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2020 No. 110

**The Competition (Vertical Arrangements Block
Exemption) (Guernsey) Regulations, 2020**

Made

12 November 2020

Coming into operation

12 November 2020

Laid before the States

THE COMMITTEE FOR ECONOMIC DEVELOPMENT, in exercise of the powers conferred upon it by sections 7(1) and 63 of the Competition (Guernsey) Ordinance, 2012^a ("the Ordinance"), and all other powers enabling it in that behalf, hereby makes the following regulations:-

Exemption.

1. (1) Pursuant to section 7(1) of the Ordinance and subject to the provisions of these regulations, section 5(1) of the Ordinance shall not apply to those vertical agreements which contain vertical restraints.

(2) The exemption provided for in paragraph (1) shall apply to vertical agreements entered into between an association of undertakings and its members, or between such an association and its suppliers, only if all its members are retailers of goods and if no individual member of the association, together with its

^a Order in Council No. XXXI of 2012; as amended by No. IV of 2014, No. XVI of 2015 and No. IX of 2016.

connected undertakings, has a total annual turnover exceeding EUR 50 million.

(3) The exemption provided for in paragraph (1) shall remain applicable where, for any period of two consecutive financial years, the total annual turnover threshold is exceeded by no more than 10%.

(4) Vertical agreements entered into by associations of undertakings that meet the requirements of paragraph (2) shall be covered by these regulations without prejudice to the application of section 5 of the Ordinance to horizontal agreements concluded between the members of such associations or decisions adopted by such associations.

(5) For the purpose of calculating the total annual turnover referred to in paragraph (2) the turnover achieved during the previous financial year by the relevant party to the vertical agreement and the turnover achieved by its connected undertakings in respect of all goods and services, excluding all taxes and other duties, shall be added together:

Provided that no account shall be taken of dealings between the party to the vertical agreement and its connected undertakings or between its connected undertakings.

(6) The exemption provided for in paragraph (1) shall apply to vertical agreements containing provisions which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the vertical agreements and are directly related to the use, sale or resale of goods or services by the buyer or its customers.

(7) In paragraph (6), the exemption applies on condition that, in relation to the contract goods or services, those provisions do not contain restrictions

of competition having the same object as vertical restraints which are not exempted under these regulations.

(8) The exemption provided for in paragraph (1) shall not apply to vertical agreements entered into between competing undertakings except that it shall apply where competing undertakings enter into a non-reciprocal vertical agreement and-

- (a) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level; or
- (b) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.

Market share threshold.

2. (1) The exemption provided for in regulation 1 shall apply on condition that –

- (a) the market share held by the supplier does not exceed 30% of the relevant market on which it sells the contract goods or services, and
- (b) the market share held by the buyer does not exceed 30% of the relevant market on which it purchases the contract goods or services.

(2) Where in a multi-party vertical agreement an undertaking buys the contract goods or services from one undertaking party to the agreement and sells the contract goods or services to another undertaking party to the same agreement, the market share of the first undertaking must respect the market share threshold provided for in paragraph (1) both as a buyer and a supplier in order for the exemption provided for in regulation 1 to apply.

(3) In calculating the market share for the purposes of this regulation the following rules shall apply -

- (a) the market share of -
 - (i) the supplier shall be calculated on the basis of market sales value data, and
 - (ii) the buyer shall be calculated on the basis of market purchase value data,
- (b) If the market sales value data or the market purchase value data mentioned in subparagraph (a) are not available, estimates based on other reliable market information, including market sales and purchase volumes, may be used to establish the market share of the undertaking concerned,
- (c) the market shares shall be calculated on the basis of data relating to the preceding calendar year,

- (d) the market share of the supplier shall include any goods or services supplied to vertically integrated distributors for the purposes of sale,
- (e) if a market share is initially not more than 30% but subsequently rises above that level without exceeding 35%, the exemption provided for in regulation 1 shall continue to apply for a period of two consecutive calendar years following the year in which the 30% market share threshold was first exceeded,
- (f) if a market share is initially not more than 30% but subsequently rises above 35%, the exemption provided for in regulation 1 shall continue to apply for one calendar year following the year in which the level of 35% was first exceeded,
- (g) the benefit of subparagraphs (e) and (f) may not be combined so as to exceed a period of two calendar years, and
- (h) the market share held by the undertakings referred to in paragraph (e) of the definition of connected undertakings shall be apportioned equally to each undertaking having the rights or powers detailed in subparagraph (a) of the definition of connected undertakings.

Restrictions that remove the benefit of the block exemption – hardcore restrictions

3. (1) The exemption provided for in regulation 1 shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have the object of -

(a) restricting the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that these prices do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties;

(b) restricting the territory into which, or of the customers to whom, a buyer may sell the contract goods or services, except any restriction -

(i) on a buyer's place of establishment,

(ii) of active sales into an exclusive territory or to an exclusive customer group that is -

(A) reserved to the supplier, or

(B) allocated by the supplier to another buyer,

where such a restriction does not limit sales by the customers of the buyer,

- (iii) of sales to end users by a buyer operating at the wholesale level of trade,
 - (iv) of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system, or
 - (v) of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier,
- (c) restricting active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment,
- (d) restricting cross-supplies between distributors within a selective distribution system, including between distributors operating at different level of trade,
- (e) restricting, as agreed between a supplier of components and a buyer who incorporates those components, the supplier's ability to sell the components as spare parts to end-users or to repairers

or other service providers not entrusted by the buyer with the repair or servicing of its goods.

Excluded restrictions

4. (1) The exemption provided for in regulation 1 shall not apply to the following direct or indirect obligations -

(a) if contained in any vertical agreement -

(i) any non-compete obligation, the duration of which is indefinite,

(ii) any non-compete obligation, the duration of which exceeds five years,

(iii) subject to paragraphs (4) and (5), any obligation which causes the buyer not to manufacture, purchase, sell or resell goods or services after termination of the vertical agreement,

(iv) any obligation which causes the members of a selective distribution system not to sell the brands of particular competing suppliers.

(b) if contained in a petrol filling station vertical agreement

(i) any non-compete obligation, the duration of which exceeds three years,

(ii) any obligation which restricts the buyer's ability to dispose of any petrol filling station premises that are owned by the buyer.

(2) For the purposes of subparagraph (1)(a)(i) -

(a) in any vertical agreement, a non-compete obligation which is tacitly renewable beyond a period of five years shall be deemed to have been concluded for an indefinite duration,

(b) in any petrol filling station vertical agreement, a non-compete obligation which is tacitly renewable beyond a period of three years shall be deemed to have been concluded for an indefinite duration.

(3) The time limitations of five years in subparagraph (1)(a)(ii) and three years in subparagraph (1)(b)(i) shall not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier, or leased by the supplier from third parties not connected with the buyer, provided that the duration of the non-compete obligation does not exceed the period of occupancy of the premises and land by the buyer.

(4) Notwithstanding paragraph (1)(a)(iii), the exemption provided for in regulation 1 shall apply to any direct or indirect obligation which causes the buyer, after termination of the vertical agreement, not to manufacture, purchase, sell or resell goods or services where the following conditions are fulfilled -

- (a) the obligation relates to goods or services which compete with the contract goods or services,
- (b) the obligation is limited to the premises and land from which the buyer has operated during the contract period,
- (c) the obligation is indispensable to protect know-how transferred by the supplier to the buyer, and
- (d) the duration of the obligation is limited to a period of one year after termination of the vertical agreement.

(5) Notwithstanding paragraph (1)(a)(iii), the exemption provided for in regulation 1 may apply to a restriction which is unlimited in time on the use and disclosure of know-how which has not entered the public domain.

Non-application of this regulation

5. The Authority may declare by decision in writing, after consultation with the Committee, that, where parallel networks of similar vertical restraints cover more than 50% of a relevant market, these regulations shall not apply to vertical agreements containing specific restraints relating to that market.

Interpretation.

6. (1) In these regulations, unless the context otherwise requires –

“**agreement between undertakings**” has the same meaning as in the Ordinance,

“**Authority**” has the same meaning as in the Ordinance,

“business” has the same meaning as in the Ordinance,

“buyer” includes -

- (a) an undertaking which, under an agreement between undertakings falling within section 5(1) of the Ordinance, sells goods or services on behalf of another undertaking, and
- (b) a buyer’s respective connected undertakings,

“competing undertaking” means an actual competitor or potential competitor, and **“actual competitor”** means an undertaking that is active on the same relevant market, and **“potential competitor”** means an undertaking that, in the absence of the vertical agreement, would, on realistic grounds and not just as a mere theoretical possibility, in case of a small but permanent increase in relative prices be likely to undertake, within a short period of time, the necessary additional investments or other necessary switching costs to enter the relevant market,

“Committee” has the same meaning as in the Ordinance,

“connected undertakings” means -

- (a) those undertakings in which the undertaking concerned, directly or indirectly -
 - (i) owns more than half the capital or business

assets,

- (ii) has the power to exercise more than half the voting rights,
 - (iii) has the power to appoint more than half the members of the supervisory board, the administrative board or bodies legally representing the undertakings, or
 - (iv) has the right to manage the undertakings' affairs,
- (b) those undertakings which have in the undertaking concerned the rights or powers detailed in subparagraph (a),
- (c) those undertakings in which an undertaking as referred to in subparagraph (b) has the rights or powers detailed in subparagraph (a),
- (d) those undertakings in which a party to the vertical agreement together with one or more of the undertakings referred to in subparagraphs (a), (b) or (c), or in which two or more of the latter undertakings, jointly have the rights or powers listed in subparagraph (a), and
- (e) those undertakings in which the rights or the powers listed in subparagraph (a) are jointly held by -

- (i) parties to the vertical agreement or their respective connected undertakings referred to in subparagraphs (a) to (d), or
- (ii) one or more of the parties to the vertical agreement or one or more of their connected undertakings referred to in subparagraphs (a) to (d) and one or more third parties.

“customer of the buyer” means an undertaking not party to the vertical agreement which purchases the contract goods or services from a buyer which is party to the vertical agreement,

“intellectual property rights” includes industrial property rights, know-how, copyright and neighbouring rights,

“know-how” means a package of non-patented practical information, resulting from experience and testing by the supplier, which is secret, substantial and identified: in this context, **“secret”** means that the know-how is not generally known or easily accessible; **“substantial”** means that the know-how is significant and useful to the buyer for the use, sale or resale of the contract goods or services; **“identified”** means that the know-how is described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality,

“non-compete obligation” means -

- (a) any direct or indirect obligation causing the buyer not

to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or

- (b) any direct or indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier, more than 80% of the buyer's total purchases of the contract goods or services and their substitutes on the relevant market, calculated on the basis of the value or, where such is standard industry practice, the volume of its purchases in the preceding calendar year,

“the Ordinance” means the Competition (Guernsey) Ordinance, 2012,

“petrol filling station” means premises upon or from which is carried on the trade or business of a retail fuel supplier, which may include (without limitation) the sale, despatch or delivery of fuel; **“fuel”** includes petrol, diesel oil and liquid petroleum gas,

“petrol filling station vertical agreement” means a vertical agreement entered into between two or more undertakings which relates, directly or indirectly, to one or more petrol filling stations,

“selective distribution system” means a distribution system where the supplier undertakes to sell the contract goods or services, either directly or indirectly, only to distributors selected on the basis of specified criteria, and where those distributors undertake not to sell such goods or services to unauthorised distributors within the territory reserved by the supplier to operate that system,

“supplier” includes a supplier’s respective connected undertakings,

“undertaking” means a person carrying on a business and its respective connected undertakings, and includes any incorporated or unincorporated association which consists of or includes such persons,

“vertical agreement” means an agreement between undertakings or concerted practice entered into between two or more undertakings each of which operates, for the purposes of that agreement or concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services,

“vertical restraint” means a restriction of competition in a vertical agreement which falls within the scope of section 5(1) of the Ordinance.

(2) The Interpretation and Standard Provisions (Bailiwick of Guernsey) Law, 2016^b applies to the interpretation of these regulations as it applies to the interpretation of an enactment.

Citation.

7. These regulations may be cited as the Competition (Vertical Arrangements Block Exemption) (Guernsey) Regulations, 2020.

^b Order in Counsel No. V of 2018; as amended by No. XXII of 2018; No. XXVI of 2018.

Commencement.

8. These regulations shall come into force on the 12th day of November 2020.

Dated this 12th day of November, 2020

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Deputy N Inder

President of the Committee for Economic Development

For and on behalf of the Committee

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations are made under section 7(1) and 63 of the Competition (Guernsey) Ordinance, 2012.

They exempt certain arrangements between entities operating at different levels of the production or distribution chain from the provisions of section 5(1) of the Competition (Guernsey) Ordinance, 2012, notwithstanding that such arrangements may otherwise amount to an agreement between undertakings which have the object or effect of preventing competition. The Regulations are largely in line with the European Commission's Vertical Agreements Block Exemption Regulation, with specific regulations also introduced in respect of fuel forecourt arrangements.

These Regulations came into force on 12th November, 2020.

