Case C1441G

The Medical Specialist Group

Penalty Statement

Guernsey Competition and Regulatory Authority

16 December 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 decided that the Medical Specialist Group LLP (**MSG**) had infringed the prohibition imposed by Section 5(1) of the 2012 Ordinance (prohibition on agreements between undertakings which have the object or effect of preventing competition within any market in Guernsey for goods or services). The terms and grounds for the GCRA's decision were set out in a notice in writing dated 16 September 2021 (the **Decision**) which was served on MSG on that date.

1.3 In consequence of the infringements identified in the Decision, and as set out at paragraph 5.6 of the Decision, the GCRA provisionally considered that it would be appropriate to impose financial penalties on MSG under section 32(4) of the 2012 Ordinance. On 11 October 2021, it therefore served a notice in writing (**Draft Penalty Statement**) on MSG under section 43(2) of the 2012 Ordinance setting out the terms of and grounds for that proposed decision.

1.4 In accordance with Section 43(2)(c) of the 2012 Ordinance, MSG was invited to make representations to the GCRA on the matters set out in the Draft Penalty Statement.

1.5 On 4 November, MSG's advocates wrote to officers of the GCRA requesting that the GCRA stay its consideration of the imposition of a financial penalty on MSG, pending the outcome of MSG's appeal against the Decision. Officers responded to MSG, indicating that it should respond to the Draft Penalty Statement by the deadline of 9 November 2021 set out in that document. Accordingly, on 9 November 2021, MSG submitted its written representations to the GCRA.

1.6 Having considered the written representations of MSG in response to the Draft Penalty Statement, the GCRA now makes this final decision (**Penalty Statement**) pursuant to section 32(4) and section 34 of the 2012 Ordinance.

1.7 This Penalty Statement constitutes the notice in writing specified by section 44(1) of the 2012 Ordinance and what follows set out the terms of and the grounds for the GCRA's decision as specified by section 44(2) of the 2012 Ordinance.

1.8 An undertaking aggrieved by this Penalty Statement 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 Penalty Statement.

B. Confidentiality

1.9 A copy of this Penalty Statement will be published on the GCRA's website (www.gcra.gg).

1.10 Before publishing the Penalty Statement, the GCRA will redact confidential information from it.

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

1.12 Written representations made under the previous paragraph should be provided by 4 p.m. on 20 December 2021 and should be emailed to: info@gcra.gg.

1.13 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.

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

2. FACTUAL BACKGROUND AND CONDUCT

2.1 The GCRA refers to the general factual background as set out in Chapter 3 of the Decision, and to its findings in relation to MSG's conduct as set out in Chapter 4 of the Decision.

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

3. LEGAL FRAMEWORK

A. Introduction

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

B. Sources of law

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

3.3 Section 34 of the 2012 Ordinance sets out further considerations applicable to the imposition of penalties, as set out below.

3.4 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.[1] With effect from 23 February 2021 the GCRA may take those principles into account.[2] 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.

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

2 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.

3.5 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[3] Guideline 12 – Financial Penalties, issued June 2013.

3.6 The GCRA also considers it relevant to have regard as a persuasive source of law to the decisional practice of the UK's competition regulator, the Competition and Markets Authority (the **CMA**) (together with case-law considering those decisions), and to published guidelines issued by the CMA, including in particular the CMA's Guidance as to the appropriate amount of a penalty (CMA73), issued 18 April 2018 (**CMA Penalty Guidance**).

C. The framework for deciding whether to impose a penalty

Background

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

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

Intention, negligence and recklessness

3.8 EU and UK competition law provide that the European Commission (the **Commission**) and the CMA respectively may not impose a financial penalty on an undertaking in respect of anti-competitive conduct unless satisfied that the infringement was committed intentionally or negligently.[4] GCRA Guideline 12 interprets section 34(1)(c) of the 2012 Ordinance in a similar

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[3] Issued as a Channel Islands Competition and Regulatory Authorities (CICRA) Guideline.

[4] Article 23(2) of Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L/1, 4.1.2003; Competition Act 1998, s.36(3).

way, providing that before imposing a penalty, the GCRA will usually need to be satisfied that the infringement in respect of which it proposes to impose a penalty was committed intentionally, negligently or recklessly.

3.9 Given the similarity of the 2012 Ordinance and the corresponding EU/UK competition law provisions and given that there is no local case precedent, the GCRA considers that the interpretation of the European and UK courts of the terms "intentionally" and "negligently" are persuasive sources of law when interpreting the equivalent provisions of the 2012 Ordinance.

3.10 The EU Court of Justice (**ECJ**) has considered the definitions of the terms "intentionally" and "negligently".

> "[T]he question whether the infringements were committed intentionally or negligently… is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty".[5]

3.11 The UK's Competition Appeal Tribunal (**CAT**) has defined the terms "intentionally" and "negligently" as follows:

> "[A]n infringement is committed intentionally for the purpose of section 36(3) of the Act if the undertaking must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. An infringement is committed negligently for the purposes of section 36(3) if the undertaking ought to have known that its conduct would result in a restriction or distortion of competition."[6]

3.12 As to the meaning of the term "intentionally" in particular, the CAT has also observed:

> "It is sufficient that the undertaking could not have been unaware that its conduct had the object or would have the effect of restricting competition, without it being necessary to show that the undertaking also knew that it was infringing the Chapter I or Chapter II prohibition … While in some cases the undertaking's intention will be confirmed by internal documents, in our judgment, and in the absence of any evidence to the contrary, the fact that certain consequences are plainly foreseeable is an element from which the requisite intention may be inferred."[7]

3.13 The CAT has also stated that the CMA is not obliged to specify whether it considers the infringement to be intentional or merely negligent.[8]

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5 Case C-280/08 P *Deutsche Telekom v Commission* EU:C:2010:603, paragraph 124.

6 ibid.

7 *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, paragraph 456.

8 *Argos Limited and Littlewoods Limited v OFT* [2005] CAT 13, paragraph221.

3.14 Accordingly:

(a) The GCRA may conclude that an infringement has been committed intentionally where the undertaking concerned must have been aware, or could not have been unaware, that its conduct had the object or would have the effect of restricting competition. It is not necessary to show that the undertaking actually knew that its conduct was or might be an infringement of competition law as such; the requisite intention may be inferred from the fact that certain circumstances were plainly foreseeable.

(b) The GCRA may conclude that an infringement has been committed negligently where the undertaking concerned ought to have been aware that its conduct had the object or would have the effect of restricting competition.

(c) It is not necessary for the GCRA to specify whether it considers the infringement to be intentional or negligent or, by extension, reckless. However, the distinction may be relevant as part of a consideration of aggravating factors, where an intentional infringement is likely to be treated more severely than a negligent infringement: GCRA Guideline 12, section 3.

Other factors relevant to the GCRA's assessment of whether to impose a penalty

3.15 In addition to considering whether an infringement was committed intentionally, negligently or recklessly, the GCRA will take into account the remaining factors listed in section 34(1) of the 2012 Ordinance when deciding whether or not to impose a penalty.

D. The framework for deciding the amount of the penalty

Background

3.16 The GCRA must also take into account the factors set out in section 34(1) of the 2012 Ordinance when determining the amount of any penalty.

3.17 Within the framework of section 34(1), the GCRA's decision as to whether and how to impose a financial penalty is at its discretion: GCRA Guideline 12, section 2.

3.18 GCRA Guideline 12, section 2 sets out the objectives that the GCRA seeks to achieve in exercising its discretion, namely, to impose a penalty that reflects the seriousness of the sanctioned conduct and achieves deterrence.[9]

The three-stage approach

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

(a) Step 1 – Basic penalty: In this step, the basic penalty is calculated having regard to the value, in sterling, of the sales of goods or services to which the infringement relates in Guernsey for the last full business year of the business's participation in the infringement, which is then multiplied by the number of years or months of the duration of the infringement (rounded up to the nearest half year). As a general rule, the basic penalty will be set at a level of up to 30% of the value of sales, with the percentage being selected depending on how serious and widespread the infringement is.

(b) Step 2 – Adjustments to the basic penalty:

(i) The basic penalty may be increasing having regard to aggravating factors or decreased having regard to mitigating factors;[10]

(ii) There may be an increase for specific deterrence, pursuant to which the GCRA may increase the basic penalty of those businesses which have a particularly large turnover beyond the value of sales to which the infringement relates.

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9 "The two objectives of the GCRA's policy on financial penalties are:

- to impose penalties on businesses that infringe the competition laws, reflecting the seriousness of the infringement, and
- to ensure that the threat of penalties is a deterrent to engaging in anti-competitive practices, or, if the financial penalty relates to a merger or acquisition, a deterrent to failing to adhere to the notifying thresholds.

We consider that a financial penalty should be fair and proportionate, taking into account, for example, the profits made from the infringement, the effects on competition and the harm suffered by consumers. However, we will impose severe financial penalties in respect of agreements between businesses to fix prices or share markets and other cartel activities and serious abuses of a dominant position. We consider that these are among the most serious infringements of competition law and the amount of the financial penalty will aim to deter both the businesses that are subject to an infringement decision and other businesses who, in the future, may consider engaging in conduct that is prohibited under the competition laws."

10 Lists of possible factors are set out in GCRA Guideline 12, section 3.

(c) Step 3 – Legal Maximum: In this step, the penalty is reduced if the maximum penalty of 10% of worldwide turnover up to a maximum period of three years is exceeded.[11]

3.20 The mandatory factors set out in section 34(1) of the 2012 Ordinance will be taken into account at the appropriate stage of the three step approach, as described below.

Step back

3.21 The GCRA may also conduct a "step back" exercise at the end of the penalty calculation and consider the appropriateness of the conclusions that it has reached. It has done so in this case: see paragraphs 4.47 - 4.50 below.

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

4. LEGAL ASSESSMENT

A. Whether to impose a penalty

Overview

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

(a) The breach was intentional, or at least negligent or reckless;

(b) The breach was serious;

(c) The breach was not brought to the GCRA's attention by MSG and was not terminated, suspended or rectified when the GCRA began its investigation. It was instead continued and was ongoing at the date of the Decision;

(d) MSG is well resourced and able to pay a financial penalty; and

(e) There is no existing GCRA decisional practice that suggests that it would be inappropriate to impose a financial penalty.

Intention, negligence and recklessness

4.2 As set out at paragraph 3.8 - 3.14 above, the GCRA must consider whether the infringement has been committed intentionally, negligently or recklessly.

4.3 The GCRA concludes that the circumstances giving rise to the breach of competition law in this case were plainly foreseeable such that MSG could not have been unaware that its conduct had the object of restricting competition; at the very least, it ought to have been aware of this.[12] As such, the GCRA finds that the infringement was committed intentionally, or at least negligently or recklessly. In particular:

(a) The non-compete clauses[13] were contained in written agreements concluded between MSG and its (former) consultants and were maintained consistently in some form during

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12 See *Napp Pharmaceutical Holdings v Director General of Fair Trading* [2002] CAT 1, paragraph 456, cited at paragraph 3.13 above.

13 As described in paragraph 4.33 of the Decision.

the period of the breach,[14] including through MSG's transition from a General Partnership to an LLP. They were therefore deliberately entered into and maintained.

(b) A non-compete clause, by its nature, is designed to prevent competition.[15] In this case, their purpose was to prohibit departing consultants from competing to any extent with MSG for the provision of the relevant specialist private elective healthcare service in Guernsey.[16]

(c) This purpose is made clear by MSG's own conduct in seeking to enforce its non-compete clauses against [✂]. On 16 November 2018, MSG's then advocates wrote to [✂][17] in respect of his involvement with [✂]. The letter stated:

"Our client [MSG] has contacted us in relation to your involvement with [✂], [✂]. You are noted on their website as "*Co-founder of* [✂]"."

The letter states that [✂] involvement with [✂] constitutes a breach of the non-compete provisions of the General Partnership Agreement[18] and the Retirement and Settlement Agreement. It further states that the penalty for such a breach is £1,000 per week or part thereof.

Finally, the letter requires [✂]:

"To immediately cease all involvement with [✂] such that you are no longer in breach. To that end, we will require a written undertaking from you by no later than 5 pm on Monday 26 November 2018 (the **Deadline**) that you have permanently ceased any and all involvement with [✂], including but not limited to, any form of consultancy, treatment, advice and/or guidance. The undertaking should confirm that your name and contact details have been permanently removed from [✂] website by the Deadline. Furthermore, the undertaking should also confirm that any materials at the clinic (or indeed anywhere else) which identify you as providing services to [✂] have been permanently removed from the clinic by the Deadline and thereafter destroyed. Finally, you must confirm that in line with your obligations under and in terms of the Partnership

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14 From 1 August 2013.

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

16 Decision, paragraph 4.94.

17 See Decision, paragraphs 3.41 – 3.47, 3.50 – 3.51 for the background to [✂] relationship with MSG and his complaint to the GCRA in respect of the non-compete clauses contained in the General Partnership Agreement, the Retirement and Settlement Agreement between [✂] and MSG and the Settlement Agreement between MSG and [✂] (Decision, paragraph 4.33).

18 General Partnership Agreement, clause 35.

Agreement you will not be involved in [✂], or indeed any similar enterprise/venture/business, until after 12 October 2022. Please be advised that your failure to provide a written undertaking in the foregoing terms within the stipulated timeframe will likely result in our client immediately instructing us to commence legal action against you including, if necessary, injunctive relief in order to protect their legitimate business interests. Please also be advised that our client will seek the costs of any such proceedings from you. In addition, our client reserves the right to seek damages from you in respect of any and all losses they have incurred to date or may incur in the future as a result of your breach."[19]

MSG thereby signalled its intent to instigate legal action against [✂] to prevent completely his involvement in [✂] until 2022 and to claim significant sums of money from him by way of damages. The intended effect of writing to [✂] in these terms could not have been other than to prevent competition with MSG by [✂].

(d) MSG's explanation for its conduct, including by section 2 of its Response to the GCRA's Draft Penalty Statement, is that it considered its non-compete clauses to have an objective justification, and accordingly no penalty should be imposed in circumstances where all that it did was "*genuinely and reasonably err in the exercise of its judgment in complex circumstances*".

(e) However, the facts which are available suggest that MSG was well aware, or could not have been unaware, that at least the non-compete clauses in the General Partnership Agreement and under its settlement agreements with [✂] were anticompetitive. MSG ought to have appreciated this from the excessive length of those clauses, if nothing else: the circumstances giving rise to the breach of competition law were plainly foreseeable. Moreover, following the complaint to the GCRA, MSG made attempts to restrict the ability of [✂] and his business partner, [✂], to communicate with the GCRA. According to the evidence of [✂], as part of its settlement negotiations with [✂], MSG initially sought to require [✂] and [✂] only to communicate with the GCRA through MSG's advocates.[20] MSG also required [✂] to write to the GCRA withdrawing the complaint.[21] Thus, clause 2.6 Settlement Agreement provides that:

"[✂] and [✂] will withdraw the Complaint to the GCRA in writing. The agreed wording in relation to the withdrawal of this complaint can be found at Schedule 1. [✂] are to

19 [MSG2/1034 – 1035].

20 GCRA interview with [✂] [01:15:53] – [01:16:59] [MSG2/1348-1349].

21 By e-mail of 27 March 2019 [✂] did so [MSG4/3].

include the MSG in all correspondence, which is not subject to confidentiality, from the date of this Agreement in relation to the Complaint to the GCRA."

The GCRA considers that the above demonstrates that MSG did not wish its conduct to be subject to scrutiny by the GCRA. This indicates an awareness on the part of MSG that its non-compete clauses prevented competition and supports a finding of intentional infringement, or at least negligent or reckless infringement, in respect of (at least) the clauses identified at paragraph 5.3(a) of the Decision, being those which applied to [✂].

(f) In any event, and generally, MSG has offered no evidence as to the steps it has taken in relation to the supposed exercise of its judgement. In view of the fact that the very purpose of the non-compete clauses was to prevent competition with MSG, and in particular in view of the long terms and wide scopes of the clauses in question as identified at paragraph 4.97 of the Decision, MSG ought to have appreciated that there was a very substantial risk that its conduct had the object of restricting competition. It ought therefore to have taken steps to satisfy itself that the terms and scopes of the clauses in question were objectively justified.[22] There is no evidence that it did so. In particular, there is no evidence that it reviewed or has any policy of reviewing the effectiveness of its policies once implemented (including under the currently extant LLP Agreement and associates' contracts).

4.4 In view of the above, the GCRA considers that the circumstances giving rise to the breach of competition law were plainly foreseeable and so MSG could not have been unaware that its conduct restricted competition. Accordingly, the GCRA proposes to find that the infringement in this case was committed intentionally, or at least negligently or recklessly. Whether or not MSG was aware that its conduct was in breach of competition law is not relevant in this regard.

Other factors relevant to the GCRA's assessment of whether to impose a penalty

4.5 As set out at paragraph 3.15 above, the GCRA must also consider the following factors in deciding whether to impose a financial penalty:

(a) whether the contravention was brought to the attention of the GCRA by the undertaking or person concerned;

[22] See *Ping v CMA* [2018] CAT 13, [228].

(b) the seriousness of the contravention;

(c) what efforts, if any, have been made to rectify the contravention and to prevent a recurrence;

(d) the potential financial consequences to the undertaking or person concerned, and to third parties including customers and creditors of that undertaking or person, of imposing a penalty; and

(e) the penalties imposed by the GCRA in other cases.

4.6 In this case:

(a) The contravention was not brought to the attention of the GCRA by MSG. Indeed, MSG actively sought to suppress the reporting of the contravention by [✂]: see paragraph 4.3(e) above.

(b) The contravention which the GCRA has found is a restriction by object. Restrictions by object are, by their nature, injurious to competition. In such cases, the GCRA considers it appropriate to impose a financial penalty that will aim to deter both the businesses that are subject to an infringement decision and other businesses who, in the future, may consider engaging in conduct that is prohibited by competition law.

(c) The contravention was maintained by MSG throughout the period of the GCRA's investigation and was ongoing at the date of the Decision. Therefore, no efforts have been made to rectify the contravention.

(d) Having considered a range of relevant factors, the GCRA concludes that MSG is well resourced and can afford to pay a financial penalty. The appropriate level of the penalty will be considered in the following section.

(e) There is no past decisional practice in Guernsey in this area. Therefore, to impose a penalty in this case is not inconsistent with any relevant previous decision.

4.7 In view of the foregoing factors, and in the exercise of its discretion, the GCRA considers it appropriate to impose a financial penalty on MSG. These factors are considered at this stage only for the purpose of determining whether to impose a financial penalty at all; aggravating and mitigating factors are addressed separately below.

B. The calculation of the penalty

4.8 In calculating the appropriate penalty, the GCRA will adopt the three-step approach set out in its Guideline 12, section 3, and at paragraph 3.19 - 3.20 above.

Step 1 – Basic penalty

4.9 As explained above, the basic penalty is calculated having regard to the value, in sterling, of the sales of goods or services to which the infringement relates in Guernsey for the last full business year of the business's participation in the infringement, which is then multiplied by the number of years or months of the duration of the infringement (rounded up to the nearest half year).[23] As a general rule, the basic penalty will be set at a level of up to 30% of the value of sales, with the percentage being selected depending on how serious and widespread the infringement is.[24]

The appropriate percentage

4.10 As to the appropriate percentage, GCRA Guideline 12 - Financial Penalties states that:

> "Price-fixing or market-sharing agreements, other cartel activities and predatory pricing by dominant businesses are among the most serious infringement. The assessment of gravity will be taken on a case by case basis and we will consider all relevant factors, including; the nature of the relevant market and/or product, the structure of the market; the market share(s) of the business(es) involved, entry conditions and the effect on competitors, third parties and end consumers."[25]

4.11 This approach is consistent with the approaches of both the European Commission and the CMA.

4.12 The **Commission's Fining Guidelines**[26] state that:

> "Horizontal price-fixing, market sharing and output limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale."[27]

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23 The Competition (Calculation of Turnover) (Guernsey) Regulations, 2012, Regulation 1 – 2(1).

24 GCRA Guideline 12, section 3 (page 11).

25 GCRA Guideline 12, section 3 (page 11).

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

27 Commission's Fining Guidelines, paragraph 23.

4.13 In its decision-making practice, the Commission has applied a "gravity percentage" in the region of 15%[28] - 19%[29] for cartel infringements of EU competition law.

4.14 The CMA Penalty Guidance states:

> "The CMA will generally use a starting point between 21 and 30% of relevant turnover for the most serious types of infringement, that is, those which the CMA considers are most likely by their very nature to harm competition [….]. In relation to infringements of the Chapter I prohibition and/or Article 101, a starting point between 10 and 20% is more likely to be appropriate for certain, less serious object infringements, and for infringements by effect."[30]

4.15 As the GCRA has already observed, the non-compete agreements put in place by MSG are restrictions of competition by object. As such, they are serious restrictions[31] likely by their very nature to harm competition. However, the GCRA does not consider that they amount to "price-fixing or market-sharing agreements [or] other cartel activities" and, as such, should attract a lower "gravity percentage" than that generally applied to cartel behaviour.

4.16 The GCRA therefore considers that the appropriate starting point in this case is 10% of relevant turnover, which is at bottom of the appropriate range for object infringements.[32]

4.17 As set out above, the GCRA will then adjust the starting percentage up or down based on relevant factors including:

- the nature of the product including the nature and extent of demand for that product;
- the structure of the market including the market share(s) of the undertaking(s) involved in the infringement, market concentration and barriers to entry;
- the market coverage of the infringement;
- the actual or potential effect of the infringement on competitors and third parties; and
- the actual or potential harm caused to consumers whether directly or indirectly.

4.18 As to these factors, the GCRA provisionally finds as follows.

4.19 First, the geographic market definition in respect of the relevant private elective markets was left open in the Decision.[33] As such, the GCRA makes no finding in respect of the nature of the

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

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

30 Paragraph 2.6.

31 2012 Ordinance, section 34(1)(b).

32 See paragraph 4.14.

33 Decision, paragraphs 4.66 – 4.67.

service, market structure/share or market coverage of the infringement and so does not propose to adjust the basic amount of the penalty on this basis.

4.20 Second, the GCRA considers that there may have been some harm caused to [✂] (and, by extension, to consumers) by MSG's conduct. When interviewed by the GCRA, [✂] explained as follows:

> "[The non-compete clause] just means that we can't provide a level of service or you know a level of expertise beyond a certain level. So, I am confident in saying that [✂] would be working for the vast majority of the time, probably at least 80 percent of the time consulting, seeing patients. And he's not able to. As a result it's affected business and it's affected the service that we can provide [……] It certainly has meant that I've ended up, well both of us have had to put more money into the business than we thought we were going to. We've had to spend over seventy thousand with lawyers which we didn't anticipate. And I think, I think it would be true to say that it we weren't both relatively well-heeled individuals the company would have gone, would have folded."[34]

Given that:

(a) the extent of the alleged harm suffered by [✂] has not been quantified; and

(b) [✂] has continued to trade; and

(c) the basic penalty has already been set at 10% of relevant turnover,

the GCRA does not consider that, on the facts of this case, it would be appropriate to increase the starting percentage on the basis of competitor and/or consumer harm.

4.21 The remaining factors discussed at paragraph 4.6(a) and 4.6(d)–(e) above, together with the fact that the GCRA proposes to find that the infringements were committed intentionally, negligently or recklessly,[35] will be considered at step 2.

4.22 For all these reasons, the GCRA considers that in this case no adjustment in the basic amount of the penalty is necessary on the basis of any of the relevant factors set out at paragraph 4.17.

4.23 Finally, the GCRA considers that no adjustment to the 10% figure – which the GCRA has provisionally set at the bottom of the range generally applied to object infringements – is required in respect of general deterrence as it is already sufficient in this case.

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[34] Transcript of interview with [✂] [00:42:46] – [00:43:00] [MSG2/1331].

[35] 2012 Ordinance, section 31(1)(c).

Duration

4.24 As to duration, the GCRA has found that the conduct started on 1 August 2013 and was ongoing at the time of the Decision.

4.25 Regulation 1 of the Competition (Calculation of Turnover) (Guernsey) Regulations, 2012 (**Turnover Regulations**) provides that:

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

4.26 In this case, the period of the contravention is 8 years. Since the multiplicand cannot exceed the number 3, the multiplicand for duration in this case is 3.

Turnover

4.27 Turnover is calculated on the basis set out in the Turnover Regulations.

4.28 The applicable turnover of an undertaking is the turnover for the business year preceding the date on which the decision of the GCRA is taken.[36] In this case, that business year is 2020.

4.29 The applicable turnover of an undertaking is limited to the amounts derived by it from the sale of products and the provision of services falling within the undertaking's ordinary activities after deduction of sales rebates, value added tax and other taxes directly related to turnover.[37]

4.30 In this case, the services to which the infringement primarily relates are the provision of private elective secondary healthcare services in Guernsey.[38] MSG's turnover in respect of private elective secondary healthcare services in 2020 was £4,644,212.[39] By taking this turnover figure as its starting point, the GCRA has already offered a substantial discount compared with the figure it could have used under Regulation 3 of the Turnover Regulations, which point to a total turnover figure. The GCRA takes this approach in an attempt to be proportionate and in light

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36 Turnover Regulations, regulation 2.

37 Turnover Regulations, regulation 3.

38 In fact, the non-compete clause under the General Partnership Agreement and the corresponding associates' contracts prevented partners from taking jobs even with the States of Guernsey: see paragraphs 4.97(a) and (c) of the Decision.

39 Note 5 to the Report and Audited Financial Statements of the Medical Specialist Group LLP for the year ended 31 December 2020 [MSG4/23].

of the "*step back*" which it has taken to consider the penalty in the round (see paragraphs 4.44 and 4.45 below).

4.31 By section 6 of its Response to the GCRA's Draft Penalty Notice, MSG argues for a further discount, suggesting that the GCRA should disregard that portion of its private income which is passed through to partners. This is inappropriate and would not take into account the true economic value of MSG's private work, nor the true nature of the partnership association and the partners' respective interests in MSG. Excluding partners' individual income in this way seems to be based on an idea that they should be treated as separate undertakings – but even if this were the case,[40] the Turnover Regulations would require the aggregate turnover to be taken into account (see Regulation 7). The GCRA will therefore take £4,644,212 as the applicable turnover figure.

4.32 The basic penalty is therefore £1,393,263.60.

[40] Which it is not; see paragraph 4.19 – 4.23 of the Decision.

Step 2 – Adjustments to the basic penalty

Aggravating factors

4.33 In this step, the basic penalty may be increased having regard to aggravating factors or decreased having regard to mitigating factors.

4.34 The GCRA has found that the infringement was committed intentionally, or at least negligently or recklessly. As the GCRA has not made a definitive finding of intentional infringement, it does not consider it appropriate to increase the proposed penalty on that ground.

4.35 The GCRA notes that the infringement was maintained after the start of the GCRA's investigation in March 2019 and was ongoing at the date of the Decision.[41] As set out in GCRA Guideline 12, this is generally considered to be an aggravating factor.[42] On the facts of this particular case, the GCRA considers it to be an aggravating factor in respect of the infringing conduct identified at paragraph 4.3(e) above. In particular, MSG maintained its settlement agreements with [✂] in force even once the GCRA had begun its investigation: see paragraph 5.3(a) of the Decision.

4.36 In addition, the GCRA considers that the conduct of MSG in relation to the GCRA's investigation, which was aimed at causing the investigation to be discontinued and at obtaining copies of correspondence entered into between [✂]/ [✂] and the GCRA, is an aggravating factor.[43] As explained at paragraph 3.50 of the Decision, the purpose of the GCRA's competition law enforcement functions is to protect competition in the market (thereby ensuring that consumers ultimately have access to high quality goods and services at competitive prices) and not to protect individual competitors within that market. The fact that two businesses have settled a legal dispute privately between them is not determinative of the question of whether the agreement or practice that gave rise to their dispute was anti-competitive and thus amenable to enforcement action by the GCRA. As such, there was no basis on which MSG could legitimately have considered that its settlement of a private dispute in relation to the non-

41 2012 Ordinance, section 34(1)(d).

42 GCRA Guideline 12, section 3.

43 Attempting to obstruct an investigation is a factor regarded by the Commission as aggravating (Commission's Fining Guideline, paragraph 2, second bullet). Similarly, the CMA considers "persistent and repeated unreasonable behaviour that delays the CMA's enforcement action" as aggravating (CMA Penalty Guidance, paragraph 2.18, first bullet). In *Greek Ferries*, OJ 1999 L109/24, [1995] 5 CMLR 47, the Commission imposed an uplift of 10% in respect of behaviour (a proposal by a cartel instigator to restructure that cartel after the Commission had begun its investigation, so as to make it more difficult to detect) it considered to be obstructive and therefore aggravating (paragraphs 160 – 161).

compete clauses could or should have had any impact on the continuation by the GCRA of its investigation. MSG's conduct in this regard, therefore, had no legitimate basis. Furthermore, that conduct:

(a) had the potential to obstruct the GCRA's investigation; and

(b) increased the administrative burden on the GCRA, since it was necessary to issue both [✂] and [✂] with notices under section 27 of the 2012 Ordinance to prevent the inappropriate disclosure of information to MSG by [✂] and/or [✂].[44]

4.37 In consequence, the GCRA will impose a modest uplift in relation to aggravating factors of 10%, taking the total penalty to £1,532,589.96 at this stage.

Mitigating factors

4.38 The GCRA does not consider that any mitigating factors apply. In particular:

(a) The contravention was not brought to the attention of the GCRA by MSG.[45] (See paragraph 4.6(a) above; this is treated as a neutral factor save as identified at paragraph 4.36 above.)

(b) No efforts have been made by MSG to rectify the contravention.[46] The GCRA does observe that MSG reduced the term and scope of its non-compete clauses in the new LLP Agreement and associates' contracts, a point highlighted in MSG's Response to the GCRA's Draft Penalty Notice. However, as set out at paragraph 4.3(f) above, MSG has not offered evidence explaining why this was done, and the GCRA has concluded that the clauses remained infringing even once reformed.

4.39 By section 3 of its Response to the GCRA's Draft Penalty Notice, MSG asks for the following additional mitigating factors to be taken into account:

(a) That it cooperated with the GCRA in its investigation. However, all MSG did was to provide submissions when requested. This does not amount to cooperation capable of constituting a mitigating factor.

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44 [MSG2/1429 – 1430]; [MSG2/1448 – 1449].
45 2012 Ordinance, section 34(1)(a).
46 2012 Ordinance, section 34(1)(d).

(b) It says that there is "*genuine uncertainty on the part of the business as to whether the agreement or conduct constituted an infringement*". It suggests that the GCRA has changed position in relation to what might amount to an appropriate period for its non-complete clauses, and that this is evidence of genuine uncertainty. However, this suggestion misreads the Decision. It merely directs the removal of the non-compete clauses in their current form. It is true that by paragraph 5.2 of the Statement of Objections the GCRA had considered offering MSG a 'safe harbour' by directing it to reduce the term and scope of its current non-compete clauses. However, MSG failed to engage with the GCRA in relation to this proposal (as it had been invited to do by paragraph 5.3 of the Decision) and in the event the GCRA considered it more appropriate simply to conclude that the clauses in their current form are unlawful. It does not follow that the GCRA has changed its position. Nor does it follow that MSG is in a position to say that there is genuine uncertainty on its part as to whether the agreement or conduct constituted an infringement in circumstances where there is no evidence of its having carried out a proper internal analysis (see paragraph 4.3(f) above).

(c) The fact that the States of Guernsey was aware of the restrictive covenants and raised no objection. However, the States of Guernsey is not the competition regulator. The GCRA therefore considered this factor to be irrelevant.

Specific deterrence

4.40 There may also under step 2 be an increase for specific deterrence as opposed to general deterrence, pursuant to which the GCRA may increase the basic penalty of those businesses which have a particularly large turnover beyond the value of sales to which the infringement relates.

4.41 The majority of MSG's turnover is generated in the public emergency and public elective markets.[47] However, the GCRA does not consider that it is appropriate to apply any increase in respect of specific deterrence, which it considers is appropriately and sufficiently reflected in the adjusted penalty at the end of step 2.

4.42 The penalty at the end of step 2 is therefore £1,532,589.96.

[47] Note 5 to the Report and Audited Financial Statements of the Medical Specialist Group LLP for the year ended 31 December 2020 [MSG4/23].

Step 3 – Legal Maximum

4.43 In this step, the penalty is reduced if the maximum penalty of 10% of worldwide turnover up to a maximum period of three years is exceeded.[48]

4.44 MSG's total turnover in 2020 was [✂].[49] The proposed total penalty of £1,532,590 does not exceed 10% of MSG's total turnover.

Affordability

4.45 The GCRA has also considered the potential financial consequences to MSG of imposing the proposed financial penalty.[50] It is axiomatic that any financial penalty will have some adverse financial consequences on an undertaking on which it is imposed. Consistently with the Commission's Fining Guidelines, the GCRA considers that, in order for any reduction under this provision to be justifiable, it would therefore be necessary to demonstrate that the proposed financial penalty would jeopardise the economic viability of MSG.[51]

4.46 There is no evidence before the GCRA to support the contention that this penalty would jeopardise the economic viability of MSG; MSG was afforded the opportunity to put forward evidence in that regard to the GCRA when responding to the Draft Penalty Statement, but it did not do so. Furthermore, the GCRA notes that MSG's profit[52] in 2020 was [✂],[53] which is well in excess of the level of the penalty. It also notes that the impact of COVID on MSG's private income was not considered by MSG to be material.[54]

4.47 As such, the GCRA does not consider that it would be appropriate to reduce the proposed penalty on the grounds of its potential financial consequences for MSG.

4.48 MSG argues, by section 7 of its Response to the GCRA's Draft Penalty Notice, that the GCRA should not use the profit figure of [✂], since this reflects profits before distribution to partners. However:

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48 2012 Ordinance, section 34(3).

49 Note 5 to the Report and Audited Financial Statements of the Medical Specialist Group LLP for the year ended 31 December 2020 [MSG4/23].

50 2012 Ordinance, section 34(1)(e).

51 Commission's Fining Guidelines, paragraph 35.

52 Before partners' remuneration and profit share.

53 Report and Audited Financial Statements of the Medical Specialist Group LLP for the year ended 31 December 2020 [MSG4/13].

54 Annual Report and Audited Financial Statements of MSG, 2020, page 25.

(a) The GCRA considers that this is the appropriate figure to us in any event, since it properly reflects the economic reality of a partnership which is run as a profit-making entity for the benefit of its partners.

(b) None of MSG's arguments suggest that the fine is unaffordable in the sense of jeopardising the economic viability of MSG.

Step back

4.49 At the end of this penalty calculation exercise, it is appropriate for the GCRA to "*step back*"[55] and consider the appropriateness of the conclusions it has reached. The GCRA takes into account all of MSG's representations, including its concerns expressed in section 5 of its Response in relation to imposing excessive penalties on business who merely make errors of judgement, the common use of non-compete clauses in partnership agreements, and special features of the Guernsey market, as well as its argument in section 7 of its Response that the imposition of a penalty will make it more difficult for it to invest in Guernsey healthcare.

4.50 The GCRA does not consider that this is a case of imposing an excessive penalty on a business which has merely made an error of judgment. As observed at paragraph 4.3(f) above, MSG has not offered any evidence that demonstrates it undertook a proper investigation of whether the conduct that the GCRA has found to infringe competition law was objectively justifiable. On the contrary, MSG's conduct demonstrates an awareness that its conduct was anticompetitive, particularly in respect of its obstructive approach to the GCRA's investigation (as set out above at paragraph 4.3(e) above).

4.51 The GCRA considers that it is important to maintain healthy competition in Guernsey healthcare in order to attract appropriate investment from all possible sources, not only MSG. MSG states that its timeline for investing in a new MRI scanner for Guernsey may be affected by the financial penalty which the GCRA has imposed. However, as noted at paragraph 4.45 above, it is axiomatic that any financial penalty will have some adverse financial consequences of this type. Otherwise, the penalty would have no deterrent effect, which is an important part of the GCRA's policy on financial penalties (see section 2 of GCRA Guideline 12). This effect cannot therefore, as a matter of principle, be a reason why the penalty should be significantly reduced. Meanwhile, in an example of the types of investments which may be made when healthy competition is made possible, the GCRA notes that [✂] has invested in its own in-house

[55] See *Kier Group and Others v OFT* [2011] CAT 3, [166].

extremity-only MRI machine. The detrimental effects of penalties on affected undertakings must be weighed against the beneficial effects of the proper enforcement of competition law in Guernsey.

4.52 The GCRA has carefully and expressly reduced the penalty at various stages in an attempt to treat MSG proportionately. In these circumstances, and considered in the round, the GCRA concludes that the penalty is appropriate.

5. THE GCRA'S PROPOSED ACTION

5.1 In consequence of the infringements identified in the Statement of Objections, the GCRA will impose a financial penalty under section 31(4) of the Competition (Guernsey) Ordinance 2012 as follows:

Starting percentage	10%
Duration multiplier	3
Turnover figure	£4,644,212
Step 1 figure	£1,393,263.60
Aggravating factors	10%
Mitigating factors	0%
Specific deterrence	0%
Step 2 figure	£1,532,589.96
Legal maximum reduction	0%
Step 3 figure	£1,532,589.96
Final figure	£1,532,590 (rounded to nearest £)

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.