



19 July 2022

By e-mail only

The Minister
Department for the Economy
Government of Jersey
19-21 Broad Street
St Helier
Jersey JE2 3RR

Dear Minister

VERTICAL ARRANGEMENTS BLOCK EXEMPTION – JCRA ADVICE

In line with the requirements of Article 10 of the Competition (Jersey) Law 2005 (**Competition Law**), this letter sets out the advice of the Jersey Competition Regulatory Authority (the **Authority**) in relation to the introduction of a Jersey Vertical Arrangements Block Exemption Order (**VABEO**). We would like to take this opportunity to thank officers from your Department for their input and support on this issue.

Block exemptions are used in a number of jurisdictions, such as the European Union (EU) and the United Kingdom (UK), and introducing VABEO in Jersey – in line with international best practice – could generate significant benefits for businesses, consumers and the relevant authorities in Jersey (as set out further below). The Authority, therefore, advises the Minister to introduce a VABEO in Jersey.

Legal Framework

Article 8(1) of the Competition Law prohibits arrangements between businesses that have “the object or effect of hindering to an appreciable extent competition in the supply of goods or services within Jersey or any part of Jersey’ (Article 8(1) Prohibition)”. Currently, a business that considers that an agreement to which it is party may breach the Competition Law must apply to the Authority for an individual exemption.

However, under Article 10(1) of the Competition Law the Minister may exempt certain categories of arrangements from the prohibition by way of a so-call “block exemption”, provided that the Minister is satisfied that the potentially anticompetitive effects of that category of arrangements are typically outweighed by their pro-competitive effects. In such case, arrangements that meet the criteria set out in the block exemption will be exempt on the basis that they are presumed compatible with the Competition Law and will, therefore, no longer be required to apply for individual exemption.

Vertical arrangements

Vertical arrangements are arrangements for the sale and purchase of goods or services between businesses operating at different levels of the supply or distribution chain. This includes, for example, agreements between manufacturers and distributors, or between wholesalers and retailers.

Though vertical arrangements are currently caught by the Article 8(1) Prohibition, this category of agreements often do not harm the markets in which they operate. Conversely, they may, as set out further below, deliver significant benefits to businesses, consumers, and relevant authorities.

Benefits

Block exemptions can create significant benefits for businesses, consumers, and relevant authorities in terms of improved distribution or availability of goods, increased efficiency, and reduced costs. In particular, vertical block exemptions are used in a number of jurisdictions (including the EU and the UK) and can generate significant benefits. For example, the introduction of a Jersey VABEO:

- (a) **for businesses**, could create legal certainty about the status of certain arrangements under competition law and reduce the administrative burden on companies that would otherwise have to apply for an individual exemption;
- (b) **for consumers**, could provide significant benefits in terms of improved distribution or availability of goods, increased efficiency, and reduced costs; and
- (c) **for the Authority**, allow the authority to make more effective use of limited resources, by enabling the Authority to prioritise cases that are likely to have a significant competitive impact (since the exempted cases that are unlikely to raise competition concerns would no longer require individual examination).

Accordingly, the Authority considers that the potentially anticompetitive effects of the vertical arrangements that would be caught by a Jersey VABEO would typically be outweighed by their pro-competitive effects in accordance with Article 10(1)-(2) of the Competition Law.

Relevant Procedure

The Authority published a Consultation paper on 1 March 2022, indicating its intention to propose the introduction of the proposed VABEO and seeking stakeholders' input on its scope. The Authority did not receive any responses to the Consultation paper.

The fact that no stakeholder opposed the introduction of a Jersey VABEO, has reinforced the Authority's view that such a block exemption could benefit the Jersey economy and, therefore, advise the Minister to proceed with the introduction of a Jersey VABEO. This advice will be published inline with the Competition Law.

The Proposed VABEO

The Authority believes that the introduction of a VABEO would substantially improve the operation of Competition Law in Jersey provided that:

- (a) all parties to the vertical arrangement have a market share not exceeding 30% of the relevant market in which they operate (a “safe harbour”); and
- (b) the vertical arrangement does not include a so-called hardcore restriction which removes the benefit of the VABEO.

The Authority considers that alignment with international best practice is an important source of efficiency that would help promote legal certainty whilst reducing compliance costs for businesses operating in Jersey. However, the Jersey regime needs to be implemented in a way that is responsive to the context of Jersey’s economy and the resources of the Authority.

The Authority recommends that Jersey adopts a similar approach to vertical block exemptions as the EU and the UK in areas where the two positions align. This includes:

- (a) **Definitions** - to be aligned with EU and UK vertical block exemptions;
- (b) **Exemptions** - to follow the approach taken in the EU and the UK, including an extension for the dual distribution exemption to also cover wholesalers and importers;
- (c) **Market share thresholds** – to include a “safe harbour” for certain vertical arrangements where all parties to the arrangement have a market share not exceeding 30% of the relevant market in which they operate;
- (d) **Hardcore restrictions** – to include a list of restrictions that remove the benefit of the block exemption (so-called hardcore restrictions), which includes resale price maintenance (RPM) but excludes a prohibition of dual pricing and an equivalence principle ; and
- (e) **Excluded restrictions** – to provide a list of excluded restrictions which will require case by case assessment, including non-compete obligations with a duration that exceeds five years.

Where the EU and UK positions do not align, the Authority proposes that the Jersey VABEO follows the approach taken in the UK Vertical Agreements Block Exemption Order (UK Order) and the accompanying guidelines, which will replace the current retained vertical block exemption regulation and guidance upon expiration on 31 May 2022.

Under Article 60 of the Competition Law, the Authority “shall attempt to ensure that so far as possible questions arising in relation to competition are dealt with in a manner that is consistent with the treatment of corresponding questions arising under European Union law in relation to competition within the European Union”. However, given that most companies operating in Jersey are UK (rather than EU) based, the Authority considers that following the EU position, in this case, would create unnecessary regulatory burden and decreased legal certainty for many businesses active in Jersey. The Authority, therefore, proposes to follow the UK position wherever the EU and UK block exemptions do not align.

Accordingly, the Authority proposes the following:

- (a) **Dual distribution:** to not introduce an additional market share threshold at the retail level, or to treat dual distribution involving hybrid platform differently from other dual distribution arrangements.
- (b) **Parity obligations (MFN clauses):** to adopt definitions that provide a differentiation between so called “narrow” and “wide” parity obligations, and to treat “wide” parity obligations in retail markets as hardcore restrictions (conversely, wide parity obligations in business-to-business markets would not be treated as hard-core restrictions under the UK Order).
- (c) **Territorial and customer restrictions:** to treat territorial/customer restrictions as ‘hardcore’ restrictions that remove the benefit of the proposed VABEO (to support consumer choice across all parts of Jersey and promote intra-brand competition, and to align with EU and UK best practices despite the Jersey market being significantly smaller than the EU single market and the UK internal market), but to allow an exemption for both “shared exclusivity” (thus allowing a supplier to appoint more than one exclusive distributor in a particular territory or for a particular customer group) and a combination of exclusive and selective distribution in the same or different territories.

Finally, the Authority does not propose, at this stage, to include specific provisions relating to fuel forecourts. Instead, the Authority will consider whether there would be merit in introducing a separate block exemption in relation to certain fuel forecourt arrangements. This would be in line with international best practices in the EU and UK, where the general vertical block exemption regulation is supplemented by sector specific block exemptions, for example in relation to motor vehicles.

Conclusion

As indicated above, a vertical block exemption order could generate significant benefits for Jersey businesses, consumers, and relevant authorities. The Authority, therefore, recommends that an order is made to introduce a Jersey Vertical Arrangements Block Exemption. In accordance with Article 10(4) of the Competition Law, this advice will be published on the Authority website.

We are grateful for the opportunity to contribute to bringing the framework legislation up-to-date, ensuring that Jersey meets best practice. Officers will continue to work in consultation with the Department in the development of detailed drafting instructions.

Yours sincerely,



Tim Ringsdore
Chief Executive Officer
Jersey Competition Regulatory Authority

Copy: Colin Gibaut (Director Strategic Development, Government of Jersey)
Lukas Ament (Competition Policy Advisor, Government of Jersey)