



Consultation on Block Exemptions under Channel Islands Competition laws

Consultation

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Executive summary

Under competition law in Guernsey and Jersey, in order to protect consumers and preserve competition in the market in the interests of the economic well being of the islands, anti-competitive agreements or arrangements between undertakings are prohibited. This is a common approach to competition law and reflects the approach adopted across Europe. However, some of the agreements which are prohibited by competition law may not in themselves be harmful – or they may offer significant benefits which outweigh the harm caused in other areas. In these exceptional circumstances, and subject to strict scrutiny and very specific criteria, it is possible for competition regulators to grant exemptions for individual agreements from the blanket prohibition under the competition law. There is also the option, in a small number of areas, where it is clear that certain types of agreement would not be harmful, to grant block exemptions for those types of agreement.

In this pan Channel Island consultation, CICRA is consulting on the merits of introducing block exemptions under the provisions of competition law in Guernsey and Jersey.

Block exemptions provide for certain categories of agreements and practices to be exempt on the basis that they are compatible with the provisions of the relevant competition laws. Such agreements and practices may otherwise require individual exemptions from the Authority.

The substantial advantage to parties to such agreements is that they would no longer be required to notify CICRA and would not need to seek individual exemptions. This process is time consuming for the parties involved and does not make the most effective use of the limited resources available to CICRA to conduct its duties under the competition and regulatory laws.

In CICRA's view, the introduction of a small number of block exemptions which are limited in their scope would substantially improve the operation of competition law in both Guernsey and Jersey and offer increased certainty for businesses in the Channel Islands.

1 Introduction

1.1 Background

Block exemptions are a mechanism widely used within Europe at a national and an EU level to exempt certain types of agreements from the strict provisions of competition law. They are generally applied to arrangements which would normally fall under the scrutiny of a competition authority but which fall into one of two categories, namely they would be cleared because they do not harm competition, or would require (and be granted) an exemption because they offer substantial benefits to consumers which outweigh any potential harm to competition.

In each case the block exemption specifies a range of criteria which the agreement must meet in order to qualify for exemption and ensure that the agreement is not harmful. The regulator retains the power to review individual cases within the area of the exemption, but this is by exception and would generally only occur when there is a specific concern or complaint involved.

The *Competition (Guernsey) Ordinance 2012* and the *Competition (Jersey) Law (2005)* both allow this type of exemption to be implemented – albeit in slightly different ways.

1.2 Benefits

There are significant benefits to the parties involved, to CICRA and to consumers as a whole from putting in place such exemptions.

They allow CICRA as the competition authority to target its resources to those areas where it can deliver most benefit without becoming unnecessarily involved in exercises to clear harmless agreements through competition rules.

They simplify and reduce costs for the parties involved and greatly increase certainty in their ability to conduct certain types of business (for example, franchising operations) and benefit customers and the economies of the islands as a whole.

2 Potential scope for exemptions

2.1 What areas could we consider?

Across Europe, at an EU level, there is a range of exemptions, from generic for particular types of vertical or horizontal arrangement to a number of specific sectors for which regulations and guidance have been published, including:

- Agriculture;
- Insurance;
- Motor vehicle trade
- Postal services;
- Professional Services;
- Transport;
- Telecoms;
- Licensing agreements for technology transfer;
- Joint execution of research and joint development of its results.

While it may eventually be desirable to address all of these areas, for economies the size of the Channel Islands, it is sensible to prioritise those aspects which are most relevant and potentially beneficial, without seeking to extend it into an overarching or bureaucratic exercise which attempts to address every possible exemption.

For some of the sectors above, given the likelihood or frequency with which exemptions are requested it would make sense to ensure that they are addressed. For other areas, where applications are rare or there may be specific factors which would need to be considered from the perspective of an island economy, it would be more effective to consider applications on a case by case basis.

2.2 Priorities for block exemptions

From CICRA's perspective, the highest priorities for consideration would appear to be:

- General vertical agreements
- Fuel distribution/forecourt agreements;
- Motor vehicle trade;
- Insurance;

A block exemption for vertical agreements between undertakings active at different levels in the supply chain for goods and services would offer substantial benefits to the parties involved. In many cases vertical agreements, even though they need to be examined under competition law, do not harm the markets in which they operate. They may deliver significant benefits to consumers in terms of improved distribution or availability of goods, increased efficiency and reduced costs.

A block exemption for vertical agreements would simplify the issues associated with franchising and similar arrangements. CICRA believes that exempting such arrangements within appropriate criteria could encourage such arrangements locally and remove one potential barrier to bringing more businesses and economic development to the Channel Islands.

Fuel agreements and the motor trade are identified because between them they have generated the majority of work for CICRA on exemptions to date and therefore offer the greatest benefit in terms of reducing the regulatory burden on CICRA and the parties involved.

The insurance sector is an important sector to the economies of the Channel Islands (esp. in Guernsey). It seems likely that operation and practice in the industry locally is no different to that across the EU. In Europe, a specific exemption for insurance companies was required to allow them to pool information on insurance risks. The potential need for this has not previously been identified locally.

2.2 Lower priorities for consideration

Horizontal arrangements, because they are between competitors active in the same market sector, such as agreements to share supply or facilities, tend to raise more issues from a competition perspective. While there may be substantial benefits to customers in some cases, by their nature this type of agreement is more likely to raise competition issues with potential to cause harm to markets and consumers in these areas. They may be more restrictive and therefore more problematic than vertical arrangements. It is also the case that they may be even more harmful in a small economy, where the overall size of the market being competed for is small, than would be the case in a larger geographic market.

The postal and telecoms sectors in both islands are governed by their own laws in each island and adding another layer of guidance or regulation in this area would not in CICRA's view be appropriate at this stage. It may however be useful to issue notes and guidance on concurrent use of powers in those sectors before moving to specific exemption guidance.

At this point in time CICRA does not see a specific need for block exemptions to be applied to the agriculture or transport sectors, where previous cases have involved particular or unique issues which require specific consideration and would not lend themselves to the form of a block exemption. Similarly with the professional services sector, although given the breadth of this sector CICRA recognises that there may be generic issues that could be relevant to, or benefit from, block exemptions rather than consideration on a case by case basis. Respondents to this consultation should highlight if they think this is the case.

3 Consultation

Respondents to the consultation are asked to consider:

1. **Should CICRA seek the implementation of block exemptions in Guernsey and Jersey?**
2. **Has CICRA identified the correct priorities? And are there any reasons for not seeking to apply block exemptions in the areas identified?**
3. **What criteria or restrictions should be attached to any specific block exemptions proposed by respondents?**
4. **Are there any other areas which should be brought into consideration?**

Responses to this consultation document should be submitted in writing to CICRA's offices in either Guernsey (GCRA) or Jersey (JCRA):

GCRA Suites B1 & B2 Hirzel Court St Peter Port Guernsey GY1 2NH	JCRA 2 nd Floor Salisbury House 1-9 Union Street St Helier Jersey JE2 3RF
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CICRA encourages the submission of responses by email to or by email to info@gcra.gg in Guernsey, and info@jcra.je for Jersey.

The deadline for responses is **5.00pm on 26th June 2015**.

All comments should be clearly marked: ***"CICRA consultation on Block Exemptions"***.

CICRA's normal practice is to publish all responses to consultations on its website. If you do not want your response to be published in part or in full, the relevant sections should be clearly marked as confidential, and the response should explain why those parts of the response should be treated as confidential.

4 Next Steps and Implementation of Block Exemptions

Consultation process

CICRA will carefully consider the responses to this consultation and will take them into account in preparing formal advice and making specific recommendations to the States of Jersey and States of Guernsey.

CICRA will publish its formal proposals to the relevant departments, Commerce and Employment in Guernsey and the Assistant Chief Minister in Jersey, setting out the areas for which block exemption regulation should be made and setting out text including the relevant qualifying criteria and conduct or agreements which should be excluded

The departments and/or Ministers would need to consider CICRA's formal proposals and then determine whether or not to approve those.

Block exemptions would then be put in place by the appropriate mechanism. In Guernsey this would be through the laying down of appropriate regulations by the Commerce and Employment department under section 7 of the *Competition (Guernsey) Ordinance 2012*. In Jersey this would be done by order of the Minister under article 10 of the *Competition (Jersey) Law 2005*.

Such exemptions would take effect in line with the relevant Regulations or Order. Following publication by the Department or Minister of block exemptions, CICRA would prepare, and publish on its website, guidance for parties on the implementation of block exemption rules.

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ANNEX 1: Legal Background

There are specific provisions within the competition law in both Guernsey and Jersey to allow for block exemptions, set out below.

Guernsey

From the *Competition (Guernsey) Ordinance 2012*:

7 Block exemptions.

- (1) The Department may, after consulting the Authority, by regulation -
 - (a) exempt any class or description of agreements between undertakings from the prohibition set out in section 5(1), and
 - (b) vary or revoke any such exemption.
- (2) When advising the Department, the Authority shall, in particular, advise it whether in the Authority's opinion the class or description of agreement concerned -
 - (a) contributes to improving the production or distribution of goods or services or promoting technical or economic progress in the production or distribution of goods or services,
 - (b) allows consumers of those goods or services a fair share of any resulting benefit,
 - (c) does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the objectives mentioned in paragraphs (a) and (b), and
 - (d) does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the market in Guernsey for the goods or services in question.
- (3) Before advising the Department the Authority must -
 - (a) publish a draft of the advice it intends to give in such manner and for such period as it considers appropriate,
 - (b) at the same time specify a reasonable period within which representations may be made in relation to the draft advice, and
 - (c) consider any representations submitted to it within that period.
- (4) The Authority must publish the advice it gives to the Department in such manner and for such period as it considers appropriate.
- (5) Regulations under this section may, without prejudice to section 63 (general provisions as to subordinate legislation) -
 - (a) impose conditions or obligations subject to which an exemption granted by the regulations is to have effect,
 - (b) provide that a contravention of a condition imposed by the regulations has the effect of cancelling the exemption in respect of an agreement,
 - (c) provide that if there is a contravention of an obligation imposed by the regulations, the Authority may revoke the exemption in respect of the agreement,

- (d) provide that if the Authority considers that a particular agreement is not one which falls within paragraphs (a) to (d) of subsection (2), or is one to which paragraph (b) of this subsection applies, it may declare that the exemption does not apply in respect of the agreement,
- (e) provide for the manner in which the Authority may revoke an exemption under paragraph (c) or issue a declaration under paragraph (d) and the manner in which the notice of revocation or the declaration is to be published,
- (f) provide for an exemption to have effect from a date earlier than the date on which the regulations came into force,
- (g) provide that the regulations or any of their provisions will cease to have effect on a date or at the end of a period specified in the regulations.

Jersey

From the *Competition (Jersey) Law 2005*:

10. Block exemptions.

- (1) The Minister may, after consulting the Authority, by Order exempt from Article 8(1) a class of arrangements to which that Article would otherwise apply.
- (2) When advising the Minister, the Authority shall, in particular, advise him or her whether in the Authority's opinion the exemption of the class of arrangements –
 - (a) is likely to improve the production or distribution of goods or services, or to promote technical or economic progress in the production or distribution of goods or services;
 - (b) will allow consumers of those goods or services a fair share of any resulting benefit;
 - (c) does not impose on the undertakings concerned terms that are not indispensable to the attainment of the objectives mentioned in sub-paragraphs (a) and (b); and
 - (d) does not afford the undertakings concerned the ability to eliminate competition in respect of a substantial part of the goods or services in question.
- (3) Before advising the Minister the Authority must –
 - (a) publish a draft of the advice it intends to give; and
 - (b) consider any representations made to it within any reasonable period to be specified by the Authority when it publishes its draft advice.
- (4) The Authority must publish the advice it gives to the Minister.
- (5) An Order made under this Article may –
 - (a) impose conditions or obligations subject to which an exemption granted by the Order is to have effect;
 - (b) contain different provisions for different classes of arrangements;
 - (c) provide that a breach of a condition imposed by the Order has the effect of cancelling the exemption in respect of the relevant arrangement;

- (d) provide that if there is a failure to comply with an obligation imposed by the Order, the Authority may cancel the exemption in respect of the relevant arrangement;
- (e) provide that if the Authority considers that a particular arrangement is not one to which paragraph (2) applies, it may declare that the exemption does not apply to the arrangement;
- (f) provide for the manner in which the Authority may cancel an exemption in accordance with sub-paragraph (c) or (d) or issue a declaration in accordance with paragraph (e) and the manner in which notice of the cancellation or declaration is to be published;
- (g) provide for an exemption to have effect from a date earlier than the date on which the Order was made;
- (h) provide that the Order or any provision of it is to cease to have effect at the end of a period specified in the Order.