Case C1441G

The Medical Specialist Group

Decision

Guernsey Competition & Regulatory Authority

16 September 2021

Guernsey Competition and Regulatory Authority
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1. INTRODUCTION

A. Synopsis

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

1.2 Following an investigation conducted under section 22(1) of the 2012 Ordinance, the GCRA has decided that the Medical Specialist Group LLP (**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).

1.3 This document (**Decision**) constitutes the notice in writing specified by section 44(1) of the 2012 Ordinance and what follows sets out the terms of and the grounds for the GCRA's Decision as specified by section 44(2) of the 2012 Ordinance.

1.4 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.

1.5 In consequence of the infringements identified in this Decision, the GCRA may impose a financial penalty under Section 31(4) of the 2012 Ordinance. The GCRA may issue a separate proposed penalty notice in this regard.

B. Confidentiality

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

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

1.8 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.

1.9 Written representations made under the previous paragraph should be provided by 4 p.m. on 23 September 2021 and should be emailed to: info@gcra.gg.

1.10 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. EXECUTIVE SUMMARY

This executive summary is provided for reference only. It does not form part of this Decision.

Legal Framework

- The 2012 Ordinance came into force on 1 August 2012.
- It prohibits:
    - Agreements between undertakings that have the object or effect of preventing competition within any market in Guernsey for goods or services.
    - The abuse of a dominant position within any market in Guernsey for goods or services.

Reasonable grounds to suspect

- The GCRA determined that there were reasonable grounds to suspect that MSG had non-compete agreements in place with its former consultants and that these agreements infringed Guernsey competition law.
- It further determined that investigation of these agreements fell within its prioritisation principles.

Anti-competitive agreements

- The GCRA's investigation has found that MSG has post-term non-compete agreements in place with its former consultants (partners and associates).
- The GCRA has concluded that these post-term non-compete agreements are prohibited by the 2012 Ordinance because**:**
    - They have the object of preventing competition in the provision of certain medical services in Guernsey; and
    - To take the restrictions outside of the scope of the prohibition on anti-competitive agreements, MSG would have had to demonstrate that the restrictions were objectively justifiable – ie, that the partnership could not operate without the restrictions in place; and
    - MSG has not demonstrated to the requisite legal standard that the restrictions are objectively justifiable.

Direction and Penalty

- Because the GCRA has found that the non-compete agreements are prohibited by Guernsey competition law, it directs MSG to remove them.
- The Authority will be minded to impose a financial penalty where it finds a restriction of competition by object. It will therefore now consider whether it would be appropriate to issue a draft penalty statement to MSG in respect of the infringements described in this Decision.

3. FACTUAL BACKGROUND

A. Healthcare services in Guernsey

Primary healthcare

3.1 Primary healthcare in Guernsey[1] includes GP services, A&E visits, ambulance use, dentistry, and physiotherapy (where requested by a GP).[2] 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

3.2 Some secondary care and specialist services are made available by the Office of the Committee for Health & Social Care, a department of the States of Guernsey. 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 (**Specialist Health Insurance Scheme**) which entitles them to receive such specialist care and treatment free at the point of delivery.

3.3 The Office of the Committee for Health & Social Care provides secondary healthcare services working in partnership with private entities including MSG, the Guernsey Therapy Group (**GTG**), and other visiting or off-Island providers.

3.4 There is one acute hospital in Guernsey (the PEH). The PEH website explains:[3]

> "The [Specialist Health Insurance Scheme] has 2 main parts relating to hospital admission:

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1 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 [MSG3/83-116]).

2 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 [✂], as set out in further detail in this Decision.

3 See https://www.gov.gg/PEH, under the heading "Specialist Health Insurance Scheme".

- A contract between the States of Guernsey and MSG covering the cost of specialist consultations, treatments, operations and procedures at MSG and the PEH.

- A contract between the States of Guernsey and the Guernsey Therapy Group (GTG), covering inpatient physiotherapy treatment in hospital if it is indicated as part of the specialist procedure.

The scheme doesn't cover cosmetic surgery, assisted reproduction (IVF) or sterilisation (unless there is a valid clinical need), dentistry or GP consultations and treatment at Emergency Department or Primary Care centre."

3.5 The Office of the Committee for Health & Social Care also 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 areas of specialism not covered by MSG, including Psychiatry, Medical Imaging (Radiology), Pathology and Public Health.

3.6 In addition to the provision of services at the PEH, the Specialist Health Insurance Scheme also funds the provision of visiting and off-Island specialist services (such as neurology, haematology, rheumatology, microbiology and renal) provided by UK-based hospitals.

3.7 Secondary healthcare can also be accessed on a private basis. MSG makes its services available to private patients for a charge, albeit where hospital-based care is required, those services must be provided at the States-run PEH. Privately funded patients may pay for such services either directly or through healthcare insurance schemes. The private secondary healthcare services of both MSG and the GTG are advertised on the States of Guernsey's website.[4] There are no other hospital-based providers of secondary healthcare in Guernsey.

B. MSG

Background

3.8 MSG is a partnership of medical and surgical consultants. It employs associates (who are also all medical and surgical consultants) and other medical support staff (such as surgical assistants, nurses and audiologists).[5] As MSG does not employ junior doctors, its services are wholly consultant led and delivered.

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4 http://www.gov.gg.secondaryhealthcare

5 http://www.msg.gg/wp-content/uploads/2014/08/1672-MSG-2018-ANNUAL-REPORT-WEB-1.pdf

Services provided by MSG

Public services

3.9 MSG supplies the services of its consultants to the patients covered by the Specialist Health Insurance Scheme under a Secondary Healthcare Contract (**SHC**) entered into between MSG and the States of Guernsey. As described above, these services are, as a matter of States policy, provided free at the point of delivery to patients covered by the scheme.[6] In this Decision, these services are referred to as **Contract Services** and the patients who access them are referred to as **Contract Patients**.

3.10 The website of the States of Guernsey states that the first SHC between MSG and the States of Guernsey became effective on 1 January 1996.[7] The SHC has been revised on various occasions since that date. The current SHC was signed on 3 March 2017 and commenced on 1 January 2018.[8]

3.11 The SHC is divided into fifteen sections, with thirteen accompanying Schedules and two appendices. It specifies the terms under which MSG provides Contract Services in the areas of specialism covered by MSG and covers a wide range of issues, including [✂]. It is a [✂] which may be terminated on either side on the provision of [✂] (clause 54.1) though [✂] is possible (clause 19.2) and the States of Guernsey may [✂] (clause 19.14), as long as this would not make the contract [✂].

3.12 MSG's performance under the SHC is evaluated in accordance with contractual Key Performance Indicators (KPIs) relating to professional compliance, productivity and quality, patient safety and experience, and sustainable service.[9]

3.13 As part of the Contract Services, 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.

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6 Paragraphs 3.2 - 3.3; Written Representations of MSG, paragraph 3.22. [MSG3/83-116]

7 http://www.gov.gg.secondaryhealthcare, states that "[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."

8 Contract between the States of Guernsey and MSG dated 3 March 2017 (SHC) [MSG/1465-1616].

9 See https://www.gov.gg/secondaryhealthcare.

3.14 The GCRA understands that the SHC is worth some [✂] a year. Its fee is determined on a [✂] basis. However, and as stated above, MSG also supplies support staff who assist their consultants in delivering services under the SHC, together with equipment. Under the terms of the SHC, if the States of Guernsey terminate the SHC or a service area under it, they are required to [✂] (clause 55.3).

3.15 Whilst it is clear that the SHC gives the States of Guernsey a significant degree of oversight of the provision of the Contract Services and that the approach of each of the MSG and the States of Guernsey to their respective roles under the SHC is underpinned by a common set of principles,[10] the roles of the States of Guernsey and of MSG are clearly distinct. In particular, the States of Guernsey is "solely responsible for commissioning the scope and description of the Secondary Healthcare Service under [the SHC] and for setting the Secondary Healthcare Budget"[11] and is, in addition, solely responsible for commissioning other healthcare services that may interface with the services provided by MSG, including tertiary care, physiotherapy, off-island care, community services and other secondary healthcare not provided by MSG.[12] The States of Guernsey is also responsible for the provision of certain secondary healthcare services (referred to in the SHC as the "States Services"). By contrast, MSG is engaged by the States of Guernsey as a provider of secondary healthcare services (referred to in the SHC as the "MSG Services") only.[13]

Private services

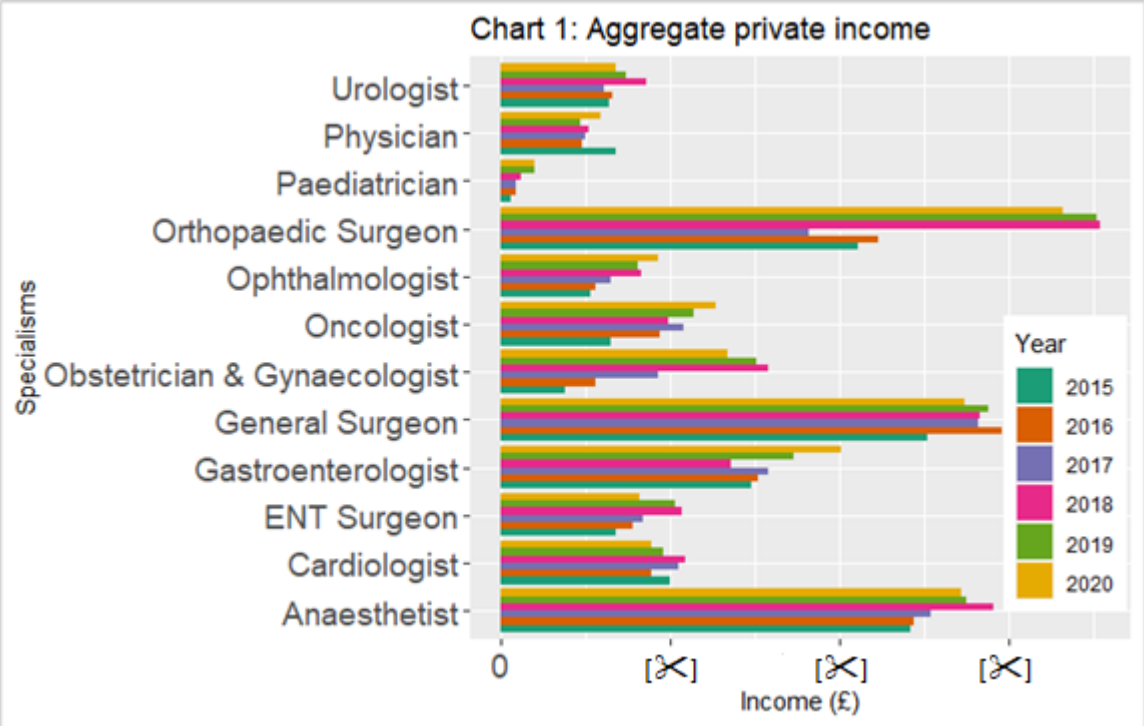
3.16 Under the terms of the SHC, MSG consultants are entitled to offer private elective secondary healthcare services (**Private Services**), provided that this does not compromise or interfere with the provision of publicly funded healthcare services under the SHC.

3.17 On its website, MSG explains that patients opting for private elective secondary healthcare (referred to in this Decision as **Private Patients**) can benefit from "extras not available to contract patients" (i.e., patients receiving services provided under the SHC). Those "extras" include self-referral (rather than, as for Contract Patients, requiring referral through a GP), flexible appointment times and operation dates, consultant selection (rather than, as for Contract Patients, being required to see the consultant to whom their case is allocated), and private hospital rooms. They may also include additional services not available under the SHC

10 SHC, section one, clause 6 [MSG/1465-1616].
11 SHC, Section One, clause 5.1 [MSG/1465-1616].
12 SHC, Section One, clause 5.2 [MSG/1465-1616].
13 SHC, Section One, clause 5.3 [MSG/1465-1616].

(such as new technologies or drugs, and additional services such as cosmetic surgery, fertility services and executive health screening packages).[14]

3.18 A list of Private Patient initial consultation charges is made available on MSG's website.[15] Those charges include £225-£250 for an initial consultation with a surgical consultant and £200-£225 for a follow-up consultation with a surgical consultant. The prices for other procedures which may be performed as part of an appointment are not advertised. Chart 1 shows the aggregate private income earned by MSG over the period 2015 to 2020, by specialism.[16,17]



3.19 MSG does not provide physiotherapy services. As set out above, the contract with the States of Guernsey for the provision of hospital inpatient physiotherapy services is held by GTG.

The structure of MSG

3.20 MSG has since 1 January 2018 been a Limited Liability Partnership. Prior to that date it was a General Partnership. MSG's website stated that, as at November 2017, it had been a General Partnership for more than 25 years (i.e. since at least 1992). In this Decision, the term **MSG** is

14 https://www.msg.gg/flexibility-choice/

15 http://www.msg.gg/flexibility-choice/.

16 The income data has been indexed and is presented in real 2020 pounds.

17 The private income data for MSG consultants for the period 2015-2020 (both years inclusive), comprising the total private fees they made each year including the 40% share to be allocated to MSG, was provided by MSG on 23 March 2021 in response to Item 19.

used to refer to the General Partnership and to the Limited Liability Partnership as appropriate.

3.21 MSG doctors (partners and associates) are all qualified medical and surgical consultants. According to MSG's 2019 Annual Report,[18] its 49 consultants span the following practice areas:

(a) 12 consultants in Adult Medicine (Cardiology, Gastroenterology, Oncology, General Physicians, Diabetes/Endocrinology, Geriatrics, Nephrology, Respiratory);

(b) 10 consultants in Anaesthetics (Anaesthetics, Intensive Care, Chronic Pain);

(c) 12 consultants in Surgery (General Surgery, Breast Surgery, Ear, Nose & Throat, Ophthalmology, Orthopaedics, Urology); and

(d) 15 consultants in Women & Child Health (Obstetrics & Gynaecology, Paediatrics).

3.22 The 2019 Annual Report notes that MSG's income comes primarily from the SHC (80%), with the balance from private earnings.

The terms of the Partnership Agreements

3.23 The terms on which 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**).[19]

3.24 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 (clause 1). The partners agreed to employ themselves diligently in the work of the Practice (clause 20).

(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 (clauses 4 and 17).

(c) The earnings of MSG partners were to be shared with each other according to equal shares (clauses 4 and 12), including earnings from medical appointments and other work carried out in the Bailiwick (clause 14).

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18 See http://report19.msg.gg/organisation.html

19 [MSG/2711-2734]

(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 (clause 13 and Appendix II). 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.

(e) Each partner was obliged to join and maintain professional indemnity insurance with a Medical Defence Union approved by the Practice (clause 22).

(f) Partners could be required to retire in the event of a lengthy sickness (clause 26) or because of the reorganisation of medical provision in the Bailiwick of Guernsey (clause 36) or could retire voluntarily (clause 28). However, until 2010 it was not possible for a group of partners in the same specialism to retire at the same time (clause 28(ii)).

(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 (clause 21).

(h) If a partner removed under clause 21 intended to continue to practise in the Bailiwick of Guernsey, his or her shares would revert automatically to the remaining partners and no purchase price would be paid. Instead, the departing partner would receive a payment in respect of the value of their shares within three months of departure, such valuation to be made by two competent persons or, in the event that they could not agree, an umpire (clause 29(i)).

(i) If a partner removed under clause 21 did not intend to continue to practise in the Bailiwick of Guernsey and agreed to be bound by clause 35, the other partners would purchase the departing partner's shares for a purchase price calculated according to an agreed formula which took into account the net per-partner earnings of the partner and provided for the departing partner to receive 60% of their private practice earnings (clauses 29(ii) and 30 and Appendix III). That formula was the same formula to be applied in the event of departure because of retirement or death.

(j) Disputes under the General Partnership Agreement were to be referred to an arbitrator (clause 38).

3.25 Partners joining MSG "bought in" to the partnership.[20]

3.26 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."

3.27 The term **Medical Practitioner** is defined as "any person whose name is inscribed on the Medical Register maintained by the General Medical Council" (clause 41.1).

3.28 Accordingly:

(a) Partners terminated for cause under clause 21 who did not agree to be bound by clause 35 would have their shares in the partnership taken from them, the shares would be divided equally between the remaining partners and no purchase price for those shares would be paid. Instead, the remaining partners would take a valuation of the outgoing partner's share in the stock in trade and effects of the practice and the outgoing partner would receive a payment reflecting the value of that share within three months of the valuation taking place.

(b) By contrast, such partners who agreed to be bound by clause 35, or partners departing for any other reason, would have their shares purchased from them at a purchase price calculated according to the formula set out above (paragraph 3.24(i)).

(c) Clause 35 prohibited 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

[20] Transcript of [✂] interview, [22:27] – [26:08] [MSG2/1236-1315].

shares by the other partners (which could itself occur up to three months after the outgoing partner's departure). The prohibition is expressed in extremely 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 seems even to extend to work not necessarily undertaken in the direct capacity of Medical Practitioner.

3.29 MSG converted into a limited liability partnership on 1 January 2018. An "LLP Committee" was formed by 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**.[21] The discussion shows that MSG was aware of the possibility that MSG partners might leave to do the same work for the States of Guernsey directly and originally wanted to ensure that they could do so, but would be subject to a lower buy-out.[22] It appears that legal advice was taken on the form of the non-compete provision because MSG was concerned that it should be enforceable.[23]

3.30 The terms on which the new limited liability partnership operates are set out in the Limited Liability Partnership Agreement (**LLP Agreement**).[24]

3.31 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 (clause 43.1).

(b) 60% of the private practice income is remitted by the LLP to the Partner and the remaining 40% is retained by MSG (clause 43.2).

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

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21 See LLP Committee Output Document (7 July 2017) [MSG/1617].
22 See LLP Committee Output Document (7 July 2017), GC9, p. 20 [MSG/1636].
23 See LLP Committee Output Document (7 July 2017), p. 23 [MSG/1639].
24 LLP Agreement [MSG1A].

(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[.]"

3.33 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 (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 limits the relevant type of medical services 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.

3.34 Clause 82.2 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. There does not appear to have been any attempt to implement the lower buy-out stipulation in relation to former partners who leave in order to perform the same roles for the States of Guernsey directly, as had been contemplated in the LLP Committee Output Document.[25]

3.35 As was the case under the General Partnership Agreement, it is not possible for a group of partners to voluntarily retire at the same time without permission of the Management Board (clause 71.2).

3.36 There is no provision in the SHC that requires MSG to impose non-compete restraints on its departing partners (or associates), either in its General Partnership Agreement / LLP Agreement or otherwise (e.g. in its contracts with its associates). In response to a question from the GCRA as to whether the States of Guernsey had given MSG any formal direction

[25] See LLP Committee Output Document (7 July 2017), GC9, p. 20 [MSG/1636].

requiring MSG to impose such non-compete restraints, MSG stated that it was not aware of any such formal direction having been given.[26]

3.37 The GCRA also notes that the SHC contains provisions designed to address a scenario where "tension arises between the amount of MSG Budget available and the scope and/or quality of MSG Services to be delivered".[27] If this occurs, the States of Guernsey and MSG must use the [✂] to achieve a solution. Such solution may take into account the factors set out in clause 7.6 of the SHC. These factors do not include or mandate the imposition of non-compete clauses or the use of privately generated income to cross-subsidise the provision of Contract Services under the SHC.[28]

The terms of the associates' contracts

3.38 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 MSG before deciding whether or not they wish to become partners in MSG.

3.39 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:

(a) The earliest non-compete clause which the GCRA has located is contained in a 1995 associate's contract.[29] The form of the clause appears to have been largely unchanged until 2017 (amended only to update the references to gender); MSG has provided contracts from current associates, current partners and former associates and partners.[30] The pre-2018 associates' contracts contained a restriction similar to that

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26 MSG response to question 22 of GCRA information request of 11 December 2020 [MSG3/321-322].

27 SHC, clause 7.6 [MSG/1465-1616].

28 The relevant factors are [✂].

29 Contract of Employment between MSG and [✂] (April 1995), clause 14 [MSG/1137]. Contracts from 1991 and 1992 do not appear to contain any non-compete clause; see Contracts of Employment between MSG and: [✂] (31 December 1991) [MSG/959-964]; [✂] (31 December 1991) [MSG/1073-1076]; and [✂] (1 January 1992) [MSG/1079-1082].

30 Contracts of Employment between MSG and: [✂] (3 October 2016), clause 17 [MSG/669]; [✂] (3 November 2011), clause 17 [MSG/736]; [✂] (14 March 2016), clause 17 [MSG/745]; [✂] (7 March 2016), clause 17 [MSG/755]; [✂] (14 March 2016), clause 17 [MSG/765]; [✂] (29 July 2015), clause 18 [MSG/777]; [✂] (12 November 1997), clause 14 [MSG/787]; [✂] (1 May 2001), clause 13 [MSG/793]; [✂] (10 March 2014), clause 18 [MSG/813]; [✂] (5 September 2008), clause 15 [MSG/826]; [✂] (25 March 2002), clause 13 [MSG/833]; [✂] (28 February 2006), clause 14 [MSG/847]; [✂] (24 January 2012), clause 17 [MSG/856]; [✂] (25 October 2010), clause 17 [MSG/864]; [✂] (25 March 2002), clause 13 [MSG/871]; [✂] (7 March 2016), clause 17 [MSG/879]; [✂] (3 January 2014), clause 17

included in clause 35 of the General Partnership Agreement, but with a duration of only 18 months, as follows:

> "Upon the Employee's contract being determined under the terms of this Agreement, he/she shall not at any time within 18 months thereafter directly or indirectly exercise or carry on or be concerned or interested in exercising or carrying on upon his/her own account or in partnership with or as assistant to any other person or body the practice of medical practitioner in the Bailiwick of Guernsey. For the avoidance of doubt, the term 'Medical Practitioner' shall mean any person whose name is inscribed on the UK Medical Register."

(b) The language appears to have changed recently, most likely in line with the change to the corresponding clause in the LLP Agreement. Associates' contracts entered into in 2018 and 2019 provide:[31]

> "Save with the prior written approval of the Management Board, the Employee shall not during the period of 18 months after the determination of his/her contract under the terms of the Agreement provide, supervise, manage or have any other involvement with the provision of, medical services in the Bailiwick of Guernsey in the same specialty as that which he practised as an Employee, save as an employee of the States of Guernsey. For the avoidance of doubt, the term 'Medical Practitioner' shall mean any person whose name is inscribed on the UK Medical Register."

(c) The associates' contracts would have been entered into on a case-by-case basis (rather than changed for everyone at the same time, as in the case of the Partnership Agreements). The GCRA has identified one pre-2018 contract which was varied, apparently at a time when the SHC was being renegotiated, and which provided for the possibility of working for the States of Guernsey directly.[32]

[MSG/895]; [✂] (13 March 2000), clause 14 [MSG/905]; [✂] (18 July 2003), clause 14 [MSG/910]; [✂] (4 June 2001), clause 13 [MSG/916]; [✂] (7 February 2007), clause 14 [MSG/922]; [✂] (6 July 2006), clause 14 [MSG/930]; [✂] (11 October 2010), clause 17 [MSG/936]; [✂]l (25 January 2016), clause 17 [MSG/945]; [✂] (19 March 2012), clause 17 [MSG/955]; [✂] (17 May 2017), clause 17 [MSG/979]; [✂] (10 February 2014), clause 17 [MSG/986]; [✂] (1 May 2001), clause 13 [MSG/997]; [✂] (16 January 2006), clause 14 [MSG/1004]; [✂] (7 March 2016), clause 17 [MSG/1014]; [✂] (9 March 2016), clause 17 [MSG/1025]; [✂] (8 May 2000), clause 14 [MSG/1035]; [✂] (25 April 2017), clause 17 [MSG/1043]; [✂] (7 November 1995), clause 14 [MSG/1051]; [✂] (31 July 2012), clause 17 [MSG/1061-1063]; [✂] (1 September 1999), clause 14 [MSG/1085]; [✂] (1 July 2010), clause 35 [MSG/1093]; [✂] (1 July 2010), clause 35 [MSG/1101]; [✂] (24 April 1998), clause 14 [MSG/1109]; [✂] (15 June 1999), clause 14 [MSG/1119]; and [✂] (24 August 2004), clause 14 [MSG/1128].

31 Contracts of Employment between MSG and: [✂] (16 April 2019), clause 17 [MSG/680]; [✂] (6 February 2019), clause 17 [MSG/694]; [✂] (27 February 2019), clause 17 [MSG/708]; [✂] (26 April 2018), clause 17 [MSG/719-720]; and [✂] (14 November 2018), clause 17 [MSG/727].

32 Contract of Employment between MSG and [✂] (5 July 2016), clause 17 [MSG/969].

3.40 Accordingly, although the 18-month duration of the non-compete provision remains the same, the non-compete provision in the new associates' contracts is different from that included in nearly all of the pre-2018 associates' contracts in three other main respects:

(a) It continues to include very broad language ("provide, supervise, manage or have any other involvement with the provision of") and uses the language of "involvement with the provision of medical services" rather than the status of Medical Practitioner (rendering the definition of Medical Practitioner still included within the clause redundant);

(b) It limits the relevant type of medical services to the specialism in which the consultant in question worked while at MSG; and

(c) It provides an exemption for work for the States of Guernsey.

C. The complaint to the GCRA

3.41 The existence of the non-compete clauses between 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 [✂].

3.42 Mr [✂] 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.[33] He executed the General Partnership Agreement on 1 January 2006.[34] Mr [✂] worked as a specialist orthopaedic surgeon for MSG for nearly 13 years.

3.43 On [✂], Mr [✂] retired from MSG and on [✂] signed a "Retirement and Settlement Agreement".[35] This agreement contained an "Ongoing Obligations" clause, which provided:

"For the avoidance of doubt, save as amended by this Agreement, those terms of the Partnership Agreement that apply on and after a partner's retirement shall continue to apply to Mr [✂] including, without limitation, clauses 22 and 24 (Partner's duties) *and clause 35 (Restriction on future practice) of the Partnership Agreement*, and even if MSG converts to a limited liability partnership or other successor body in due course" (emphasis added).

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

34 [MSG/6322-6323]

35 12 October 2017 Retirement and Settlement Agreement [MSG/9191-9200].

3.44 As set out above at paragraph 3.26, 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 MSG.

3.45 In [✂], one year after his resignation from MSG and 18 months after he had stopped practising as an orthopaedic surgeon, Mr [✂] opened a new business called [✂][36] of which he is the co-founder, CEO and shareholder.

3.46 [✂] operates from premises in St Peter Port. According to its website,[37] it presently offers a range of services related to musculoskeletal health including physiotherapy, sports therapy and injury prevention services.

3.47 Following an attempt by MSG to invoke clause 35 of the General Partnership Agreement against him in respect of his involvement with [✂],[38] Mr [✂] complained to the GCRA by way of an e-mail complaint on 1 December 2018, entitled "Non compete".[39]

D. The GCRA's investigation

3.48 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 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 went beyond the specific arrangements between Mr [✂] 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.

3.49 On 18 and 22 March 2019, the GCRA wrote to Mr [✂], Mr [✂] (Chairman of [✂]), [✂] and MSG to notify them of its decision to open its investigation into whether MSG had contravened Section 5(1) and Section 1(1) of the Ordinance.[40] On 22 March 2019, the GCRA

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36 [✂] is operated through two legal entities, [✂] and [✂], referred to collectively in this Decision as "[✂]".

37 [✂]

38 Letter from Dr Yarwood (5 October 2018) [MSG/6275-6276].

39 Email from [✂]o Sarah Livestro (1 December 2018) [MSG2/999].

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

wrote to the same parties requesting information relevant to its investigation pursuant to Section 23 of the 2012 Ordinance.[41]

3.50 The GCRA notes that MSG and Mr [✂] (together with Mr [✂] and [✂]) 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 [✂][42] by way of a settlement agreement (the **Settlement Agreement**).[43] 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 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.

3.51 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 imposes non-compete obligations on Mr [✂][44] and, to that extent, it falls within the scope of application of the investigation. It also requires Mr [✂] to withdraw his

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

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

43 Settlement Agreement (12 March 2019) [MSG/6563-6571].

44 Mr [✂] 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 [✂] was in consequence required to remove all references to himself as a Medical Practitioner on [✂] materials (clause 2.4) and not to book any appointments with patients until after 1 January 2020. Save in that MSG agreed that Mr [✂] could continue in his role at [✂] on the agreed terms, it was again expressly stated that Mr [✂] still owed ongoing obligations under clause 35 of the General Partnership Agreement in relation to any other enterprises (clause 3).

complaint to the GCRA[45] and purports to restrict the ability of Messrs [✂] and [✂] to communicate with the GCRA.[46]

3.52 On 25 and 26 March 2019, the GCRA wrote to Mr [✂] and Mr [✂] (respectively) to make a further information request arising from the Settlement Agreement and to invite them to attend separate interviews.[47]

3.53 On 2 April 2019, the GCRA wrote to MSG to make a further information request arising from the Settlement Agreement.[48]

3.54 On 24 April 2019, the GCRA wrote to Mr [✂] and Mr [✂] to direct them that the fact of and their responses to the 25 and 26 March 2019 requests should be kept confidential from MSG, notwithstanding clause 2.6 of the Settlement Agreement, in order to avoid prejudicing the investigation.[49]

3.55 On 24 June 2019, the GCRA interviewed Mr [✂] and Mr [✂].

3.56 On 19 September 2019, the GCRA sent a request for further information to MSG.[50]

3.57 On 8 October 2019, the GCRA sent a request for information to the States of Guernsey.[51]

3.58 On 10 July 2020, pursuant to section 43(2) of the 2012 Ordinance the GCRA sent to MSG a notice in writing[52] (**Statement of Objections**; **SO**), setting out its preliminary conclusions in respect of the above matters.[53]

3.59 MSG provided the GCRA with both written and oral representations in respect of the matters set out in the Statement of Objections[54] (**Written Representations**; **Oral Representations**).

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45 By clause 2.6 of the Settlement Agreement, Mr [✂] and Mr [✂] were required to "withdraw the Complaint to CICRA in writing" in agreed language set out in Schedule 1 to the Settlement Agreement.

46 By clause 2.6 of the Settlement Agreement, Messrs [✂] and [✂] 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".

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

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

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

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

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

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

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

54 Email from Elliot Aron to Sarah Livestro of 11 September 2020, attaching MSG's Written Representations [MSG3/83-116]. Oral representations were made on 20 October 2020.

The GCRA prepared a transcript of MSG's oral representations (the **Transcript**), which were provided to MSG on 30 October 2020. MSG was invited to review the Transcript and to make any amendments, clarifications or additions to it by 6 November 2020.[55] That deadline was extended to 13 November 2020 at the request of MSG's advocates.[56]

3.60 On 13 November 2020, MSG's advocates sent to the GCRA an amended version of the Transcript. They also stated that MSG did not at that time wish to add anything further to its written submissions.[57]

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

(a) MSG;[58]

(b) Healthcare Group (GPs);[59]

(c) Island Health (GPs);[60]

(d) The Queens Road Medical Practice (GPs);[61]

(e) The Committee *for* Health and Social Care (States of Guernsey).[62]

3.62 Final responses to, and clarifications in respect of, those information requests were received in early July 2021.[63]

3.63 On 30 July 2021, the GCRA provided the responses of Healthcare Group, Island Health and The Queens Road Medical Practice to MSG. 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.[64]

3.64 On 27 August 2021, MSG responded as follows:

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55 Email from Sarah Livestro to Elaine Gray and Elliot Aron of 30 October 2020 [MSG3/16737].
56 Email from Elaine Gray to Sarah Livestro of 30 October 2020 [MSG3/16903 -16905].
57 Email from Elliot Aron to Sarah Livestro of 13 November 2020, attaching marked up transcript and covering letter [MSG3/16829]; [MSG3/16906-16907].
58 By email on 11 December 2020 [MSG3/284 - 310].
59 By email on 9 December 2020 [MSG3/14866-14884].
60 By email on 9 December 2020 [MSG3/14885-14903].
61 By email on 9 December 2020 [MSG3/14904-14922].
62 By email on 9 December 2020 [MSG3/16704-16722].
63 Letter and email to GCRA from Carey Olsen, 2 July 2021 [MSG3/16724-16736].
64 Letter from Michael Byrne to Carey Olsen, 30 July 2021 [MSG3/16805-16825].

"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."[65]

3.65 Having taken into account all the evidence provided to it and having heard and taken into account the representations of MSG:

• MSG Written Representations to 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

the GCRA has reached this Decision.

[65] Letter from Carey Olsen to Michael Byrne/Sarah Livestro, 27 August 2021 [MSG3/16826-16828].

4. LEGAL FRAMEWORK AND ASSESSMENT

A. Introduction

4.1 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. Sources of law

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

4.3 In respect of conduct that took place before 23 February 2021, the GCRA was obliged to take account of the treatment of corresponding questions under European Union (**EU**) competition law when determining questions in relation to Guernsey competition law but was not prevented from departing from EU precedents where this was appropriate in light of the particular circumstances of the Bailiwick.[66] With effect from 23 February 2021 the GCRA may take those principles into account.[67] Given that Guernsey competition law is very closely modelled on EU competition law and that there is currently no local case law precedent 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.

4.4 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.

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66 GCRA Guideline 2, page 6 (https://www.gcra.gg/legal-frameworks/guidelines/guideline-anti-competitive-agreements/).

67 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.

4.5 The GCRA will also have regard to its own past decisional practice and to its own published guidelines concerning the application of Guernsey competition law, including in particular GCRA Guideline 2 – Anti-Competitive Agreements.

4.6 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,[68] together with any relevant court or tribunal decisions applying competition law in the United Kingdom.

C. Prohibition on anti-competitive agreements

4.7 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[69]. 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. The interpretation of these provisions by the EU and UK authorities is therefore relevant when considering the application of section 5(1) in Guernsey.

4.8 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

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68 The Competition Act 1998.

69 "**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."

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).

4.9 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.

4.10 In order to determine whether the section 5(1) prohibition applies to any or all of the non-compete provisions described above, 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;

(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 restricting competition** on the markets identified.

Undertakings

4.11 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"

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

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

4.13 Since both a partnership and the individuals making up that partnership may constitute "persons" and thus "undertakings" under the 2012 Ordinance, it is necessary to determine whether the partnership or the individuals who form that partnership are the relevant undertakings for the purposes of this Decision.

4.14 When considering the status of medical consultants, the EU courts have found that self-employed medical specialists may be "undertakings" in their own right.[70] However, where a group of such specialists operates and presents itself as a single entity on the market, that group will be treated as the relevant undertaking and, under the principle of intra-group immunity,[71] the agreement between the members is not capable of infringing competition law as between the members for so long as they remain part of the group. So, for example, in a non-infringement decision concerning groups of medical specialists of this type, the UK's OFT considered:[72]

> "Such a group will be treated as single undertaking 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."

4.15 The GCRA therefore concludes that, as a matter of Guernsey competition law, where individual medical consultants form a partnership, and that partnership presents itself as a single entity offering goods or services on a market,[73] it is the partnership, and not the individual consultants making up that partnership, that constitutes the relevant undertaking.

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70 Cases C-180/98 etc *Pavel Pavlov v Stichting Pensioenfonds Medische Specialisten* EU:C:2000:428, paragraph 77.

71 It is settled EU competition law that, under the principle of intra-group immunity, it is not possible for an agreement or arrangement between undertakings which are themselves part of the same undertaking to constitute a breach of competition law. Applying this principle, the UK OFT stated that, "where the general business practices of a group of individuals are such that the group engages in commercial or economic activity on a market and its individual members do not engage in that same commercial or economic activity on a market other than through the group for as long as they continue to be members of the group, then the group will be treated as a single undertaking rather than as an association of several undertakings for the purposes" of competition law. (*Anaesthetists' groups*, OFT non-infringement decision No. 15/04/2003).

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

73 The offering of goods and services on a market (i.e. being engaged in "economic activity") is the core of the definition of an "undertaking" under EU competition law (Case C-41/90 *Höfner and Elser* v. *Macrotron* EU:C:1991: 161, paragraph 21). See also GCRA' Guideline on Anti-Competitive Arrangements (Guideline 2).

4.16 By contrast, where a consultant leaves a partnership, and providing that he or she continues to participate in the economic activity of offering medical services (or seeks to do so), the individual medical specialist becomes a separate undertaking.

4.17 By the principle of personal responsibility, liability for a competition infringement can be attributed to any legal entity which was directly involved in the infringing conduct.[74] Where an undertaking that committed an infringement of competition law has ceased to exist, a successor undertaking may be held liable in circumstances where that successor has become responsible for the operation of the "combination of physical and human elements which contributed to the infringement".[75]

4.18 Applying the law on "undertakings" to the facts of this case, the GCRA concludes as follows.

MSG

4.19 MSG is a partnership offering medical services according to the terms of the LLP Agreement (and previously the General Partnership Agreement) as described at paragraph 3.24. As such, it qualifies as an "undertaking" for the purposes of competition law, as defined in section 60(1) of the 2012 Ordinance.

4.20 However, since both a partnership and the individuals making up that partnership may constitute "persons" and thus "undertakings" under the 2012 Ordinance, it is necessary to determine whether the MSG partnership or the individual consultants who form that partnership are the relevant undertakings for the purposes of the present case.

4.21 Having regard to the criteria identified by the OFT in the *Anaesthetists' groups* non-infringement decision (see paragraph 4.144.12 above), the GCRA concludes that MSG is the relevant undertaking in this case for the following reasons:

(a) Partners of 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 (paragraph 3.31(a) above);

(b) Partners of MSG generate the vast majority of their profits for the common benefit of the group, and restrictions are placed on the extent to which they can generate private

[74] Case C-97/08 P *Akzo Nobel v Commission* EU:C:2009:536, paragraph paragraph 56-57.
[75] Cases T-305/94 etc *Limburgse Vinyl Maatschappij v Commission* EU:T:1999:80, paragraph 953.

work on their own account, with private work in any event being conducted under the auspices of MSG (paragraph 3.31(a) above);

(c) Partners of MSG are not permitted to undertake private work other than through MSG, (paragraph 3.31(a) above);

(d) Partners of MSG operate under a common name;[76]

(e) Partners of MSG share administrative functions such as joint billing;[77] and

(f) Partners of MSG 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.[78]

4.22 As the relevant undertaking, MSG is the legal entity to which liability for infringement of competition law can be attributed to the extent that it was directly involved in such infringement. MSG is therefore the addressee of this Decision, irrespective of which individual consultants in MSG took the relevant actions.

4.23 The current MSG limited liability partnership is the successor entity to the previous MSG general partnership in that it amounts to the same combination of physical and human elements which contributed to the infringement (see paragraph 4.17 above), and so remains the proper addressee even in respect of infringements committed prior to 1 January 2018.

Former partners and associates

4.24 Whilst a partner or associate at MSG, an individual medical specialist cannot constitute a separate undertaking. However, on departure, and providing that he or she continues to participate in the economic activity of offering medical services (or seeks to do so), the individual medical specialist becomes a separate undertaking.

4.25 In the specific case of Mr [✂], whilst he was a partner at MSG, he did not constitute a separate undertaking. However, on his resignation and departure from MSG, and in view of the fact that he sought to continue to offer medical services, he became a separate undertaking. In any event, he became a separate undertaking as soon as he set up [✂], through his work managing [✂] as its shareholder and CEO.

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76 www.msg.gg

77 Each Partner's Private Practice Income is collected by the LLP as agent of the relevant Partner (LLP Agreement, clause 43.2) [MSG1A]. www.msg.gg asks patients with queries about their invoice to e-mail a common e-mail address: finance@msg.gg, quoting their invoice number.

78 http://report19.msg.gg/organisation.html

Conclusion

4.26 For the purposes of this Decision, the GCRA concludes that each of MSG, its former partners and its former associates (to the extent that these have sought to practise medicine after leaving MSG) are undertakings as defined by the 2012 Ordinance.

Existence of agreement

Agreement

4.27 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".

4.28 This broad definition of the concept of an "agreement" is aligned with the interpretation of that concept in EU law. Thus, the Court of Justice has noted[79] that an agreement:

> "centres round the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention."

4.29 What is required, therefore, is a concurrence of wills to act on the market in a specific way in accordance with the terms of the agreement. It is not necessary to show in addition a joint intention to pursue an anti-competitive aim.[80]

4.30 Whether a particular agreement or arrangement is legally enforceable does not affect its classification as an "agreement" for the purposes of Guernsey competition law.[81]

4.31 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)."

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79 Case T-41/96 *Bayer v Commission* EU:T:2000:242, paragraph 69 (upheld in Joined Cases C-2 and 3/01 P, EU:C:2004:2, paragraph 97).

80 Case T-168/01 *GlaxoSmithKline v Commission* EU:T:2006:265, paragraph 77 (upheld in Case C-501/06 P, EU:C:2009:610).

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

4.32 Applying the law on "agreements" to the facts of this case, the GCRA concludes as follows.

4.33 MSG has entered into a series of relevant contracts which undoubtedly manifest the necessary concurrence of wills to qualify them as "agreements, arrangements or understandings" for the purposes of Section 5(1) of the 2012 Ordinance, namely:

(a) The General Partnership Agreement, to the extent that clauses of it continue to apply as between MSG and erstwhile partners – notably, the restraint of trade provision at clause 35;

(b) The LLP Agreement, to the extent that clauses of it continue to apply as between MSG and erstwhile partners – notably, the restraint of trade provision at clause 81.1;

(c) The Retirement and Settlement Agreement between MSG and Mr [✂] – which notably expressly continued the application of clause 35;

(d) The Settlement Agreement between MSG and Mr [✂] – which notably continued to restrict Mr [✂]'s freedom of operation in relation to [✂]; and

(e) Each associate's contract containing a post-termination non-compete clause (which appears to be every contract entered into since 1995) to the extent that they applied to erstwhile associates.

4.34 As set out above, it does not matter whether MSG, Mr [✂] or any other party 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, for example, the fact that MSG did not in the end insist on the full five years' non-compete from Mr [✂] does not mean that it was not party to the five-year non-compete agreement (though the GCRA will consider MSG's conduct when settling the dispute when deciding the level of any financial penalty).

<u>"Public" obligations</u>

4.35 In its Written Representations, MSG states that because it provides both state funded (i.e. public) and private (i.e. patient funded) secondary healthcare services, it should not be viewed as a "private body". Rather its non-compete obligations should be viewed as serving a public purpose and the services it provides under the SHC should be viewed as "an obligation to provide services which are, in effect, akin to those which, for example, Guernsey Post or Guernsey Electricity are forced to provide under the universal service offering in order to

preserve essential infrastructure services".[82] Although not precisely articulated, these statements imply that the ostensibly "public" nature of some of the services provided, and the restrictions imposed, by MSG should be taken into account when assessing whether or not the agreements in question fall within section 5(1) of the 2012 Ordinance

4.36 As described above, an infringement by undertakings of section 5(1) of the 2012 Ordinance will only arise if the restrictive behaviour results from an independent concurrence of wills. Behaviour that is required (rather than merely encouraged, reinforced, sought or directed)[83] by national legislation falls outside the scope of application of section 5(1) of the 2012 Ordinance, since that behaviour does not arise as a result of the autonomous decision of the undertakings concerned but is mandated by law.[84] Similarly, if the legal and/or regulatory framework eliminates all possibility of competitive activity, any harm to competition is caused by the State measures and not by the autonomous behaviour of the businesses concerned.[85]

4.37 In the present case, the GCRA concludes that the agreements detailed in paragraph 4.33 above, including, in particular, the non-compete terms of those agreements, cannot be viewed as having been compelled by the States of Guernsey such that those agreements would fall outside the scope of application of section 5(1) of the 2012 Ordinance. There is no evidence that the States of Guernsey has required MSG to enter into non-compete clauses (as to which, see paragraphs 3.36 - 3.37 above). In addition, the fact that the States of Guernsey procures the supply of secondary healthcare services to fulfil certain of its public/social objectives[86] does not affect the characterisation of the arrangements described in paragraph 4.33 as agreements falling within the scope of application of section 5(1) of the 2012 Ordinance.

Conclusion

4.38 For the reasons set out above, the GCRA concludes that the contracts identified in paragraphs 4.33 constitute agreements for the purposes of the 2012 Ordinance.

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82 Written Representations of MSG, paragraphs 3.25 – 3.26 ([MSG3/83-116]).

83 Case T-387/94 *Asia Motor France v Commission* EU:T:1996:120, paragraph 60.

84 Cases C-184/13 etc *Anonima Petroli Italiana SpA v Ministerio delle Infrastruturre e dei Trasporti*, EU:C:2014:2147, paragraphs 28-29.

85 Case T-386/94 *Asia Motor France*, paragraph 61.

86 In that regard, the GCRA notes that the SHC [MSG/1465-1616] clearly defines the roles of the parties to that agreement (see paragraph 3.11) with the States of Guernsey having sole responsibility for commissioning the scope and description of the Secondary Healthcare Services and for setting the budget, whereas MSG is designed as a service provider (i.e. an undertaking).

Relevant market

4.39 For the purposes of applying Section 5(1) of the 2012 Ordinance, which concerns anticompetitive agreements, 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 or effect the prevention or hindrance of competition.[87] However, if it considers it appropriate to do so, the GCRA may choose to define the relevant market in order to contextualise the conduct under examination.

4.40 In the present case, the GCRA considers that definition of the relevant product market assists with contextualisation (see paragraphs 4.112 – 4.121; 4.125; 4.130; 4.135 – 4.136). The precise geographic market does not need to be defined precisely for each identified product market in order to contextualise the conduct and thus may legitimately be left open.

4.41 The essential legal test of market definition turns on interchangeability. The Court of Justice has required the European Commission, for the purpose of delimiting the relevant market, to investigate:[88]

> "[those] characteristics of the product in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products."[89]

4.42 For competition law purposes, markets are generally defined in two dimensions:

(a) Product market – this identifies the group of products or services that act as competitive constraints on each other.

(b) Geographic market – the area within which this group of products or services can be found.

4.43 Market assessment generally begins with the identification of a focal product. The focal product itself will be defined by the product or service under investigation and comprises "the product that two parties to an agreement both produce or the product which is the subject of a complaint".[90]

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

88 Case 6/72 *Europemballage Corporation and Continental Can v Commission* EU:C:1973, paragraph 32.

89 This concept is explained in GCRA Guideline 7 – Market Definition.

90 GCRA Guideline 7 – Market Definition, section 5.

4.44 The standard economic approach for defining the relevant market is the SSNIP or "hypothetical monopolist" test.[91] The SSNIP test asks whether, for the focal product in question, a hypothetical monopolist would be able to raise prices profitably by a small but substantial amount (usually 5 or 10%) for a non-transitory period (**SSNIP**).

4.45 Whether a SSNIP would be profitable depends on:

(a) Demand side substitution – the extent to which customers would switch away to other products, and

(b) Supply side substitution – the extent to which alternative suppliers would switch capacity into the market.

4.46 Where the full set of evidence required to carry out a formal SSNIP test is not available, SSNIP acts as a framework within which inferences on the basis of the best available evidence can be drawn to conclude on the relevant market definition.

4.47 Applying the above to the facts of this case, and referring to paragraphs 3.1-3.7 above, which set out the features of the primary and secondary healthcare markets in Guernsey, the GCRA concludes as follows.

<u>The product market</u>

4.48 Considering the scope of the relevant product market, the GCRA considers that the starting point is "the product that two parties to an agreement both produce or the product which is the subject of a complaint".[92]

4.49 The GCRA considers that the products which are the subject of the complaint in this case are the specialisms provided by MSG.

4.50 The GCRA further considers that neither patient buyers nor the States of Guernsey as a buyer under the SHC would switch to another type of consultancy service (e.g. paediatric consultancy services) if the price of the focal product (e.g. orthopaedic consultancy services) were to rise as described in the hypothetical monopolist test. This is because one type of medical specialism is not functionally substitutable for another.

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91 GCRA Guideline 7 – Market Definition, section 5 (page 14), section 6 (page 20).

92 GCRA Guideline 7 – Market Definition, section 5.

4.51 Nor is it likely that existing suppliers of other types of specialist consultant medical services would in the short run switch to supplying the focal product if the price of the focal product were to rise[93] (e.g. consultant paediatricians would not switch to supplying consultant orthopaedic services). This is because the skills required to carry out one medical specialism are not likely to be easily transferable to another medical specialism (particularly at consultant level) in the short term.

4.52 The GCRA therefore concludes that there would be a separate market for each medical specialism and the focal products in each market are the distinct medical specialisms provided by MSG. In its Written Representations, MSG also acknowledged that the provision of each medical specialism constituted a distinct product market.[94]

4.53 As set out above at paragraph 3.16, MSG provides secondary healthcare services on both a public and a private basis. In addition, certain secondary healthcare services provided by MSG are not available to contract patients (see paragraph 3.17 above).

4.54 In respect of services that are available on both a public and a private basis, it is therefore appropriate to consider whether each focal product market (each individual medical specialism) should be further segmented into elective care and emergency care and, within those categories, into publicly funded and privately funded care.[95]

4.55 The GCRA considers that it is appropriate for the purposes of this Decision to further subdivide the focal product markets as shown in the graphic below, so that each medical specialism provided by MSG is subdivided into the following separate markets:

(a) Public emergency care;

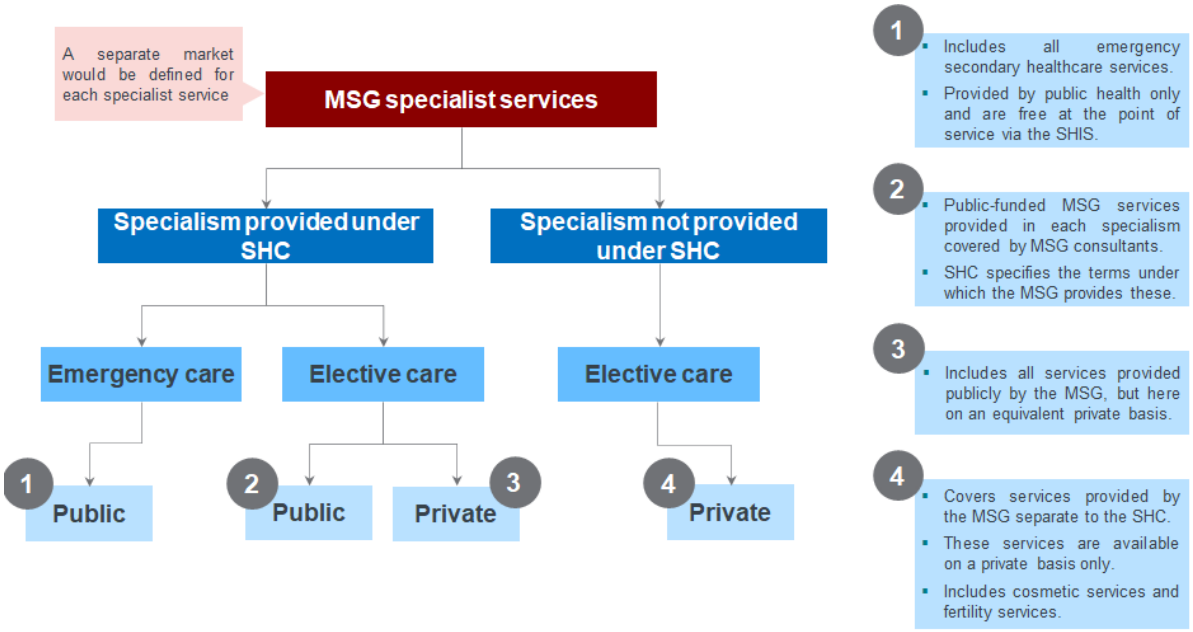
(b) Public elective care;

(c) Private elective care.

93 As stipulated in the hypothetical monopolist test.

94 Written representations of MSG, paragraph 5.6 [MSG3/83-116].

95 For the specialisms not provided under the SHC, the product market would be the provision of each medical specialism on a private, elective basis. This is because patients would not have the option to receive publicly-funded treatments under these specialisms through the SHC and none is provided on a private emergency basis.



4.56 This is for the following reasons:

(a) Although there may be some limited supply side substitution between elective and emergency procedures (in that a consultant will be able to provide both), there is unlikely to be any demand-side substitution due to the nature of the treatment required under each type of procedure. Elective procedures are booked and planned between a patient and the relevant specialist, whereas emergency procedures are non-scheduled, unplanned and urgent with emergency patients being seen by the available on-call emergency specialist. This means that it is unlikely, in the event of a SSNIP by a hypothetical monopolist, that a sufficient number of customers would switch from one type of procedure to another so as to make a price increase profitable. Thus, for the purposes of this Decision, emergency and elective secondary healthcare services for each medical specialism will be regarded as constituting distinct product markets;

(b) The GCRA understands that emergency care is provided only on a public (and not a private) basis and thus there is no relevant market for private emergency care. For elective care, procedures and treatments available to private patients do not differ in quality from those available to contract patients,[96] which suggests that publicly-funded

[96] In MSG's Oral Representations, Mr Yarwood stated as follows: "[T]he private and the contract patients are mixed, certainly the theatre lists are mixed, and if you came and followed me around for a week you wouldn't know which of the patients were private and contract, I don't treat them any differently, which is one of the reasons there's a standard of contract care in Guernsey that's fantastic. Which is one of the reasons some people [….] don't use their insurance.." (Oral Representations of MSG, [3:35:58], [MSG3/136-201]).

care might potentially constrain prices and defeat a SSNIP by a hypothetical monopolist providing the equivalent private specialism. However, the GCRA also notes that private care patients benefit from a range of "extras"[97] not available to contract patients, which might reduce the extent of demand side substitution (i.e. customers' willingness to switch) between private and public care. In addition, although patients who initially opt for private care can subsequently switch to public care, there are likely to be cost related barriers to a contract patient switching to private care.[98] Because of the nature of the terms of the SHC, there is also likely to be limited supply side substitutability between private and public care.[99] Therefore, for the purposes of this Decision, the elective secondary healthcare markets for each medical specialism can be further segmented into private elective secondary healthcare markets and public elective secondary healthcare markets.

The geographic market

4.57 The geographic market is the area over which demand and supply substitution takes place.[100]

Emergency care

4.58 Emergency care for a given medical specialism cannot easily be provided outside of Guernsey. This is because emergency care would need to be provided in a timely way, which limits both demand and supply side substitutability.

4.59 If there is no local consultant who is able to provide a Guernsey patient with the treatment required, that patient will be transported by air ambulance to Southampton General Hospital.[101] However, the fact that this type of care will be provided in the UK under certain very specific conditions is unlikely to exercise a material competitive constraint on the

97 As explained in paragraph 3.17.

98 The ability of a patient to switch from public to private care may depend upon whether the patient in question has private health insurance. If they do not, switching may be expensive so that the direct cost of private care constitutes a clear barrier for demand side substitution from public to private care. If they do have private insurance, the insurance policy may require them to choose whether to proceed with public or private care before commencing treatment and/or may prevent switching once treatment has begun.

99 Under the terms of the SHC, MSG consultants must provide a certain amount of public elective care. And under the SHC, public funded elective care can only be provided by MSG for any medical specialism covered by MSG. This means that supply side substitution is limited to those cases for which MSG consultants can switch from public to private care within the terms of the SHC.

100 GCRA Guideline 7, section 6.

101 https://www.air-rescue.org

provision of emergency care that can be provided on-island and thus is of limited relevance to the question of market definition.

4.60 Given that, on the whole, emergency care is provided on-island, the GCRA considers that for the purposes of the current case, the appropriate geographic market for emergency care for each medical specialism provided by MSG is Guernsey-wide.

Public elective care

4.61 Public elective care in a specialism provided by MSG is carried out on-island by MSG. There are only a limited number of cases in which public elective care is carried out off-island, these being:

(a) Where a patient requires care in a medical specialism not provided by MSG; or

(b) Where a patient requires a level of care or specialist treatment that cannot be provided on-island.

4.62 As such both demand and supply side substitution are limited. Patients cannot switch from on-island to off-island public elective care unless they fall into one of the categories above. And for specialisms that can be provided on-island, an off-island specialist cannot switch to provision of on-island public elective care because under the terms of the SHC such care is provided only between the HSC and its partners.

4.63 For those reasons, the GCRA considers that for the purposes of the present case, the appropriate geographic market for public elective care for each medical specialism provided by MSG is Guernsey-wide.

Private elective care

4.64 The planned nature of private elective care, which allows for flexibility in the arrangements for treatment, could facilitate patients switching from on-island to off-island care. However, there are potential barriers that might limit patients' incentive or ability to do so in the event of a SSNIP in on-island private elective care:

(a) Costs for uninsured patients might be significant; and

(b) Comprehensive insurance plans that allow for off-island treatment may be more expensive than on-island only plans, which might constitute a barrier to patients acquiring such policies.

4.65 The GCRA has sought data from GPs on the percentage of private patients who seek off-island care. However, that data is limited and the results are therefore inconclusive.

4.66 As such, the GCRA considers that the precise scope of the geographic market for private elective care may be Guernsey-wide or wider than Guernsey (encompassing the UK).

4.67 The precise geographic market definition for private elective care can be left open in this case since:

(a) For the reasons set out below, the GCRA has found that the non-compete clauses amount to restrictions of competition by object and that an effects-based analysis is therefore not required.[102] As such, it is not necessary to come to a firm conclusion on the precise scope of the geographic market for the provision of private elective care to inform an effects based analysis.

(b) It is not necessary, for the purposes of contextualisation, to define the geographic market for the provision of private elective care precisely.

Conclusion

4.68 For the reasons set out above, the GCRA concludes that there are separate emergency, public elective and private elective secondary healthcare markets for each medical specialism. The geographic market for each emergency and public elective secondary healthcare market is Guernsey-wide. The geographic scope of each private elective secondary healthcare market is at least Guernsey-wide but may be wider, encompassing other geographic areas such as the UK.

Hindering or preventing competition by object or by effect

4.69 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.

[102] Case C-8/08 *T-Mobile Netherlands* EU:C:2009:343, paragraphs 29 – 30.

Infringement by object

4.70 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.[103] In such cases, the restrictive effect on competition is presumed.[104]

4.71 The Court of Justice has stated that it is sufficient that there be merely the possibility of a negative impact on competition:

> "… it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction of distortion of competition."[105]

4.72 The Court of Justice has more recently summarised the effect of the case-law as follows:

> "Consequently, 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."[106]

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

> "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".[107]

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103 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.

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

105 *T-Mobile Netherlands*, ibid., paragraph 31.

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

107 ibid., paragraph 53.

4.74 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.[108] As such, the motive of the parties for entering into an agreement is not relevant to the question of whether that agreement constitutes a restriction by object.

4.75 In addition, there may be an infringement by object even where the parties have not implemented their agreement,[109] though it may be relevant to consider the way in which an agreement is implemented as part of the assessment of the agreement.[110]

Ancillary restraints

4.76 If a restriction in an agreement is objectively necessary to enable the parties to achieve a legitimate purpose, then that restriction amounts to an "ancillary restraint" which does not infringe competition law.[111] 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.

4.77 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.

4.78 If it is not impossible to implement the agreement without the restriction, the parties to the agreement must, if they wish to retain the restriction, apply for an exemption. Exemption involves a balancing of pro- and anti-competitive effects (i.e., whether the provision in question is indispensable for the achievement of the economic efficiency claimed rather than whether the provision in question is indispensable).[112]

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

109 Case C-277/87 *Sandoz Prodotti Farmaceutici v Commission* EU:C:1990:6, paragraph 3.

110 Commission's *Guidance on the Application of Article 101(3)*, [2004] OJ C 101/97, paragraph 22.

111 Case 56/65 *Société Technique Minière v Maschinenbau Ulm* EU:C:1966:38, [1966] ECR 235, 250.

112 Case C-382/12 P *Mastercard v Commission* EU:C:2014:2201, paragraph 91.

Ancillary restraints and by object restrictions

4.79 The concepts of infringement by object and ancillary restraints have been considered in the context of restrictive covenants (or non-compete clauses) by both the EU and UK courts.

4.80 In a series of cases considering franchising agreements,[113] 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[114] (which will depend on the circumstances of the case but has frequently been limited to one year post termination[115]);

(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;[116]

(c) They relate only to the geographic area where the franchisee operated during the franchise agreement.[117]

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

114 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 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).

115 *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).

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

4.81 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" [118] 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*".[119]

4.82 This principle has been developed by the Commission in its *Commission Notice on restrictions directly related and necessary to concentrations.*[120] In determining whether a non-compete obligation is objectively justified ("directly related and necessary to the implementation of the concentration"[121]), the Commission notes that:[122]

> "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."

Ancillary restraints – burden of proof

4.83 The GCRA bears the legal burden of proving that there has been an infringement of section 5(1) of the 2012 Ordinance. However, the evidential burden of demonstrating that the non-compete clauses are objectively justified falls on the party under investigation (in this case MSG).[123]

4.84 Therefore, in order to discharge the legal burden of proof, the GCRA must first demonstrate that there is a prima facie case to be answered under section 5(1) of the 2012 Ordinance and subsequently assess the evidence put forward by MSG as to why its conduct falls within the ancillary restraints doctrine (in respect of which MSG bears the evidential burden of proof) in order to determine whether the non-compete clauses are objectively justified.[124]

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117 *Pirtek*, paragraph 63.
118 Case 42/84 *Remia BV & ors v Commission* EU:C:1985:327 (paragraph 6).
119 Ibid, paragraph 20, (emphasis added).
120 [2005] OJ C 56/24.
121 Ibid paragraph 18.
122 Ibid paragraph 19.
123 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), paragraph 45; *Racecourse Association v Office of Fair Trading* [2005] CAT 29, paragraphs 131 -133.
124 *Racecourse Association v Office of Fair Trading* [2005] CAT 29, paragraph 133.

Ancillary restraints – relationship to common/customary law on restraint of trade

4.85 In its Written Representations, MSG states that:

> "the GCRA has not given any, or any proper, consideration to the employment and/or partnership aspects of restrictive covenants or has simply (and wrongly) assumed that the covenants [are] not justifiable."[125]

4.86 MSG also states that "the GCRA's analysis appears to be predicated largely on the traditional employment law analysis of restrictive covenants",[126] which ignores the partnership aspects of those covenants.

4.87 The Written Representations then set out the common/customary law framework within which restrictive covenants are to be assessed and cite a number of cases in which these principles have been considered.[127]

4.88 As set out above at paragraph 4.9 if there is an inconsistency between the competition law rules set out in the 2012 Ordinance and customary/common law on restraint of trade, then it is the competition law and not the restraint of trade rules that will apply. This point was acknowledged by MSG in its Oral Representations:

> "It's also well recognised that if a restraint of trade clause restricts or prevents competition in a market so as to breach UK or EU requirements, and by extension I suppose we say Guernsey, so if a clause breaches competition law, it will also be void and unenforceable at common law, and that's the way the cases are."[128]

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.

4.89 As such, the GCRA considers that the arguments put forward by MSG in its Written Representations as to the compatibility of the non-compete provisions with common/customary law are not relevant to the analysis in this case. The appropriate frame of reference is the competition law on objective justification as set out in this Decision and it is this legal framework within which the GCRA will assess the non-compete obligations.

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125 Written Representations of MSG, paragraph 4.4 [MSG3/83-116].
126 Written Representations of MSG, paragraph 6.16.3 [MSG3/83-116].
127 Written Representations of MSG, paragraphs 4.5 – 4.27 [MSG3/83-116].
128 Oral Representations of MSG, Advocate Elaine Gray [3:08] [MSG3/136-201].

Ancillary restraints – conclusion

4.90 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 and MSG the evidential burden of proof in respect of determining whether or not a restraint is ancillary to the agreement in question.

4.91 If a non-compete (restraint of trade) clause is prohibited by the 2012 Ordinance, it cannot be justified on the basis that it would be permitted under customary/common law on restraint of trade.

Assessment

4.92 Applying these legal principles to the facts of this case, the GCRA concludes as follows.

Infringement by object

4.93 The case law referred to above makes clear that the very point of covenants in restraint of trade is to affect trade within (at least) the territories of the agreements and to prevent or restrict competition within those areas.

4.94 Considering the economic, factual and legal context within which these particular non-compete clauses are to be pursued, it is clear that their object is to prevent competition. Their purpose is to prohibit departing consultants from competing to any extent with MSG for the provision of the relevant specialist private elective healthcare services in Guernsey. This was explained clearly by MSG; for example in MSG's Oral Representations, where Mr Yarwood stated that, even though 95% of [✂]'s business was in primary care and Mr [✂] was not able to carry out orthopaedic surgery on-island:

> "[✂]putting his name across the door [of [✂]] did cause [✂] 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."[129]

4.95 The GCRA therefore finds that the non-compete provisions imposed by MSG under clause 35 of the General Partnership Agreement (including its post-retirement application to Mr [✂] under the Retirement and Settlement Agreement and the Settlement Agreement), clause 81.1

[129] Oral Representations of MSG [1:29:46] [MSG3/136-201].

of the LLP Agreement, in the associates' contracts *prima facie* amount to infringements of competition by object.

Ancillary restraints – initial assessment by the GCRA

4.96 If the non-compete clauses are objectively necessary to achieve a legitimate aim, they will nonetheless 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 4.95 above.

4.97 In the Statement of Objections, the GCRA set out its provisional view that while some form of non-compete clause might be justified as objectively necessary and thus ancillary to the main agreements, the non-compete clauses as identified above were not ancillary and they thus amounted to infringements of competition by object. This was because:

(a) In the case of clause 35 of the General Partnership Agreement:

(i) For the reasons set out at paragraph 4.95(b) of the Statement of Objections, the temporal scope of the clause (5 years) was too long.

(ii) For the reasons set out at paragraph 4.95(c) of the Statement of Objections The substantive scope of the clause (covering any kind of work as a medical practitioner and work for the States of Guernsey as well as private work) was too wide.

(b) In the case of clause 81.1 of the LLP Agreement:

(i) The clause, although limited to private practice in the relevant specialism, contained very broad language (as set out at paragraph 3.33(b) above) rather than referring to the status of "Medical Practitioner" (i.e. the role carried out by the consultant while working at MSG) and was thus too broad in scope.

(ii) The temporal scope (2 years) was too long for the same reasons as set out in paragraph 4.95(b) of the Statement of Objections.

(c) The first version of the non-compete clause contained in the associates' contracts mirrored the language contained in clause 35 of the General Partnership Agreement, while the second version of the non-compete clause contained in the associates' contracts mirrored the language contained in clause 81.1 of the LLP Agreement, save

that in both cases the duration of the non-compete period was 18 months (rather than five years or two years respectively). For the reasons set out in the Statement of Objections at paragraph 4.98, the GCRA considered that similar considerations applied to associates as to partners overall, both in terms of the scope and the duration of the restrictions.

Ancillary restraints – evidence put forward by MSG

4.98 Given the preliminary conclusion reached by the GCRA that the non-compete clauses amounted to restrictions of competition by object, MSG bore the evidential burden of demonstrating that those clauses were objectively necessary in order for the partnership agreement to function.

4.99 In its Written Representations and Oral Representations, MSG disagreed with the provisional conclusions reached by the GCRA, arguing that the scope[130] and duration[131] of the non-compete restrictions were necessary for the partnership agreement to function, and were thus objectively justifiable.

4.100 MSG put forward a number of arguments as to why the non-compete clauses were objectively justified:

(a) **Incentive**. MSG argued that a consultant's role in Guernsey was unattractive for a number of reasons, such as the absence of junior doctors, the small size of the hospital and the higher workload compared with the UK. To offset these disadvantages, MSG needed to be able to offer prospective consultants some amount of private work in order to attract them to Guernsey. Without the non-compete clause in its current form, MSG's package would no longer be sufficiently attractive to recruit suitable doctors.[132]

(b) **Cross-subsidisation.** MSG argued that the non-compete clauses were necessary to secure (i.e. cross-subsidise) the provision of the unattractive aspects of the service provided by MSG, namely the provision of emergency secondary healthcare. It was argued that, in the absence of the non-compete restraints, additional remuneration for

130 Written Representations of MSG, paragraph 6.15 [MSG3/83-116].
131 Written Representations of MSG, paragraph 6.16 [MSG3/83-116].
132 Written Representations of MSG, paragraphs 3.29 – 3.37, 5.12, 6.9, 6.13.2, 6.13.4 [MSG3/83-116].

the provision of these unattractive public emergency secondary healthcare services would be required to attract consultants to join MSG.[133]

(c) **Reputation and contacts**. MSG argued that a departing consultant should not be able to benefit from the reputation and contacts they have built up during their time with MSG.[134] It stated that a new consultant must win the trust of patients and their families in order to attract private work. It was important that they were not undermined by a recently departing consultant as they tried to build that trust.[135]

(d) **Time taken to recruit**. MSG argued that the time taken to recruit new consultants could be substantial and that it must be able to "protect [the] work"[136] until it had been able to recruit a replacement consultant.[137]

4.101 During the meeting at which MSG made its Oral Representations and following that meeting, the GCRA invited MSG to provide any further information or evidence it considered relevant.[138]

4.102 The GCRA also sent further information requests to MSG, the States of Guernsey and three GP practices.

4.103 Finally, MSG was also asked whether it wished to provide comments on the evidence submitted by the GP practices (see paragraphs 3.63 - 3.64 above).

Ancillary restraints – GCRA assessment and conclusion

4.104 The GCRA notes that the creation and operation of partnerships are legitimate aims. The issue is whether, on the facts and evidence of this particular case,[139] MSG has demonstrated that the non-compete restrictions are objectively justifiable because they are necessary for the partnership to be able to operate.

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133 Written Representations of MSG, paragraphs 3.27, 3.39, 4.18.2, 5.12, 6.13.2, 6.13.4 [MSG3/83-116].
134 Written Representations of MSG, paragraphs 6.9, 6.13.3, 6.13.4, 6.16.2 [MSG3/83-116].
135 Written Representations of MSG, paragraph 6.16.2 [MSG3/83-116].
136 Written Representation of MSG s, paragraph 6.16.2 [MSG3/83-116].
137 Written Representations of MSG, paragraphs 3.40, 4.18.1, 6.13.4, 6.16.2 [MSG3/83-116].
138 Oral Representations of MSG, [3:42:14] – [3:46:20] [MSG3/136-201]; email from Sarah Livestro to Elaine Gray and Elliot Aron of 30 October 2020 [MSG3/16737].
139 *Carewatch Care Services Ltd v Focus Caring Services Ltd & ors* [2014] EWHC 2313 (Ch), per Henderson J at paragraph 163: "[I]n the light of both Pronuptia and the Commission's decision in Charles Jourdan it is necessary to adopt "a more cautious, case-specific analysis".

4.105 The GCRA has assessed the evidence put forward by MSG on objective justification. For the reasons set out below, the GCRA finds that MSG has not demonstrated, on the balance of probabilities, that the non-compete clauses are necessary for the operation of the partnership and thus objectively justified. They therefore amount to restrictions of competition by object.

(a) Incentive

4.106 In its responses, MSG argues that it must be able to offer consultants a reasonable amount of private work in order to attract them to Guernsey. For example, in paragraph 3.38.4 of its Written Representations, MSG states that one reason that a consultant might choose to relocate to Guernsey would be "access to a small but reasonable amount of private healthcare work, assisted by the prevalence of private healthcare insurance for many residents in Guernsey, and which can be provided in Guernsey" (emphasis added). At paragraph 5.12, it states that "the ability for MSG to attract doctors is based, in part, on the availability of a certain level of private work" (emphasis added).

(i) Claim that non-compete clauses incentivise consultants to join MSG

4.107 The GCRA finds that before being able to put forward an argument that it is objectively necessary for the operation of the partnership to incentivise consultants to come to Guernsey by imposing a non-compete clause on outgoing consultants, MSG must first demonstrate that consultants are, as a matter of fact, so incentivised. If the non-compete clauses do not incentivise consultants to come to Guernsey as a matter of fact (i.e. there is no incentive effect), an argument that non-compete clauses are objectively necessary to incentivise consultants must, necessarily, fail.

4.108 It further follows that in order to demonstrate that the non-compete clauses incentivise consultants to come to Guernsey, MSG would need to be able to demonstrate that those consultants are made aware of the non-compete clause at the time of recruitment. If they are not aware of it at the time of recruitment, logic dictates that it could not incentivise them as MSG claims and the non-compete clause could not therefore be justified on that basis.

4.109 In its information request of 11 December 2020, the GCRA asked MSG to "specify when and how [a candidate is] informed of the restraint that would protect their private practice from competition by departing MSG specialists".[140] In response, MSG stated as follows:

[140] Information request from the GCRA to MSG of 11 December 2020, question 16(j) [MSG3/284--309].

"The first time a candidate is made aware of the restraint is when they receive their contract but of course, they would be unaware of the content of the [contract of the] departing consultant and therefore we do not advise them that the private practice is "protected".

4.110 The GCRA has also been provided with a number of examples of job advertisements for consultant posts with MSG. Whilst some,[141] but not all,[142] of these mention that there are opportunities for private practice, none state that private practice is protected or that outgoing consultants are subject to a non-compete clause.

4.111 Since the evidence demonstrates that incoming consultants are not made aware of the fact that their predecessor is subject to a non-compete clause, the existence of that non-compete clause cannot be a factor that incentivises them to join MSG. As the non-compete clause cannot, therefore, as a matter of logic have any incentive effect, it follows that MSG has not demonstrated that the non-compete clause is objectively necessary to the operation of the partnership on the grounds that it incentivises consultants to join MSG.

(ii) Claim that non-compete clauses incentivise consultants to remain at MSG

4.112 Although not explicitly stated, the GCRA considers that the arguments put forward by MSG, rather than being intended to demonstrate that the non-compete clauses incentivise consultants to join MSG, might rather have been intended to show that some incentive effect was required to keep consultants with MSG in Guernsey.

4.113 As to that potential argument, the GCRA observes that MSG does not provide any evidence as to the level (either precise or approximate) of private work that would be "[small but] reasonable"[143] or at the "certain level"[144] required to keep consultants in Guernsey.

4.114 Furthermore, the GCRA also notes that even if the argument that it is necessary to offer some level of private work is accepted, MSG has not demonstrated why a restriction in the terms of the non-compete clauses, which allows MSG to protect <u>all</u> Guernsey based private elective secondary healthcare within the specialisms it offers for a period of time, is objectively necessary for the operation of the partnership by allowing MSG to offer <u>some level</u> of private work to incoming consultants such that they would be incentivised to remain in Guernsey.

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141 2016 advertisement for orthopaedic surgeon, provided in response to question 16 of information request of 11 December 2020 from GCRA to MSG [MSG3/12700].

142 2015 advertisment for consultant anaesthetist, provided in response to question 16 of information request of 11 December 2020 from GCRA to MSG [MSG3/12632].

143 Written Representations of MSG, paragraph 3.38.4 [MSG3/83-116].

144 Written Representations of MSG, paragraph 5.12 [MSG3/83-116].

4.115 In that regard, the GCRA finds that, on the balance of probabilities, a portion of private elective work for Guernsey patients would be non-contestable (i.e. could only be carried out by, and would therefore always be won by, MSG consultants). This is because:

(a) A departing consultant would not be able to carry out operations on-island but rather would be limited to undertaking on-island consultations and either operating on patients off-island themselves or referring those patients to an off-island surgeon.

(b) GPs are the main source of referrals to private secondary healthcare services and they indicated that there is a preference amongst the patients that they refer (some of whom will require surgery) to be seen on-island.

Limitations on departing consultant

4.116 The GCRA finds that the competitive constraint a departing consultant would be able to exercise on an incoming consultant would be likely to be weak, because that departing consultant would not be able to carry out operations in Guernsey. Rather, the private elective healthcare services that a departing consultant could offer within the relevant specialism would be limited to offering consultations in Guernsey and either referring patients who required surgery to another surgeon in the UK (or elsewhere) or carrying out such operations themselves off-island. This is because:

(a) There are capacity constraints at the PEH, such that, even if they were permitted to do so, it would be difficult for a departing consultant to secure theatre time to operate on private patients in Guernsey.[145]

(b) Certain essential support staff, such as theatre/surgical assistants and anaesthetists, are either employed by or are partners at MSG and, as such, would be unlikely to be available to assist with surgeries to be carried out by a departing consultant.[146]

(c) HSC employed support staff would not be willing to work additional hours (such as weekends) to cover further private work.[147]

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145 Oral Representations of MSG, [1:57:23] onwards [MSG3/136-201].

146 Oral Representations of MSG, [2:05:07] onwards [MSG3/136-201]. MSG has also confirmed that it provides staff to support UK consultants who come to Guernsey but this is only for contract patients (MSG response to question 34 of GCRA information request of 11 December 2020) [MSG3/16926] or "complicated private patients" (MSG clarificatory response of 2 July 2021), paragraph 8, [MSG3/16733] which we understand to mean patients who would otherwise be treated in the UK because of the complicated nature of the treatment required.

Patient preference to remain on-island

4.117 Although some private patients self-refer to a specialist, the vast majority of referrals would come through GPs.[148]

4.118 The GCRA therefore sought evidence as to whether patients who were referred by their GPs would elect to remain on-island for treatment, if that was a feasible option.

4.119 On the basis of evidence gathered from GPs, the GCRA finds that on the balance of probabilities, there is a group of Private Patients who would always opt to stay Guernsey for treatment, even if having that treatment carried out off-island was a feasible option. Some of those Private Patients will require surgery[149] and, as such a departing consultant could not compete for those Private Patients; rather, they could only be treated by MSG:

(a) In their responses to the GCRA's information requests,[150] GPs noted that private patients would often prefer to be seen and treated on-island, rather than off-island:

(b) Island Health noted that "all other things being equal, patients do prefer to be seen and treated on island that travel expenses are minimised, disruption to family minimised and ease of visiting in hospital maximised".[151] They further stated that "most patients elect to have their surgery locally by MSG consultants if the operation can be done as competently as if done by a UK consultant. This is for the same reasons as outlined [above]".[152] They stated that in 2015, [✂]% of their referrals were to MSG (with [✂]% being off-island), rising to [✂]% referrals to MSG in 2019 and [✂]% in 2020 (although they note that the 2020 figures may have been skewed by the COVID-19 pandemic).

(c) Queens Road Medical Practice stated that "the strong [patient] preference will be to receive care on Island if the service and expertise is available here. Ease of access/patient visiting/pre and post-operative care/follow up/minimal family disruption

147 Oral Representations of MSG, [2:38:23] [MSG3/136-201].

148 Oral Representations, [1:25:25] [MSG3/136-201].

149 In response to a question put regarding the ability of a non-MSG surgeon to carry out surgeries in Guernsey, Mr Yarwood stated "Well you wouldn't be able, he'd have to do the operations in hospital in the UK. So he could be, only in Guernsey because there isn't a second hospital, but he could see the patients here and he could arrange to do them and in fact that does happen" Oral Representations of MSG [2:07:55] [MSG3/136-201].

150 GCRA information requests of 9 December 2020 to Island Health, Queens Road Medical Practice and Healthcare Group [MSG3/14866—14922].

151 Response of Island Health to question 4 of the GCRA's Information Request of 9 December 2020 [MSG3/14855-14862].

152 Response of Island Health to question 9 of the GCRA's Information Request of 9 December 2020 [MSG3/14855-14862].

will all be strong factors".[153] In 2020, they stated that [✂]% of their private referrals were to MSG with the remaining [✂]% being off-island. This figure is broadly comparable to the position in 2015 ([✂]% MSG /[✂]% UK).

4.120 Of the private patients who are referred through GPs (i.e. the majority of all private patients), there is therefore a general preference for treatment (which may include surgery) to be carried out on-island rather than off-island where possible.

(iii) Conclusion on incentive

4.121 For the above reasons, the GCRA finds that:

(a) MSG has not demonstrated that the non-compete clauses in their current terms would be objectively necessary to allow the partnership agreements to operate by incentivising MSG consultants to remain in Guernsey through guaranteeing them a particular level of private work.

(b) Because a portion of private work (private elective surgical work for patients who wish to be treated on-island) is non-contestable, a non-compete clause is not required to secure it for MSG consultants. It is therefore the case that even in the absence of a non-compete restriction in any form, MSG would be able to offer some private work to an incoming consultant (i.e. at a minimum those patients seeking private elective care who wished to be operated on on-island). Even if it were to be accepted that the MSG partnership could not operate if it were not able to offer some level of private work to MSG consultants, the evidence does not demonstrate that a non-compete clause is required to secure some level of private work for MSG. The non-compete clause cannot, therefore, be objectively justifiable on that basis.

(b) Cross-subsidisation

4.122 MSG argued that the non-compete clauses were necessary to secure (i.e. cross-subsidise) the provision of the unattractive aspects of the service provided by MSG, namely the provision of emergency secondary healthcare. It further argued that, in the absence of the non-compete restraints, additional remuneration for the provision of these unattractive public emergency secondary healthcare services would be required to attract consultants to join MSG.

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[153] Response of Queens Road Medical Practice to question 9 of the GCRA's Information Request of 9 December 2020 [MSG3/14851-14854].

4.123 The GCRA finds that, for the following reasons, MSG has not demonstrated that the non-compete clauses are objectively necessary to allow the partnership to operate by enabling cross-subsidisation of the provision of contract work.

4.124 First, as has been set out above at paragraphs 4.120 - 4.121, even in the absence of any non-compete clause, MSG consultants would achieve some level of private elective work. As such, even if it is accepted that cross-subsidisation could be legitimate, MSG has not demonstrated why the non-compete clauses are objectively necessary to achieve cross-subsidisation at the level that would be required to allow the partnership to operate.

4.125 Second, MSG states that the salary offered to incoming (employed) consultants is set at a level that already takes account of the factors in respect of which MSG claims that cross-subsidisation from private work is required, such as on-call responsibilities, additional workload and lack of clinical support from junior doctors:

> "MSG recognise that due to the lack of Junior Doctors and Senior House Officers in Guernsey our salary packages must remain as attractive as possible in order to (a) appoint the best candidate available and (2) compensate the said candidate for the on call responsibilities (including at unsociable hours), the additional workload and the lack of clinical support available from Junior Doctors and Senior House Offers [sic]."[154]

Therefore, given that the salary offered already compensates consultants for the aspects of the role that MSG claims are unattractive, it cannot be the case that cross-subsidisation from private elective work is also required to compensate employed consultants for carrying out that unattractive work (i.e. double compensation). It may be the case that partners' remuneration is less than that of employed consultants (although MSG has not provided any evidence to demonstrate that that is so).[155] However, all consultants are initially engaged as employees. As such, even if partners' remuneration for carrying out the contract services is lower than that of employed consultants, an employed consultant retains the option to remain as an employee, and to receive the salary that fully takes account of the fact that certain aspects of the role are, according to MSG, unattractive. That being the case, the non-compete clauses are not objectively necessary to allow the partnership to operate on the grounds that they enable MSG to achieve cross-subsidisation of services that are not

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[154] Information request from the GCRA to MSG of 11 December 2020, MSG response to question 9(c) [MSG3/16915].

[155] On the contrary, MSG suggests that partners' drawings/profits are higher than the salary paid to associates. In the Oral Representations, MSG's CEO stated as follows: "So we need to maintain the attractiveness of being a partner, it has a little bit of headroom, not excessive but it has a bit of headroom from being an associate and it adds that value to the MSG." (Oral Representations of MSG, [3:24:03] [MSG3/136-201]).

adequately remunerated; the remuneration is already set at a level that takes into account the fact that "unattractive" services will have to be provided and, as such, "double compensation" through cross-subsidisation is not required.

4.126 Third, as noted above, MSG recruits consultants as employed associates and not as partners.[156] Associates are paid on the UK consultant salary scale and their salary is at the top of, or above the top of, that scale.[157] Job advertisements also mention other benefits of the package on offer as follows:

> "There are also opportunities for private practice within the job plan and two weeks of fully funded study leave annually. Other benefits include a full relocation package, private health insurance and a salary in the region of £124,000. The income tax rate for Guernsey is currently 20%."[158]

In response to a GCRA question on new consultants' pay,[159] MSG stated as follows:

> "All consultants appointed to MSG are paid a basic salary of [✂] which is higher than the top tier of the standard NHS pay scale as MSG do not pay merit/clinical excellence awards as in the UK. MSG recognises that in order to attract and recruit high calibre consultants to the Island, which has a very high cost of living, that this level of salary is appropriate and takes into consideration that they and their families will be relocating to the Island and that the level of private practice available to them will be to a lesser extent (due to the Island's population level vs the UK)."

4.127 Therefore, the GCRA's assessment is that the package on offer is, ostensibly, competitive; the salary is at the top of, or above the top of, the UK pay scale and other benefits are provided (pension provision)[160] / drawn to the candidate's attention (Guernsey's low tax rate). The salary is also adjusted to take into account the fact that:

(a) merit/clinical excellence awards are not available;

(b) the cost of living in Guernsey is high;

(c) there are additional on call responsibilities, compared to the UK;

(d) the workload may be higher than the UK;

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156 Oral Representations of MSG [3:15:13] – [3:15-29] [MSG3/136-201].

157 Oral Representations of MSG [3:12:01] [MSG3/136-201].

158 MSG response to question 16 of GCRA information request of 11 December 2020, attaching advertisement for consultant paediatric post [MSG3/12880].

159 "How does MSG determine and benchmark the salaries and benefits to be offered to new consultants? In this regard, provide full and specific details of your process for the period 2015 to 2020 inclusive", question 9 of GCRA information request of 11 December 2020 [MSG3/284-310].

160 In a response to the GCRA of 2 July 2021, MSG's advocates stated that MSG makes a contribution of 5% of salary to associates' pensions [MSG3/16725-16736].

(e) there is less clinical support from Junior Doctors and SHOs;

(f) a more limited amount of private practice may be available, compared to the UK.

4.128 On the face of the post as advertised and the explanation given by MSG, the GCRA finds that MSG has not demonstrated that the non-compete clause is objectively necessary to the operation of the partnership on the grounds that MSG's offer is unattractive and needs to be cross-subsidised with a particular level of private income in order to make it so.

4.129 Fourth, even if it were accepted that MSG had agreed to provide contract services at a price that was unattractive, MSG has not demonstrated that the non-compete clauses are objectively necessary to enable the partnership to function by cross-subsidising the provision of those services. This is because the SHC makes express provision for a scenario under which there is "tension between" the budget available for provision of the Contract Services and the scope/quality of the Contract Services that MSG can provide:

[✂] [✂]

[✂] [✂] [✂]

[✂] [✂] [✂]

[✂] [✂] [✂]

[✂] [✂] [✂]

[✂] [✂] [✂]

[✂] [✂] [✂]

4.130 MSG has not explained why, given the existence of these alternative options, if the price paid by the States of Guernsey for the services MSG supplies under the SHC is not sufficient to remunerate MSGs consultants adequately, it is objectively necessary in order for the partnership to be able to operate to impose a non-compete clause rather than making use of the provisions of clause 7.6 of the SHC (none of which would entail restrictions on

competition) to address this. In that regard, the GCRA observes that it would be more appropriate to seek to recover the cost of providing the Contract Services in the markets where those services are supplied (public secondary healthcare markets), rather than seeking to recover those costs by restricting competition in other markets (private secondary healthcare markets).

4.131 Fifth, and finally, MSG argues that its non-compete restrictions are in place to secure certain public policy objectives, namely to ensure that the PEH can provide 24/7 emergency care for the full spectrum of critical conditions. However, according to settled case law, private undertakings cannot justify action that is anti-competitive on the basis that it is designed to achieve a public policy objective.[161] The GCRA observes that setting of public policy objectives, such as the nature and extent of free at the point of delivery healthcare to be provided on-island, is a matter for the States of Guernsey and not for private undertakings, such as MSG. As such, the non-compete clauses cannot be objectively justified on the basis of public policy arguments.

4.132 The GCRA therefore concludes that MSG has failed to demonstrate that the non-compete clauses are objectively necessary to allow the partnership to operate on the cross-subsidisation grounds it has put forward.

(c) Reputation and contacts

4.133 MSG's arguments appear to be based on the concern that in the absence of the non-compete clauses, a departing consultant would be able to exploit the contacts and reputation built up during their time at MSG to deprive MSG of the benefit of those contacts and relationships, to the detriment of both MSG and of the departing consultant. MSG states as follows:

> "Our concern, if there was no non-compete clause, is that it would put off good candidates. In "private practice earning" specialisms good candidates will want/expect to do private practice, so their predecessor having cornered the market will put them off."[162]

4.134 For the following reasons, the GCRA finds that MSG has not demonstrated that the non-compete clauses, in terms of either their scope or their duration, are objectively necessary to allow the partnership to operate on the grounds that they protect reputation and contacts.

4.135 First, the GCRA has found that there are separate public elective and private elective markets for each medical specialism offered by MSG.[163] As set out below, evidence gathered by the

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161 Case T-30/89 *Hilti AG v. Commission* EU:T:1991:70, paragraphs 115 – 119.

162 MSG response to GCRA request for information of 11 December 2020, question 27 [MSG3/16924].

GCRA demonstrates that a consultant's reputation and contacts are built up, wholly or largely, not in the private elective market, but rather in the public elective market in which they operate. Because reputation and contacts are built in public elective markets, and because MSG holds 100% of each public elective market on which it is active and thus faces no competition on those markets, a non-compete clause in the corresponding private elective market is not necessary to enable reputation and contacts to be built up:

(a) In the course of MSG's Oral Representations, Mr Yarwood stated that the vast majority of patients are referred to MSG by their GP, rather than self-referring.[164] Evidence gathered by the GCRA shows that a private patient's choice as to which consultant they choose to see is likely to be strongly influenced by their GP, unless the patient is sufficiently well informed to conduct research themselves and select their own consultant on the basis of that research.[165] Thus, a consultant's reputation with GPs (rather than their reputation with individual patients) will in most cases be the key way in which they establish themselves in the market in Guernsey.[166]

(b) The evidence further shows that the reputation of a consultant with a GP is likely to be built up, wholly or largely, through their public elective work. Thus, GPs referring patients (whether public or private) to secondary healthcare state that they build up their knowledge of MSG specialists through feedback from Contract Patients. The volume of private elective work undertaken by an MSG specialist does not affect how

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163 See paragraphs 4.48 - 4.63.

164 Oral Representations of MSG [1:25:25] [MSG3/136-201].

165 Response of Queens Road Medical Practice to GCRA information request of 9 December 2020, question 4 – 6 [MSG3/14851-14854]; Response of island Health (GPs) to GCRA information request of 9 December 2020, question 4 [MSG3/14855-14862].

166 This issue was explored at a number of points in the Oral Representations, in which MSG described GPs as carrying out a "gatekeeper" function:
"[1:55:57] Sarah Livestro: From what you were saying though, would it be fair to say that in a lot of cases or some cases at least, the GPs play a fairly significant role? I mean it's quite dependent on the GP having confidence and..
[1:56:09] Gary Yarwood: Well for contract care you can't get referred without seeing your GP so it's absolutely integral isn't it?
[1:56:16] Stuart Le Maitre: They're the gatekeeper aren't they?
[1:56:18] Gary Yarwood: Yes they are. And there has to be a gatekeeper because otherwise we really would be..
[1:56:22] Sarah Livestro: Yes, you'd be inundated."
(Oral Representations of MSG [MSG3/136-201]).

well GPs know them or their work and so does not affect the likelihood or volume of private referrals to them.[167]

4.136 The GCRA therefore concludes that the reputation of an MSG consultant is generated in the relevant public elective market and not in the corresponding private elective market. MSG has a 100% share of each public elective care market in Guernsey in which it is active.[168] Because it generates its reputation and contacts in markets where it faces no competition, a non-compete clause is not necessary to protect reputation and contacts; this reputation and these contacts will be built up in the public elective markets irrespective of whether or not there is a non-compete clause in place in the corresponding private elective markets. It follows that the non-compete clause is not objectively necessary to allow the partnership to operate on the grounds that it enables reputation and contacts to be built up.

4.137 Second, MSG has not produced any evidence to demonstrate why, given the weak nature of the competitive constraint a departing consultant could be expected to exercise on MSG[169] the non-compete clauses are objectively necessary to protect contacts and enable reputation to be established, such that the partnership can operate. Given that a portion of private elective work is non-contestable[170] (see paragraphs 4.116 - 4.120) MSG's stated concern that a departing consultant will be able to corner the market appears to be unfounded.

4.138 Third, even if it were to be accepted that a non-compete clause was objectively necessary for the operation of the partnership by protecting reputation and contacts, MSG has not produced any evidence to support the argument that the periods of five years, two years and eighteen months are objectively necessary for the operation of the partnership by enabling replacement specialists to build up their private income earning capacity to a level that matches that of the departing specialist.

4.139 The GCRA therefore concludes that the non-compete clauses are not objectively justified on the grounds that they are necessary for the operation of the partnership on the grounds that they protect reputation and contacts.

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167 Response of Island Health (GPs) to GCRA information request of 9 December 2020, questions 1, 2 [MSG3/14855-14862]; response of Queens Road Medical Practice to GCRA Information request of 9 December 2020, question 2 [MSG3/14851-14854].

168 Paragraphs 4.48 - 4.63.

169 Paragraphs 4.116 - 4.120.

170 Ibid.

4.140 Because MSG bears the evidential burden of proof, the GCRA is not required to put forward less restrictive alternative non-compete clauses, in terms of either scope or duration, that might be objectively necessary for the partnership to be able to operate. The GCRA has nevertheless undertaken an assessment of the evidence available in order to assess the level of private income achieved by an incoming consultant to establish whether there is any evidence that incoming consultants achieve lower earnings than their departing counterparts for a period of time as they build reputation and contacts.

4.141 The GCRA's analysis of the income data suggests that, on average, the replacement specialists start and continue to earn more (rather than less) than their departing counterparts from early in their tenure and that there is therefore no period during which earnings are less due to the process of building reputation and contacts.

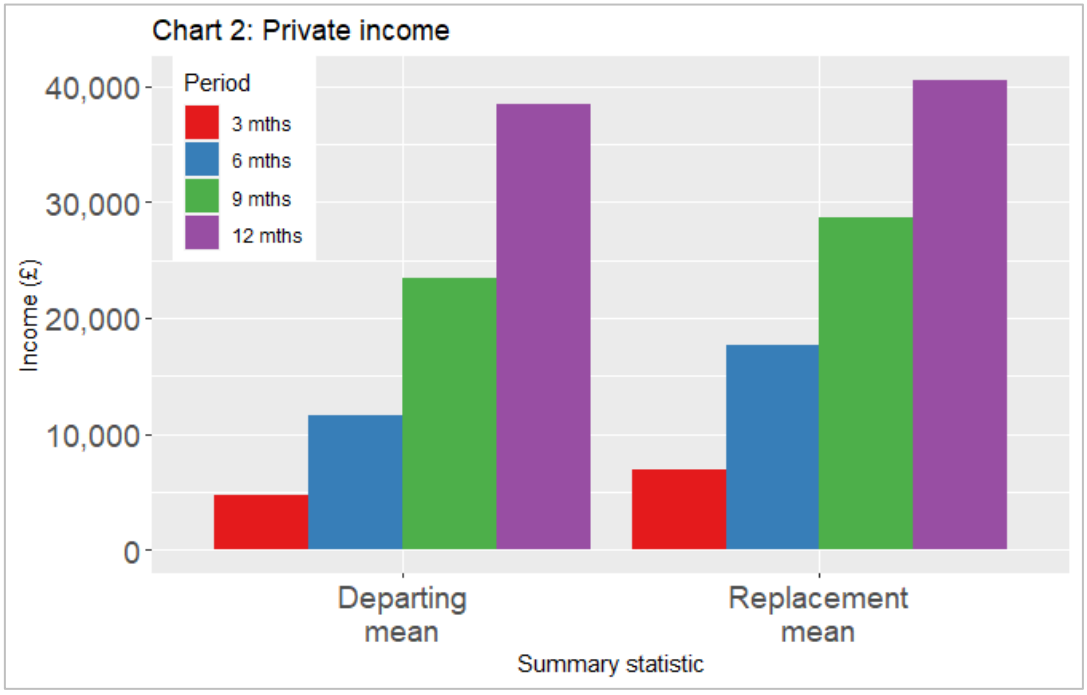
4.142 MSG has provided monthly private income data for the 5-year period from 2015 to 2020, for each departing specialist and their replacement.[171] The data covers the final 12-months prior to leaving MSG for each departing specialist, and the first 24-months from the date each replacement specialist commenced work with MSG. The income data, which was provided in current prices,[172] has been adjusted for inflation[173] to allow a like for like comparison across the 5-year period, in real 2020 pounds.

4.143 Chart 2 below shows a comparison of the mean private income earned by the replacement specialists in their first 12 months, and their departing counterparts in their final 12 months, at 3-month cumulative intervals. This suggests that, on average, replacement specialists start earning similar levels of private income as their departing counterparts in their first 3 months, and this continues until the 12-month mark. There is no statistically significant difference between the means of the two groups in any period.

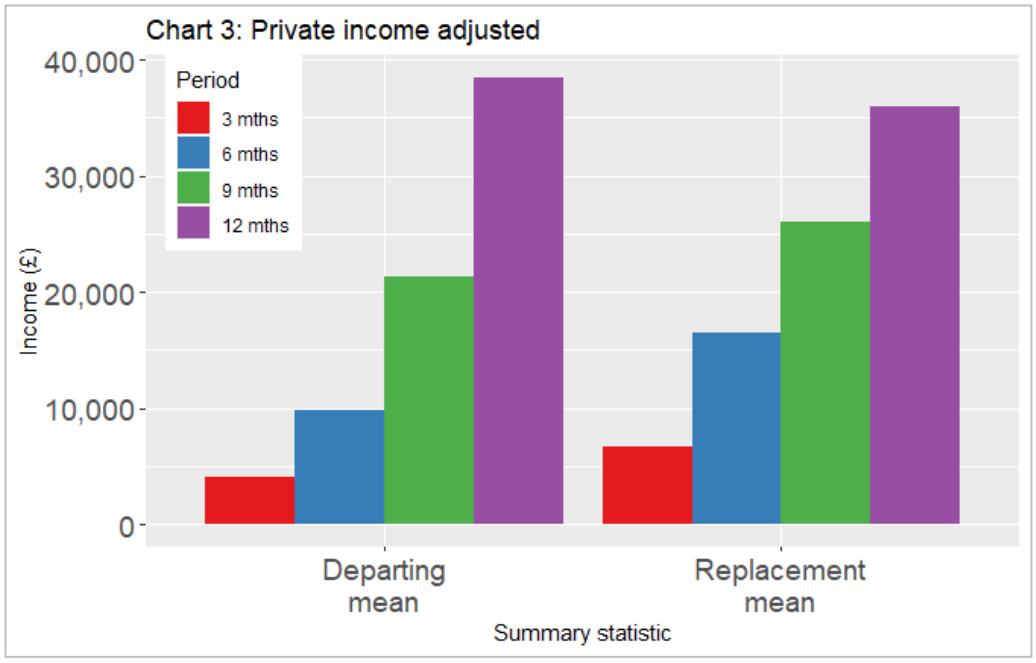
171 Response to Item 16 Part q, provided by MSG on 16 April 2021 [MSG3/16922].

172 The current price is the actual price, unadjusted for inflation.

173 The index was constructed using the annual average Retail Price Index reported by the States of Guernsey: https://www.gov.gg/rpi.



4.144 Further analysis of the data, adjusted for outliers, is illustrated in Chart 3 below.[174] The adjusted data shows that, on average, replacement specialists earn similar levels of private than their departing counterparts. Once again, the difference between the means of the two groups is not statistically significant for any period.



[174] Outliers are identified using the inter-quartile range method, with outliers capped at the value of the 95th percentile.

4.145 The GCRA's analysis of the income data suggests that, on average and as shown in Chart 2, the replacement specialists start and continue to earn comparable amounts to their departing counterparts from early in their tenure. Chart 3, with the data adjusted for outliers, reveals a similar story.

4.146 The GCRA's assessment therefore demonstrates that there is no discernible period during which the earnings of an incoming consultant are significantly lower than those of an outgoing consultant that could be attributed to a period of "bedding in"; replacement specialists demonstrate similar private earning capacity to their departing counterparts.

4.147 For all of the above reasons, the GCRA concludes that MSG has not demonstrated that a non-compete clause is objectively necessary to enable the partnership to operate by protecting reputation and contacts.

(d) Time taken to recruit

4.148 MSG argues that the time taken to recruit new consultants can be substantial and that it must be able to "protect [the] work"[175] until it has been able to recruit a replacement consultant.[176] MSG asserts a need for a restraint to be long enough to recruit a replacement and have them settle in and cement relationships with existing clients.[177]

4.149 In respect of those arguments, the GCRA finds as follows:

(a) First, for the reasons set out above, the GCRA finds that a non-compete clause is not objectively necessary to allow an incoming consultant to establish reputation and contacts and, as such, a need to "protect the work" does not exist once a new consultant is in post.

(b) Second, in respect of the period between the departure of the outgoing consultant and the arrival of the replacement consultant, MSG has not demonstrated that the non-compete clauses are objectively necessary to "protect the work" such that the partnership would not be able to operate without those restrictions. It has not identified how much private work would need to be protected by the non-compete clause in order to enable the partnership to operate nor why the temporal scope of the

175 Written Representations of MSG, paragraph 6.16.2 [MSG3/83-116]
176 Written Representations of MSG, paragraphs 3.40; 4.18.1; 6.13.4; 6.16.2 [MSG3/83-116]
177 Written Representations of MSG, paragraphs 4.25-26 [MSG3/83-116]

non-compete clauses (rather than some shorter period) is necessary to achieve that objective.

4.150 As such, the GCRA finds that MSG has not demonstrated why the non-compete clauses are objectively necessary for the operation of the partnership on the grounds that they allow MSG to "protect the work" in the period between the departure of an outgoing consultant and the arrival of a new one.

4.151 Because MSG bears the evidential burden of proof, the GCRA is not required to put forward less restrictive alternative non-compete clauses, in terms of either scope or duration, that might be objectively necessary for the partnership to be able to operate. The GCRA has nevertheless undertaken an assessment of the evidence available in order to gauge whether, if the GCRA's primary assessment that the non-compete clauses are not necessary to "protect the work" were incorrect, the substantive or temporal scope of those clauses would be appropriate.

4.152 In respect of whether a non-compete clause is objectively necessary for the operation of the partnership on the grounds that it allows MSG to "protect the work", the GCRA notes that the private elective services that an outgoing consultant would be able to provide are limited. MSG's apparent concern that an outgoing consultant would be able to corner or "harvest"[178] a significant amount of private work in any period between the departure of an outgoing consultant and the arrival of an incoming consultant is therefore unfounded; even without the non-compete restriction in place, an outgoing consultant would not be able to perform private elective surgery in Guernsey and thus that work (at the very least) does not need to be "protected" whilst MSG seeks to fill the post.

4.153 With reference to time taken to recruit, MSG asserts that, with reference to its HR records, the best case for recruitment is 6-8 months, but that this is extremely rare and asserts that, generally, it takes at least a year.[179] In this regard, MSG provided a blank sample copy of its template Consultant Recruitment Checklist, which provides for notes on and the dating and

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178 In its Written Representations, MSG stated that "The impact of allowing MSG leavers to compete with MSG for the provision of private secondary healthcare in Guernsey, without restriction upon leaving MSG, or after only 12 months of leaving MSG, would be to significantly damage the legitimate operation of the MSG given the lengthy lead-in time to recruit replacement and the ability of the leavers to harvest the annual appointments that form a feature of many practice areas." (Written Representations of MSG, paragraph 6.13.4, [MSG3/83-116].

179 Written Representations of MSG, paragraph 3.42 [MSG3/83-116].

sign off of each stage in this process.[180] In response to a further request for information, MSG provided a spreadsheet showing the resignation date and the final day at MSG for each departing specialist in the years 2015 to 2020 (both years inclusive), and the start date at MSG for each corresponding replacement specialist.[181]

4.154 For the purposes of assessing the relationship between recruitment periods and the period of time required to "protect [the] work", two alternative measures of time taken to recruit can be determined from the data. The first, 'Resignation to Start', is the period between the date of resignation of the departing specialist and the starting date of their replacement. The second, 'Final to Start', is the period between the departing specialist's final day at MSG and the starting date of their replacement.

4.155 An analysis of the recruitment data provided by MSG, illustrated in Chart 4 below, shows a mean recruitment period of 16.2 months with a range from 6 to 33 months, for the first measure (date of resignation to starting date of new specialist). In the case of the second (departure date to starting date of new specialist), the mean recruitment period is 6.2 months[182] with a range from 0 to 20 months.[183]

180 Written Representations of MSG, paragraph 3.41 [MSG3/83-116].

181 Response to Item 16 provided by MSG on 16 April 2021 [MSG3/16922].

182 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 that response, 16 April 2021, has been used as a proxy for the start date of the replacement specialist in this instance.

183 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.

4.156 The GCRA notes that, under the terms of the SHC,[184] MSG is entitled to begin recruitment for a post in respect of which a vacancy has arisen if:

(a) The incumbent consultant has resigned and will leave MSG within [✂] months; or

(b) The incumbent consultant [✂].

4.157 Under both the LLP Agreement and the General Partnership Agreement, a partner wishing to resign from the partnership is required to give six months' notice in writing.[185] The notice period for Associates is also six months.[186]

4.158 It therefore appears that MSG will, in cases where a retirement is planned, be able to begin recruitment for a replacement consultant between 12 and 6 months before the incumbent consultant leaves MSG.

4.159 It is also the case that, if MSG required protection from competition from a departing consultant, that protection would only be required after the consultant had actually left MSG.

4.160 As such, the GCRA's assessment is that the second measure, that is the period between the departing specialist's final day at MSG and the starting date of their replacement, is the only reasonable basis on which the time required to "protect [the] work" could be assessed, if any

184 Paragraph 5.9.2 of Schedule 3 of the SHC [MSG/1465-1616].
185 General Partnership Agreement, clause 28(i) [MSG/2711-2734]; LLP Agreement, clause 71.1 [MSG1A].
186 See, for example, employment contract between MSG and [✂] of 3 October 2016, clause 16(i), [MSG 668/920].

such protection were indeed required. This measure more accurately reflects the length of time a departing specialist, having left MSG, would have to act in a manner that might arguably require restraint. The analysis suggests that in such a case, a restraint period of no more than about 6 months (the mean recruitment time) would be sufficient.

4.161 For that reason, the GCRA concludes that restraints of five years, two years and 18 months, as provided for in the non-compete clauses, could not be objectively justifiable to allow the partnership to operate on the basis of "protecting the work".

Conclusion

4.162 For the reasons set out above, the GCRA finds that MSG has not demonstrated that the non-compete clauses are objectively justifiable because, in their absence, the partnership would not be able to operate.

5. FINDINGS OF THE GCRA

A. Conclusions

5.1 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 other undertakings which have the object of preventing competition within markets in Guernsey for the provision of services.

5.2 As part of that assessment, the GCRA has considered the arguments on objective justification raised by MSG. For the reasons set out above, the GCRA finds that these arguments are not supported by the evidence. As such, they cannot amount to an objective justification for the non-compete clauses.

5.3 The 2012 Ordinance came into force on 1 August 2012. The duration of each infringement in principle only begins once a former partner or associate has left MSG and so becomes a separate undertaking. The offending clauses were in place for the following durations:

(a) 1 August 2012 to 31 December 2017 in relation to clause 35 of the General Partnership Agreement generally, and [✂] to [✂] in relation to its post-retirement application to Mr [✂] in particular under the Retirement and Settlement Agreement and the Settlement Agreement.

(b) 1 January 2018 to date in relation to clause 81.1 of the LLP Agreement.

(c) 1 August 2012 to 31 December 2017 (in most cases) and to date (in others) in relation to the first version of the non-compete clause contained in the associates' contracts (as described at paragraph 3.39 above).

(d) 1 January 2018 (assumed) to date in relation to the second version of the non-compete clause contained in the associates' contracts (as described at paragraph 3.39 above).

B. Directions

5.4 The GCRA hereby directs MSG under section 32(1) of the 2012 Ordinance:

(a) to remove the non-compete provisions identified in this Decision from its current LLP Agreement and its contracts with its current associates; and

(b) To inform in writing each former MSG consultant still subject to any of the non-compete provisions identified in this Decision that those non-compete provisions are void and unenforceable.

C. Financial penalties

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

5.6 The Authority will be minded to impose a financial penalty where it finds a restriction of competition by object. It will therefore now consider whether it would be appropriate to issue a draft penalty statement to MSG in respect of the by object infringements described in this Decision. In carrying out this assessment, the GCRA will follow the approach set out in its Guideline on Financial Penalties.[187]

5.7 In the event that the GCRA proposes to require MSG to pay a financial penalty, the GCRA will issue a draft penalty statement and provide MSG with an opportunity to make representations before any decision in relation to penalty is taken.

[187] Guideline 12 – Financial Penalties: https://www.gcra.gg/legal-frameworks/guidelines/financial-penalties/

6. SIGNATURE

Signed: 

Michael Byrne, Chief Executive

for and on behalf of the Guernsey Competition and Regulatory Authority

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

Section 46 - Appeals against decisions of Authority or Department.

(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 Department 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 Minister of the Department 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.