

Application

3.16 In order to determine whether the section 5(1) prohibition applies to any or all of the post-term non-compete provisions entered into between the MSG and Mr Vhadra under the General Partnership Agreement, the Retirement and Settlement Agreement and the Settlement Agreement, it is necessary to consider each of the elements of the definition in turn, namely:

(a) The involvement of two or more **undertakings**;

(b) The existence of an **agreement**(s) between those undertakings;

[140] 2012 Ordinance, s.60(1). In this Decision, the word "prevent" (and associated terms such as "prevention") bears that meaning.

(c) The **market**(s) for goods or services in Guernsey affected by the agreements;

(d) Whether the agreement(s) between the undertakings identified has the **object or effect of preventing competition** on the markets identified.

Undertakings

3.17 The concept of an undertaking is defined in section 60(1) of the 2012 Ordinance, as follows:

> "a person who is carrying on a business and includes an association, whether or not incorporated, which consists of or includes such persons."

3.18 A person is defined in section 60(1) of the 2012 Ordinance, as follows:

> ""person" includes an individual and also –
>
> (i) a body corporate; and
>
> (ii) a partnership or other incorporated body of persons,
>
> incorporated or established with or without limited liability in any part of the world".

3.19 Thus, both a partnership and the individuals making up that partnership may constitute "persons" and thus "undertakings" under the 2012 Ordinance. Whether or not the partnership or the individual partners are the relevant undertaking for the purposes of any given agreement will depend upon the facts of the case.

3.20 The circumstances under which, as a matter of Guernsey competition law, a partnership of medical specialists will be treated as the relevant undertaking and the circumstances under which the relevant undertakings are the individual medical specialists has not been previously considered by the Guernsey courts, save that in the Judgment the Royal Court noted "[w]ithin the context of the non-compete provisions that are the subject of the Decision, a former employee or a partner of the MSG who leaves can be regarded as a separate undertaking".[141]

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[141] Judgment, paragraph 23. The implication of this finding is that whilst consultants are partners at the MSG, they are not to be considered separate undertakings for the purposes of the competition law rules. In oral submissions, the MSG's Advocate stated that it was not being disputed that each of the MSG and the departing consultants were undertakings:
"At 4.11 to 4.26 there is an explanation as to why the Medical Specialist Group and the former doctors or the leavers are a relevant undertaking, so that is not disputed, so I do not need to take you through that." [MSG4/267]

3.21 In accordance with s.54 of the 2012 Ordinance, the GCRA has therefore taken into account the way in which this issue has been considered under EU law and has also considered how the UK competition authority has dealt with the point. In the case of undertakings offering medical services, the EU courts have confirmed that self-employed medical specialists may be "undertakings" in their own right.[142] However, where a group of such specialists operates and presents itself as a single entity on the market, that group (rather than the individual specialists) will be treated as the relevant undertaking. The UK's OFT (the predecessor to the CMA) has stated that:

> "Such a group will be treated as a single entity only if it operates and presents itself as a single entity on the market, for example where the members generate profits for the common benefit of the group, operate under a common name, share administrative functions such as joint billing, have a bank account (or accounts) in the name of the group and/or a single set of accounts is produced in respect of the group's commercial activities."[143]

MSG

3.22 The MSG is a partnership offering medical services in Guernsey according to the terms of the LLP Agreement (and previously the General Partnership Agreement) as described at paragraph 2.23 - 2.33. Its quasi-public status (whether as a public body, a public authority, a body providing goods or services on behalf of the States or otherwise) is not relevant to the question of whether or not it is an undertaking.[144] Rather, what is determinative in that regard is the nature of the activities it is carrying out. Given that the MSG provides medical services on one or more markets in Guernsey, it qualifies as an "undertaking" for the purposes of competition law, as defined in section 60(1) of the 2012 Ordinance, when providing those services.[145]

3.23 The GCRA concludes that, having regard to the following factors, the MSG operates and presents itself as a single entity on the market and therefore the MSG partnership[146] (rather than the partners who form the MSG partnership) is the relevant undertaking in this case:

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142 Cases C-180/98 etc *Pavel Pavlov* v. *Stichting Pensioenfonds Medische Specialisten* EU:C:200:428, paragraph 77.

143 *Anaesthetists' groups*, OFT non-infringement decision No.15/04/2003

144 The 2012 Ordinance applies to the States and its department and to any person, body or office created or established by an enactment, insofar they are carrying on a business (2012 Ordinance s.56(1)

145 The GCRA notes that although certain economic activities are exempt from the application of the 2012 Ordinance, the provision of medical services is not one of them (2012 Ordinance, s.56(2)). The 2012 Ordinance therefore applies to the provision of medical services in Guernsey.

146 S.60(1) of the 2012 Ordinance provides that the concept of an "undertaking" encompasses each of an unincorporated association of persons carrying on business, a partnership and an incorporated association.

(a) Partners of the MSG do not offer medical services in Guernsey (save in limited circumstances) other than through the partnership for as long as they continue to be partners.

(b) Partners of the MSG generate profits for the common benefit of the group, and restrictions are placed on the extent to which they can generate private work on their own account, with private work in any event being conducted under the auspices of the MSG.

(c) Partners of the MSG operate under a common name.

(d) Partners of the MSG share administrative functions such as joint billing.

3.24 The GCRA therefore concludes that the MSG is the relevant undertaking in this case, irrespective of which individual consultants in the MSG took the relevant actions.

3.25 The GCRA notes that the MSG converted from a general partnership to a limited liability partnership on 1 January 2018. Certain of the agreements identified at paragraph 3.16 above were therefore concluded between Mr Vhadra and the MSG general partnership whilst others were concluded between Mr Vhadra and the MSG LLP. It is therefore necessary to determine whether the MSG LLP is the proper addressee of this Decision, notwithstanding the fact that some of the agreements were not entered into by it.

3.26 The LLP Agreement provides that:

"With effect from the Conversion Date and in accordance with the provision of Part II of the LLP Law and the terms of this Agreement:

(a) The property, interests, rights, privileges and debts **and the undertaking of the Predecessor Partnership were transferred to the LLP**;

(b) The Conversion Partners became members of the LLP."[147] (emphasis added)

3.27 This is consistent with the provisions of the Limited Liability Partnerships (Guernsey) Law, 2013 (the **LLP Law**), under which an LLP inherits the liabilities of the converting partnership.[148]

3.28 The GCRA therefore concludes that the MSG LLP is the proper addressee of this Decision in respect of infringements committed both prior to and post 1 January 2018.

147 LLP Agreement, clause 2.2. [MSG1a/7-8]

148 LLP Law, ss. 28 -29.

Mr Vhadra

3.29 Mr Vhadra executed the General Partnership Agreement on 1 January 2006 in his capacity as an undertaking. Although whilst a member of the MSG partnership, he ceased to act as an undertaking in his own right in respect of the medical services he provided through the MSG, on his resignation and departure from the MSG, and in view of the fact that he sought to continue to offer medical services, he was a person carrying on a business as defined by section 60(1) of the 2012 Ordinance (i.e. a separate undertaking). He continued to be a separate undertaking when he set up First Contact Health, through his work managing First Contact Health as its shareholder and CEO.

Conclusion

3.30 For the purposes of this Decision, the GCRA concludes that the MSG and Mr Vhadra are the relevant undertakings as defined by the 2012 Ordinance and that the MSG LLP is the proper addressee of this Decision.

Existence of agreement

Agreement

3.31 Section 5(1) of the 2012 Ordinance, prohibits anticompetitive "agreements" between undertakings. Section 60 of the 2012 Ordinance, defines "agreements between undertakings" as meaning "any type of agreement, arrangement or understanding".

3.32 Whether a particular agreement or arrangement is legally enforceable does not affect its classification as an "agreement" for the purposes of Guernsey competition law.[149]

3.33 It does not matter whether or not a party has decided if it will carry the agreement out. Section 3 of GCRA Guideline 2 observes:

> "The fact that a party may have played only a limited part in the setting up of the agreement, or may not be fully committed to its implementation, or participated only under pressure from other parties does not mean that it is not party to the agreement (although these facts may be taken into consideration in deciding the level of any financial penalty)."

[149] See the definition of "agreement between undertakings" under section 60 of the Competition (Guernsey) Ordinance.

3.34 Applying the law on "agreements" to the facts of this case, for the purposes of this Decision the GCRA concludes as follows.

3.35 The MSG and Mr Vhadra entered into a series of relevant written contracts containing post-term non-compete restrictions which are unquestionably "agreements" for the purposes of Section 5(1) of the 2012 Ordinance, namely:

(a) The General Partnership Agreement between the MSG and Mr Vhadra, both at the point of its execution by Mr Vhadra and to the extent that clauses of it continued to apply as between the MSG and Mr Vhadra following Mr Vhadra's retirement from the MSG – notably, the restraint of trade provision at clause 35.[150]

(b) The Retirement and Settlement Agreement between the MSG and Mr Vhadra – which at clause 6 expressly continued the application of clause 35 of the General Partnership Agreement.[151]

(c) The Settlement Agreement between MSG and Mr Vhadra – which in clauses 2 and 3 expressly continued the application of clause 35 of the General Partnership Agreement, save in respect of Mr Vhadra's involvement with First Contact Health to which a shorter period of restriction was applied.[152]

(In this Decision, the five-year restrictions contained in clause 35 of the General Partnership Agreement between the MSG and Mr Vhadra, clause 6 of the Retirement and Settlement Agreement between the MSG and Mr Vhadra and clause 3 of the Settlement Agreement between the MSG and Mr Vhadra are referred to as **Non-Compete Restrictions**.)

3.36 As set out above at paragraph 3.33, it does not matter whether the MSG or Mr Vhadra in fact intended to implement or fully implement any particular provision: the contracts were entered into and so the undertakings in question were party to the relevant agreement. Thus, the fact that MSG did not in the end insist on the full five years' non-compete from Mr Vhadra in respect of his work with First Contact Health does not mean that it and Mr Vhadra were not party to the five-year non-compete agreement.

150 As set out in full at paragraph 2.25 above
151 Paragraph 2.38(c)
152 Paragraph 2.57(a) - 2.57(e)

Conclusion

3.37 For the reasons set out above, the GCRA concludes that the contracts identified in paragraphs 3.35 constitute agreements for the purposes of the 2012 Ordinance.

Relevant market

3.38 For the reasons set out below at paragraphs 3.43 - 3.59, the GCRA has concluded that the Non-Compete Restrictions amount to restrictions of competition by object.

3.39 Given that there is no Guernsey law on the extent to which a market must be precisely defined in order to enable the GCRA to find that an agreement constitutes a restriction of competition by object and given that both Guernsey competition law and EU competition law recognise the concept of "object based" restrictions of competition, the GCRA has had regard to the way that the EU competition law addresses this issue.

3.40 The GCRA considers that an agreement that has an anti-competitive object constitutes, by its nature, a restriction of competition.[153] This means that if the GCRA determines that an agreement constitutes a restriction of competition by object, there is no requirement that it demonstrate that that agreement produces effects on the market in order to be able to reach a finding that that agreement infringes section 5(1) of the 2012 Ordinance. Because there is no requirement to prove market effects, it follows that there is no need to define precisely the markets affected by an agreement that restricts competition by object (unless establishing the infringement would otherwise be impossible).[154]

3.41 Therefore, for the purposes of applying s. 5(1) of the 2012 Ordinance, the GCRA considers that it is only obliged to define the relevant market where it is impossible, without such a definition, to determine whether the agreement has as its object the prevention of competition.[155]

3.42 In the present case, for the reasons set out below at paragraphs 3.54 - 3.59, the GCRA concludes that it is possible to determine that the agreements identified in paragraph 3.35 above amount to restrictions of competition by object without defining the affected markets precisely. It is sufficient to state that the economic activity affected by these agreements was the provision of private medical services in Guernsey – the area of activity to which the Non-

153 Case C-226/11 *Expedia* EU:C:2012:795, paragraphs 35-37.

154 Case T-44/00 *Mannesmannröhren-Werke AG* v. *Commission* EU:T:2004:218, paragraphs 129 – 134; Case T-213/00 *CMA CGM* v. *Commission* EU:T:2003:76, paragraphs 206 -215.

155 Case T-62/98 *Volkswagen v Commission* EU:T:2000:180, paragraph 230.

Compete Restrictions relate. As such, the GCRA finds that it is unnecessary for it to undertake a market definition analysis in this case.

Preventing competition by object and/or by effect

"By object" restrictions

3.43 Anti-competitive agreements or concerted practices are classified as such because they substitute independent action by competitors on a market with co-ordination. Such co-ordination will be illegal where it has the object and/or the effect of restricting competition.

3.44 Given that there is no Guernsey law on what constitutes a restriction of competition by object and given that both Guernsey competition law and EU competition law recognise the concept of "object based" restrictions of competition, the GCRA has had regard to the way that EU competition law addresses this issue in assessing whether the Non-Compete Restrictions amount to a restriction of competition by object.

3.45 Having regard to EU competition law, the GCRA considers that by object infringements are those forms of agreement between undertakings which can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.[156] In such cases, the restrictive effect on competition is presumed.[157]

3.46 The Court of Justice has summarised the case-law as follows:

> "[It] is established that certain collusive behaviour**,** such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article [101(1) TFEU], to prove that they have actual effects on the market … Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers."[158]

3.47 The Court of Justice went on to explain that an agreement should be assessed in its economic and legal context, as well as in light of the facts of the market in question, in order to determine whether its object was anti-competitive:

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156 Case C-209/07 *Competition Authority v Beef Industry Development Society (Irish Beef)* EU:C:2008:643, paragraph 17; Case C-67/13 P *Groupement des Cartes Bancaires v Commission* EU:C:2014:2204, paragraph 50; Case C-373/14 P *Toshiba v Commission* EU:C:2016:26, paragraph 26.

157 *T-Mobile* Netherlands, ibid, paragraph 29; *Cartes Bancaires*, ibid., paragraph 49; *Toshiba*, ibid., paragraph 26.

158 Case C-67/13 P *Groupement des Cartes Bancaires v Commission* EU:C:2014:2204, paragraph 51.

"According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article [101(1) TFEU], regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question".[159]

3.48 The assessment of the objectives of an agreement should be carried out objectively; it does not depend on the parties' subjective intentions, and there may be an infringement by object where the parties acted without any subjective intention of restricting competition.[160]

"By object" restrictions – non-compete clauses

3.49 S.5(2) of the 2012 Ordinance provides that agreements to share markets or to limit production are the types of agreement to which the s.5(1) prohibition particularly applies and thus are particularly restrictive of competition.[161] EU case law is in line with this provision, confirming that an agreement between competitors (actual or potential) that excludes one of them from a market – an agreement not to compete – is capable of constituting a restriction of competition by object, amounting, as it does, to "an extreme form of the desire to share a market and limit production."[162]

3.50 The GCRA also notes that the High Court has considered post-termination non-compete covenants in the context of franchising agreements and found that they have as their object the prevention of competition. This was explained by Henderson J (as he then was) interpreting the equivalent provision in UK law, section 2(1) Competition Act 1998,[163] in *Carewatch Care* Services *v Focus Caring Services*:

"It seems to me clear that the restrictive covenants prima facie fall within the scope of section 2(1) 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 within those areas. That, after all, is the whole point of a covenant in restraint of trade*. Following termination of the agreements, there would be scope for actual or potential competition between Carewatch (either through its branches, or through replacement franchisees) and Focus in the relevant territories, and the object of the covenants is to protect Carewatch's goodwill by preventing

159 Ibid., paragraph 53.

160 Case C-209/07 *Competition Authority v Beef Industry Development Society (Irish Beef)* EU:C:2008:643, paragraph 21; *Cartes Bancaires*, ibid., paragraph 54.

161 2012 Ordinance, s.5(2)(b),(c).

162 Case T-460/13 *Ranbaxy* v. *Commission* EU:T:2016:453, paragraph 222.

163 Referred to under section 2(8) as "the Chapter I prohibition".

or limiting such competition for a period of twelve months. At first blush, therefore, the Chapter I prohibition would appear to apply."[164] (Emphasis added)

3.51 This point was accepted by the MSG in its Cause appealing against the Penalty Statement (**Penalty Cause**), in which it stated that:

> "10. By their very nature, restrictive covenants do prevent competition. This is widely known and intended by those who use restrictive covenants (and is equally true of perfectly valid and appropriate restrictive covenants). "[165]

Legal, factual and economic context

3.52 Applying the above legal framework to the specific facts of this case and considering the economic, factual and legal context within which these particular Non-Compete Restrictions were to be pursued, the GCRA concludes that their object was to prevent competition.

3.53 First, as noted above, the 2012 Ordinance provides that an agreement to share markets or to limit production (of which a non-compete restriction is an extreme example because it **prevents** rather than merely **limits** production/supply of goods and/or services) is an agreement to which the s.5(1) prohibition particularly applies. The GCRA also notes that both the EU and UK courts have found that a non-compete restriction is a restriction of a type that constitutes a restriction of competition by object. The aim of such an agreement, objectively assessed, is *prima facie* to restrict competition. The GCRA agrees with and adopts this position in respect of non-compete clauses under Guernsey law.

3.54 Second, considering the breadth and duration of these Non-Compete Restrictions, their aim, objectively assessed,[166] was to prevent all competition between Mr Vhadra and the MSG, which indicates that their aim constituted a restriction of competition by object.

3.55 The breadth of the Non-Compete Restrictions prevented Mr Vhadra from competing with the MSG not only in the capacity in which he had worked as a consultant at the MSG, but to any extent:

> "directly or indirectly exercis[ing] or carry[ing] on or be[ing] concerned or interested in exercising or carrying on upon his own account or in partnership with or as assistance to any other person the Practice of Medical Practitioner in Guernsey."

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164 [2014] EWHC 2313 (Ch) at [150]

165 MSG Cause appealing against the Penalty Statement. [MSG4/158-166]

166 Or, in the words of Henderson J., their "whole point" – see paragraph 3.49

A clause of this scope of application extended beyond the specialism in which Mr Vhadra had practised at the MSG and instead prevented him from practising medicine in competition with the MSG in any capacity.

3.56 The duration of the Non-Compete Restrictions was five years. A clause of this length is likely to amount a permanent prohibition on working as a medical practitioner in Guernsey and so a permanent prohibition on competing with the MSG in Guernsey; a period of five years without work cannot simply be "waited out" and the medical practitioner so restricted will have to leave Guernsey.[167]

3.57 The conclusion that, in this context, the length of the Non-Compete Restrictions was excessive is borne out by internal MSG documents. In an internal e-mail of 17 November 2018 from Dr [A] to an MSG colleague, copied to the MSG Management Board, Dr [A] indicates that the MSG considered that a period of restriction of a year from that date would be sufficient to address the risk that Mr Vhadra would compete with the incoming orthopaedic surgeons to the detriment of the MSG:[168]

> "I think that this is just the first step [..]. In terms of value (lost private income) and morale of new orthopedic [sic] surgeons *the best outcome would be for Ranjan to stand down for a year; this would allow them to establish local reputations*."[169]

It had nevertheless attempted and continued to attempt to enforce the five-year period of restriction against Mr Vhadra (see paragraph 2.55 above). This indicates that the object of the non-compete restrictions contained in the General Partnership Agreement and the Retirement and Settlement Agreement was likely to be to prevent legitimate competition with the MSG rather than protecting any legitimate interest of the MSG.

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167 Even if a medical practitioner such as Mr Vhadra leaves Guernsey and then returns after five years (which may be considered unlikely), their competitive position is likely to have been materially weakened as a result of that prolonged absence.

168 The MSG considered that Mr Vhadra posed a credible competitive threat in respect of the supply of private elective orthopaedic services, such that two of its incoming orthopaedic surgeons had suggested that they might leave if Mr Vhadra was able to work in Guernsey. In MSG's Oral Representations, Dr [A] stated that:
"Ranjan [Vhadra] putting his name across the door [of First Contact Health] did cause two of our orthopaedic surgeons to consider whether they were going to stay or not [….] He's willing to see anybody and their business model if you need an operation is to send you off to the UK."
Oral Representations of MSG [1:29:46]. [MSG3/136-201]

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

3.58 Third, the particular factual and economic context within which these Non-Compete Restrictions functioned indicates that they constitute restrictions of competition by object for the following reasons.

(a) The MSG considered Mr Vhadra to be a realistic potential competitor to MSG (see paragraph 3.56 and footnote 168). Thus, the purpose of the Non-Compete Restrictions was to remove that competitive threat to MSG.

(b) 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 posed by Mr Vhadra's establishment of and involvement with First Contact Health at the same time as it was attempting to restrict Mr Vhadra's ability to work with First Contact Heath. In particular, in respect of an MSG proposal to begin offering a private "scan at first appointment service"[170] for patients suffering with musculoskeletal complaints, the MSG's expressed motivation for doing so was that it did not want to "lose market share". The GCRA notes that the timing of the MSG's request to begin offering these services broadly coincided with and, it is reasonable to infer, was therefore likely to have been a direct response to Mr Vhadra's establishment of First Contact Health. The aim of the Non-Compete Restrictions, viewed objectively in this context, was therefore to prevent Mr Vhadra from offering these services through First Contact Health in order to protect the MSG's own ability to establish a position for the provision of those same services. Attempting to restrict Mr Vhadra in this way in respect of a service not yet offered by the MSG (and

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[170] 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 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. [MSG/6249]

not offered by Mr Vhadra whilst he was a partner at the MSG) is aimed at preventing competition.

3.59 The GCRA therefore finds that the Non-Compete Restrictions imposed by MSG on Mr Vhadra under the General Partnership Agreement, and their post-retirement application to Mr Vhadra under both the Retirement and Settlement Agreement and the Settlement Agreement *prima facie* amount to infringements of competition by object.

Ancillary restraints

3.60 Given that the question of whether a restriction is "ancillary" under the 2012 Ordinance is a question that corresponds to whether a restriction is "ancillary" under Article 101(1) TFEU,[171] and given that there is no Guernsey case law on the treatment of ancillary restraints under the 2012 Ordinance, the GCRA has had regard to the jurisprudence of the European Courts when assessing whether the Non-Compete Restrictions may amount to ancillary restraints.[172]

3.61 When analysing whether or not a restraint can be deemed to be ancillary to another agreement, such that it falls outside the scope of application of s.5(1) of the 2012 Ordinance, the starting point is not that such a restraint is presumed to be legitimate. Rather, the issue of whether or not a restraint is ancillary arises only because a preliminary assessment has confirmed that that restraint is not *prima facie* legitimate (i.e. is anti-competitive).

3.62 A restriction amounts to an "ancillary restraint" which does not infringe competition law if that restriction is objectively necessary to enable the parties to achieve a legitimate purpose.[173] This is because the counterfactual – the situation that would prevail in the absence of the restraint – would not be a version of the agreement that was less restrictive of competition but rather no agreement at all. As such, the restriction does not prevent competition that would otherwise exist but merely allows a legitimate agreement to function.[174]

3.63 It follows that the test of objective necessity is not satisfied where an agreement is merely more difficult to implement or less profitable without the provision in question; it must be impossible to implement the agreement without the clause in question.

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171 Treaty on the Functioning of the European Union, OJ C 115/47, 9.5.2008.
172 Section 54, 2012 Ordinance.
173 Case 56/65 *Société Technique Minière v Maschinenbau Ulm* EU:C:1966:38, [1966] ECR 235, 250.
174 Case 56/65 *Société Technique Minière v Maschinenbau Ulm* EU:C:1966:38, [1966] ECR 235, 250.

Ancillary restraints – burden of proof

3.64 The GCRA bears the legal burden of proving that a non-compete clause contravenes s.5(1) of the 2012 Ordinance. The GCRA is first required to demonstrate that there is a *prima facie* case to be answered under s.5(1), 2012 Ordinance.[175] Once the GCRA has established that there is a case to be answered (i.e. that the restraints are *prima facie* anti-competitive), the party under investigation (here, the MSG) bears the evidential burden of raising material that offers evidence that the non-compete provisions can be objectively justified; "he who asserts must prove".[176] The GCRA then has to address this evidence in discharging its legal burden of proof.

Ancillary restraints and by object restrictions

3.65 For the reasons given above at paragraph 3.60 the GCRA has had regard to the way in which the EU (and UK) courts have assessed ancillary restraints in the context of non-compete clauses.

3.66 In a series of cases considering franchising agreements,[177] both the Commission and the EU and UK courts have noted that in order for such agreements to function, the franchisor must be able to share its know-how with its franchisees without running the risk that its competitors will be able to exploit this know-how and assistance and/or that the franchisee will use the know-how acquired to compete with the franchisor post-termination. To the same end, the franchisor must also be able to protect the reputation and identity of its network. Post-term non-compete clauses have been found to be essential to achieve these objectives, provided that:

(a) They are only in place for the time strictly necessary to protect the franchisor's know-how and the reputation and identity of the franchise network[178] (which will depend on

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175 Case T-216/13 Telefonica *SA v Commission* EU:T:2016:369, paragraphs 123 – 130; *Asda Stores Ltd & Ors v Mastercard Incorporated & Ors* [2017] EWHC 93 (Comm), paragraphs 44 – 45; *Racecourse Association v Office of Fair Trading* [2005] CAT 29, paragraph 130 – 135.

176 Ibid.

177 Beginning with Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* EU:C:1986:41.

178 In *Service Master* [1988] OJ L 332/38, the Commission concluded that a post-termination non-compete clause could be acceptable where it was "necessary to prevent the ex-franchisee from using the know-how and clientele he has acquired for his own benefit or for the benefit of [the franchisor's] competitors", as well as "necessary to allow [the franchisor] a limited time period to establish a new outlet in the ex-franchisee's territory" (paragraph 11). Similar reasoning was used by Briggs J. in *Pirtek (UK) Ltd v Joinplace Ltd & ors* [2010] EWHC 1641 (Ch), where he noted that that "a post-termination restraint on competition may, but will not necessarily, fall outside the purview of section 2 [of the Competition Act 1998], and that this question will depend upon whether the post-termination restraint

the circumstances of the case but has frequently been limited to one year post termination).[179]

(b) They are not extended to protect know-how which is merely general commercial technique, taking into account the knowledge already held by the franchisee.[180]

(c) They relate only to the geographic area where the franchisee operated during the franchise agreement.[181]

3.67 Similarly, in the context of mergers, the ECJ has found that non-compete clauses that protect the purchaser of a business against competition from the vendor "on the same market immediately after the transfers" [182] may be justifiable on the basis that the sale could not go ahead without the restriction. However, "such clauses must be necessary to the transfer of the undertaking concerned *and their duration and scope must be strictly limited to that purpose*".[183]

3.68 This principle has been developed by the Commission in its *Commission Notice on restrictions directly related and necessary to concentrations.*[184] In determining whether a non-compete obligation is objectively justified ("directly related and necessary to the implementation of the concentration"[185]), the Commission notes that:[186]

> "However, such non-competition clauses are only justified by the legitimate objective of implementing the concentration when their duration, their geographical field of application, their subject matter and the persons subject to them do not exceed what is reasonably necessary to achieve that end."

3.69 The above demonstrates that both the scope and duration of an ancillary restraint will be relevant to a determination of whether or not it is objectively justifiable.

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is essential to prevent the risk that know-how and assistance provided by the franchisor to the franchisee will, after termination, be used to aid the franchisor's competitors" (paragraph 50). In *Service Master*, the Commission also noted that the protection of know-how and reputation could be especially important in services franchises, where there was likely to be a close relationship between the provider of the service and the receiver of the service. Similar observations were made by Briggs J. in *Pirtek* (paragraph 60).

179 *Pirtek (UK) Ltd v Joinplace Ltd & ors* [2010] EWHC 1641 (Ch); *Carewatch Care Services Ltd v Focus Caring Services Ltd & ors* [2014] EWHC 2313 (Ch).

180 *Charles Jourdan*, [1989] OJ L 35/31, paragraph 27.

181 *Pirtek*, paragraph 63.

182 Case 42/84 *Remia BV & ors v Commission* EU:C:1985:327 (paragraph 6).

183 Ibid, paragraph 20, (emphasis added).

184 [2005] OJ C 56/24.

185 Ibid paragraph 18.

186 Ibid paragraph 19.

Ancillary restraints – conclusion

3.70 Non-compete (restraint of trade) clauses fall outside of the scope of the prohibition on anti-competitive agreements, provided that they go no further than is objectively necessary, in both scope and duration, to allow the primary agreement to which they relate to operate. The GCRA bears the legal burden of proof in respect of determining whether or not a restraint is ancillary to the agreement in question, whereas the MSG has to discharge the evidential burden of raising material that offers evidence that the non-compete provisions in its agreement can be objectively justified.

3.71 The starting point in an assessment of the legitimacy of an ancillary restraint under the 2012 Ordinance is not that such a restraint is legitimate but rather than it is prohibited unless objectively justifiable.

Ancillary restraints – assessment

3.72 If the Non-Compete Restrictions are objectively necessary to achieve a legitimate aim, they will fall outside the scope of the prohibition on infringement of competition by object. It is accordingly necessary to consider whether these clauses are ancillary to the agreements described in paragraph 3.35 above.

3.73 The MSG has previously put forward evidence and argumentation to support its view that the ancillary restraints that it currently has in place under the LLP Agreement and the corresponding associates' contracts of 2 years and eighteen months, respectively, are objectively justified. [187]

3.74 The MSG argues that because there is a general shortage of doctors in the British Isles, from where the MSG will primarily be seeking to recruit,[188] this necessarily adversely impacts on the

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[187] During the MSG Appeal, the MSG's advocate stated (Transcript, Day One, p.5 [MSG4/247]) that whilst it disputed the GCRA's findings that a two-year post term non-compete clause was two long, it had never sought to defend the five-year post term non-compete clause contained in the GPA:
"So, you will note, sir, that whilst the grounds of appeal seek to dispute vigorously the finding that the two-year for partners and eighteen-month restrictive covenants for associates should be struck down, there is no attempt to defend the five-year period. We never have sought to defend that."
The Judgment confirms that the MSG's appeal was confined to the GCRA's findings in respect of the periods of restriction imposed by the LLP Agreement and the corresponding provisions found in the associates' contracts (Judgment, paragraph 125 [MSG4/212]). It further states that there was no need for the MSG to have put forward any evidence justifying the five year period of restriction found in the GPA, because the MSG had already recognised that that period was too long (Judgment, paragraph 159 [MSG4/222]).

[188] In its Written Representations [MSG4/656-689], the MSG stated that as any consultant recruited to Guernsey must be a member of one of the various Royal Colleges established in the UK, and as there

MSG's ability to attract suitable candidates.[189] In addition to this, MSG argues there are a number of Guernsey-specific factors, namely the absence of junior doctors, the small size of the PEH, the higher workload in Guernsey compared to the UK and the limited availability of private practice work, that make recruitment particularly challenging for the MSG.[190]

3.75 In order to be able to make potential recruits an offer that is compelling, taking into account the shortage of candidates available and the specific difficulties of recruiting to the MSG set out above, the MSG argues that joiners must have the ability to earn additional income[191] from private elective work.[192] A joiner's ability to earn such additional income would be compromised if they were to face immediate competition from a departing consultant with an established reputation for that work. Thus a period of restraint on the departing consultant is necessary to allow the new joiner to establish a reputation in Guernsey.[193] Such period, according to the MSG, should also take account of the time taken to recruit a new joiner.[194] Analysis undertaken by the GCRA,[195] based on evidence provided by the MSG shows that the average time taken to recruit a new consultant measured from the leaver's date of departure to the starting date of the new specialist is 6.2 months[196] with a range from 0 to 20 months.[197]

3.76 The GCRA has concluded that the material put forward as evidence by the MSG in respect of its two year and eighteen month non-compete clauses does not demonstrate, on the balance of probabilities, that the Non-Compete Restrictions (which were broader both in scope and duration than the equivalent restriction contained in the LLP Agreement and the corresponding associates' contracts) were objectively justifiable.

3.77 First, the evidence demonstrates that by the time that Mr Vhadra and the MSG entered into the Retirement and Settlement Agreement on 10 October 2017, a post-term non-compete

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are very few "home grown" Guernsey consultants, in practice, this means that the MSG will be seeking to recruit UK based doctors (Written Representations, paragraphs 3.31 – 3.33). [MSG4/664]

189 Written Representations, paragraph 3.34. [MSG4/665]

190 Written Representations, paragraphs 3.36 – 3.37. [MSG4/665-666]

191 I.e. in addition to the salary paid by MSG.

192 Written Representations, paragraph 3.38.4 [MSG4/666]

193 Written Representations, paragraphs 6.9, 6.13.3, 6.13.4, 6.16.2. See also letter submitted in support of the MSG's Appeal by Mr Mark Webber, an orthopaedic consultant with the MSG which was annexed to the affidavit of Dr [A]; GDY1, p.225]. [MGS4/690]

194 Written Representations, paragraph 3.41. [MSG4/668]

195 See First Infringement Decision, paragraphs 4.153 – 4.158. [MSG4/65]

196 There is one instance of a departing specialist who has left and the post remained unfilled at the time of MSG's data response. The date of that response, 16 April 2021, has been used as a proxy for the start date of the replacement specialist in this instance.

197 There are a number of instances where the replacement specialist started before the departing specialist's final day at MSG. These are treated as zero months for the purposes of the analysis.

clause of five years' duration was not objectively necessary to allow the MSG to operate, the MSG already having recognised that a clause of that length was not necessary to protect its legitimate interests and having taken steps to replace it with a shorter clause:

(a) As noted above, an MSG committee tasked with investigating a transition by the MSG from a General Partnership to an LLP reported on 7 July 2017 that the post-term non-compete restriction contained at clause 35 of the General Partnership Agreement would need to be updated as a result of legal advice on what was reasonable and enforceable.[198] This demonstrates that by 7 July 2017 (i.e. 3 months before the Retirement and Settlement Agreement was entered into) a five year period of restriction was, objectively, considered to be too long.

(b) At the hearing of the MSG Appeal, the MSG's advocate confirmed that the MSG had been aware for some time that the five year period of restriction contained in clause 35 of the General Partnership agreement was, objectively speaking, too long, stating as follows:

> "Now, in this matter sir, you will have noted that the restrictive covenants effectively fall into two parts. They changed several years ago; and well before this investigation started the MSG recognised that five years, which was the period in place for its partners, was too long. They sought to change it, but it was not until 2017 that they were able to do so because of the change in their structure which was brought about as a consequence of the new secondary healthcare contracts."[199]

(c) The Retirement and Settlement Agreement was signed very shortly before the MSG transitioned from a general partnership to an LLP but after the LLP Committee had concluded that a five year period of restriction was too long (see sub-paragraph (a) above).[200] The LLP Agreement provides for a shorter post-term period of restriction of two years. It is therefore reasonable to infer that, at the time the Retirement and Settlement Agreement was entered into, a two year[201] post-term non-compete period

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198 See paragraph 2.28.

199 This is consistent with submissions made orally by MSG to the GCRA in response to the GCRA's First Statement of Objections, where the MSG's advocate stated that: "MSG tried to reform this provision, amongst others it's fair to say, over a period of many years. It is notable that they were able to do so after [Mr Vhadra] and Mr Pring left. I leave you to take your own conclusions from that. In essence, only after they had gone and with the help of HSC were they able to move to an LLP arrangement with the revised contractual matrix that we have referenced." Transcripts Day 1 of hearing. [MSG4/246]

200 The Retirement and Settlement Agreement was signed on 10 October 2017; the LLP Agreement was executed on 1 January 2018. [MSG1/9191-9200]

201 Or eighteen months, in the case of associate consultants. As observed by the Bailiff in the Judgment, it is unclear why a period of two years is objective justifiable in the case of MSG partners, whereas a

was sufficient to enable the partnership to operate and a five-year period of restriction was objectively speaking too long.

3.78 Second, since 1 January 2018, the MSG has imposed a post-term non-compete clause of 2 years on its departing partners. As the MSG has continued to operate successfully since 1 January 2018 with this shorter period of restriction in place, it can be inferred that a longer period of restriction than this is not objectively necessary to allow the partnership to operate.[202] If a longer period were necessary, the MSG would have been unable to operate as of 1 January 2018.[203]

3.79 Third, the MSG attempted to enforce the five year post-term non-compete provisions of the Retirement and Settlement Agreement against Mr Vhadra beginning with a letter sent by Dr [A] to Mr Vhadra on 5 October 2018, at which point the MSG had been operating successfully with a two year post-term non-compete provision for a period of over nine months.[204] Contemporaneous MSG documents demonstrate that at that time, the MSG considered that a period of restriction of <u>one year</u> from the date of writing (rather than the five years it was attempting to enforce against Mr Vhadra) would be sufficient to ensure that the partnership could continue to operate. In an e-mail, copied to the MSG Management Board, Dr [A] stated that:

"In terms of value (lost private income) and morale of new orthopedic [sic] surgeons <u>the best outcome would be for Ranjan to stand down for a year; this would allow them to establish local reputations</u>."[205]

Given that the MSG had been operating successfully for nine months by this point with a period of restriction of just two years and given that the then MSG Chairman considered that a period of restriction of one year from the date of writing (17 November 2018) would be sufficient to allow incoming orthopaedic surgeons to establish a local reputation (one of the

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period of eighteen months is deemed to be sufficient in the case of associate consultants. Royal Court Judgement, 10 March 2023, paragraph 169. [MSG4/225-226]

202 As stated at paragraph 2.85, for reasons of administrative efficiency, the GCRA has confined this Decision to the agreements entered into between the MSG and Mr Vhadra. For the avoidance of doubt, the GCRA makes no finding as to whether the periods of restriction imposed by the MSG under the LLP agreement and the corresponding associates' contract are themselves objectively justifiable.

203 For the avoidance of doubt, at this time, the GCRA makes no finding as to whether the post-term non-compete restrictions now imposed by the MSG on its outgoing consultants – 2 years for partners and 18 months for associates – are objectively justifiable.

204 See paragraphs 2.47 - 2.56 above.

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

main arguments advanced by the MSG to justify its use of post-term non-compete clauses),[206] there could have been no objective justification for seeking to enforce the five-year post term non-compete clause against Mr Vhadra.

3.80 Fourth, under the terms of the Retirement and Settlement Agreement, entered into on 21 March 2019, the five year period of restriction was reduced to a period of just under two years and three months in respect of Mr Vhadra's involvement with First Contact Health.[207] The fact that the MSG continued to operate successfully even though Mr Vhadra was not finally subject to the five year post term non-compete clause in respect of his involvement with First Contact Health clearly demonstrates that the five-year period of restriction was not objectively justified; it was not impossible for the MSG to operate without a restriction of that duration on Mr Vhadra.

3.81 Fifth, Mr Vhadra remained subject to clause 35 of the General Partnership Agreement, save in respect of his involvement with First Contact Health, for the full five years. This restriction, which did not expire until 11 October 2022 at the earliest,[208] cannot be objectively justified for the reasons set out above.

Conclusion

3.82 For the reasons set out above, the GCRA finds that the Non-Compete Restrictions imposed by the MSG on Mr Vhadra as defined in this Decision, namely:

(a) the five-year restriction contained in clause 35 of the General Partnership Agreement

(b) clause 6 of the Retirement and Settlement Agreement and

(c) clause 3 of the Settlement Agreement

are not objectively justifiable. The evidence does not demonstrate that, in their absence, the partnership would not be able to operate.

206 MSG Cause paragraphs 7, 8, 58, 64, 65, 73, 78. [MSG4/133-157]

207 10 October 2017 – 1 January 2020.

208 See paragraph 2.60 above.

4. FINDINGS OF THE GCRA

A. Conclusions

4.1 For the reasons set out above the GCRA finds that MSG has infringed the prohibition imposed by section 5(1) of the 2012 Ordinance, in that it has entered into agreements with another undertaking (Mr Vhadra) containing restrictions which have the object of preventing competition within markets in Guernsey for the provision of services. Those agreements and restrictions are as follows:

(a) The General Partnership Agreement between the MSG and Mr Vhadra containing the non-compete restriction (restraint of trade provision) at clause 35, both at the point of its execution by Mr Vhadra and to the extent that clauses of it continued to apply as between the MSG and Mr Vhadra following Mr Vhadra's retirement from the MSG.[209]

(b) The Retirement and Settlement Agreement between the MSG and Mr Vhadra – which at clause 6 contained a restriction expressly continuing the application of clause 35 of the General Partnership Agreement.[210]

(c) The Settlement Agreement between MSG and Mr Vhadra – which in clauses 2 and 3 expressly continued the application of clause 35 of the General Partnership Agreement, save in respect of Mr Vhadra's involvement with First Contact Health to which a shorter period of restriction was ultimately applied and in respect of which shorter period of restriction, for the avoidance of doubt, the GCRA makes no finding at this time.[211]

4.2 The GCRA concludes, for the reasons set out above, that the Non-Compete Restrictions of five years' duration contained within the above agreements cannot be objectively justified such that they fall outside of the scope of application of section 5(1) of the 2012 Ordinance.[212]

4.3 The offending clauses were in place from 12 October 2017[213] – 11 October 2022[214] save that by clause 2 of the Settlement Agreement, the five year period of restriction that had been in

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209 As set out in full at paragraph 2.25 above

210 Paragraph 2.38(c)

211 Paragraph 2.57(a) - 2.57(e)

212 Which for the avoidance of doubt does not include the shorter period of restriction ultimately agreed between Mr Vhadra and the MSG in respect of Mr Vhadra's involvement with First Contact Health pursuant to clause 2 of the Settlement Agreement.

213 The date on which the MSG and Mr Vhadra entered into the Retirement and Settlement Agreement and clause 35 of the General Partnership Agreement became operative.

214 At the earliest; as set out above at paragraph 2.60, the MSG had argued for a longer period of restriction.

place in respect of Mr Vhadra's work with First Contact Health was terminated on 21 March 2019.

B. Financial penalties

4.4 The GCRA may make an order imposing a financial penalty on an undertaking which is found to have breached the prohibition contained in s.5(1) of the Competition (Guernsey) Ordinance, pursuant to s.32(4) of the Ordinance.

4.5 A Penalty Statement will be issued to the MSG at the same time as this Decision.

5. 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.